



EXTREME ABSURDITY: A RESPONSE TO THE "EXTREME VETTING" QUESTIONS PROPOSED BY POTENTIAL DHS SECRETARY KRIS KOBACH

Posted on November 30, 2016 by David Isaacson

Kansas Secretary of State Kris Kobach, [rumored to be a potential Secretary of Homeland Security in a Donald Trump Administration](#), [met with Mr. Trump last Sunday](#), apparently to discuss some of his plans for the Department. During a media photo opportunity, Mr. Kobach [held a binder and stack of papers in such a way that a page was left partially visible](#) and allowed [an Associated Press photographer](#) to capture [some of the "Department of Homeland Security Kobach Strategic Plan for First 365 Days."](#) Although there are [many horrifying things about that plan](#), some of which this author may address further in future blogs, one aspect of Kobach's plan that particularly caught my attention was the proposal to ["Add extreme vetting questions for high-risk aliens: question them regarding support for Sharia law, jihad, equality of men and women, the United States Constitution."](#) This blog provides an initial reaction to that proposal.

It appears that by "high-risk aliens", Kobach was likely referring predominantly to aliens from countries with a large Muslim population, or perhaps just Muslims themselves. In the immediately prior item of his outline, Kobach describes the NSEERS (National Security Entry-Exit Registration System) program he wants to "update and reintroduce" as "track" "all aliens from high-risk areas." In its original form, [NSEERS applied to men over the age of 25 from 25 countries, all but one of which was a Muslim-majority country](#). (Specifically, NSEERS included nonimmigrants from [Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, Yemen](#), and the one exception, North Korea.) Thus, Kobach evidently associates "high-risk areas" predominantly with Muslim

countries. It is not entirely clear whether by "high-risk aliens" he means to describe only those from the so-called "high-risk areas", or whether he would cast a broader net.

Of the four questions that Kobach proposes to ask the "high-risk aliens", the question about "support for . . . the United States Constitution" is comparatively unobjectionable, other than with respect to the discriminatory context in which he apparently proposes to ask it. Applicants for naturalization as U.S. citizens are already required by law to be "attached to the principles of the Constitution of the United States," [INA 316\(a\)](#). The [Form N-400 Application for Naturalization](#) already asks applicants, "Do you support the Constitution and form of government of the United States?" One might perhaps take issue with Kobach's apparent proposal to expand use of this question outside the naturalization context in which it was statutorily authorized, but it is the other three proposed questions that are truly problematic.

To ask Muslim immigrants about their "support for Sharia law" is rather like asking Jewish immigrants about their "support for Halacha", or Catholic immigrants about their "support for canon law", or other Christian immigrants about their "support for Biblical principles". While the [Code of Canon Law of the Catholic Church](#) has the advantage from an American perspective of having an English common name, many Americans may not realize that [Sharia is merely an Arabic word for traditional Muslim religious law, just as Halacha – another word with which many Americans may not be familiar – is merely a Hebrew word for traditional Jewish religious law](#). Different Muslims will have different interpretations of what "Sharia law" has to say about a particular subject, just as different Jews will have different interpretations of what "Halacha" has to say about a particular subject. (Some subgroups of Muslims may entirely dispute the applicability of Sharia as historically understood, just as [Reform Judaism differentiates between its approach to one's relationship with God and the approach suggested by Halacha](#).) Some may cite Sharia to justify horrific actions, but then again [Yigal Amir claimed that his assassination of Israeli Prime Minister Yitzhak Rabin was justified by Jewish religious law](#); in neither case is it appropriate to charge all followers of the religion or some version of its laws with support for the horrific actions in question. To ask about "support for Sharia law" sheds only very limited light on what the person being asked actually believes, even if we indulge the questionable assumption that anyone's religious beliefs are the proper concern of the U.S. government.

Perhaps it would be a different story if Kobach proposed to ask a more nuanced question about whether those seeking to come to the United States believed that any and all religious law should be subordinate to democratically enacted civil law, but it does not appear that this is what he has in mind.

Kobach's proposed question about "jihad" suffers from a somewhat similar defect. [The word "jihad" literally means "struggle" or "effort", and the BBC has said that "Many modern writers claim that the main meaning of Jihad is the internal spiritual struggle", although there is also support for interpreting the word to mean a military struggle. The Merriam-Webster dictionary recognizes multiple meanings of the word](#), ranging from "a holy war waged on behalf of Islam" to "a personal struggle in devotion to Islam especially involving spiritual discipline" to "a crusade for a principle or belief". We do not assume that supporters of [Campus Crusade for Christ](#) will use violence in their struggle to spread Christianity, nor do we ask Christian prospective immigrants their opinion of the medieval [Crusades](#). If Kobach had proposed to ask a more general question about support for the use of violence, or even the use of violence motivated by perceived religious conflict, that would be a different story, but his proposed inquiry only covers this single word. Norwegian far-right terrorist [Anders Behring Breivik believed that he was at war with Muslims](#). Had we known this, does Kobach believe we should not have excluded Breivik if he had applied to come to the United States, but should have excluded any Muslim victims of his who supported internal spiritual struggle?

Even Kobach's proposed question about "equality of men and women", innocuous though it may seem and tied to an important American civic value though it may be, has a problematic dimension in the context of questioning that would apparently be directed towards religious beliefs. A number of religions that Kobach presumably does not wish to target do not provide for strict equality of men and women, in the sense of the rights of men and women in a specifically religious context. Less than a month ago, [Pope Francis ruled out the possibility of a woman ever serving as a Catholic priest. Female rabbis are extremely rare in Orthodox Judaism, with one first taking the title just this year](#), and with [one main U.S. Orthodox rabbinical group having purported to ban the practice roughly a year ago](#), although [female rabbis have been common in the Reform, Reconstructionist, and Conservative movements of American Judaism over the past several decades](#). In many Orthodox Jewish interpretations of Halacha, [ten men, not women, are required to make up a](#)

[“minyan”, or quorum to say certain prayers](#), although [the Committee on Jewish Law and Standards of the Rabbinical Assembly in the Conservative Movement has ruled that women can count towards a minyan](#). Some [Christians believe that wives should submit to their husbands](#). Could followers of those beliefs truthfully say, under penalty of perjury, that they supported full equality of men and women? While I vehemently disagree with those who would deny women full religious equality, and I personally favor a more gender-egalitarian approach, it seems to me that it would represent a major break with our own civic traditions for the U.S. government to exclude immigrants who hold the less egalitarian Christian or Orthodox Jewish beliefs discussed above—or the Muslim analogue of those beliefs.

Kris Kobach’s proposed “extreme vetting” questions would not be the first time the U.S. government has utilized a problematically worded question against a minority group. In the Japanese-American internment camps of the Second World War era, even U.S. citizens of Japanese descent [were asked whether they would “forswear any form of allegiance or obedience to the Japanese emperor, or any other foreign government, power, or organization?”](#) Many of these citizens [“resented being asked to renounce loyalty to the Emperor of Japan when they had never held a loyalty to the Emperor.”](#) (The question might be compared in this respect to the old example of an unfair yes-or-no question, “have you stopped beating your wife?”)

The internment of Japanese-Americans during World War II has been widely recognized as a horrible mistake, and [survivors of the camps were awarded restitution in 1988](#) as well as [given a formal apology by the U.S. government](#). However, [one prominent supporter of Donald Trump recently made news by suggesting that the internment of Japanese-Americans was a “precedent” for a registry of Muslims](#). That supporter had, in fact, raised the analogy in support of Mr. Kobach’s proposal to reinstate NSEERS, which is related to his proposed “extreme vetting” questions as discussed above. The parallels are extremely troubling. While it may seem that “extreme vetting” questions regarding aspects of religious belief are some distance away from actual internment of a minority group, it is important, as the Supreme Court said in [West Virginia State Board of Education v. Barnette](#) of a different attempt to enforce government-sponsored doctrine (regarding a mandatory flag salute), that we “avoid those ends by avoiding those beginnings.” This is not a road down which the United States should travel.

