

Of Korans and Constitutions

by Hugh Fitzgerald

“Have you even read the United States Constitution?” Khizr Kahn asked at the DNC, holding up his pocket version and offering to loan it to Trump. “Look for the words ‘liberty’ and ‘equal protection of law.’” This was declared by many in the Clinton clique to be the most damning indictment of Trump’s awfulness, coming from an aggrieved father, dignified in his righteous anger, and what’s more, an immigrant from Pakistan, who knew more about the fundamental document of our secular religion than Trump the Smirking Plutocrat.

Still, one had to wonder, what exactly is in the Constitution that Khizr Khan thought relevant to Trump’s remarks about Islam? I’ve looked for the appearance of the word “liberty” in the Constitution, and I suspect that Mr. Khan had in mind its appearance in the Fifth Amendment, which declares that no one can be deprived of “life, liberty, or property without due process of law.” I assume that Khizr Khan believes that clause would apply to Trump’s remark: “When I am elected, I will suspend immigration from areas of the world where there is a proven history of terrorism against the United States, Europe or our allies, until we understand how to end these threats.” I suspect that Mr. Khan is counting on the Supreme Court to use the “equal protection of the laws” clause of the 14th amendment, which applies to the federal government through the 5th amendment’s Due Process Clause, to strike down any discrimination based on religion (for what Trump’s remark meant was equivalent to a ban on Muslims). Such discrimination is, however, not forbidden, though subject to the highest standard of constitutional review. Discrimination on the basis of religion, like race, involves “suspect classifications,” and triggers strict scrutiny. This means that the government must show a “compelling state interest” to justify the

discrimination. National security, or the prevention of major loss of life, are both examples, it could be argued, of such a "compelling state interest." Those supporting such a ban on Muslim immigration at least have a constitutional case to make that Khizr Khan's aggrieved rhetoric obscured. Perhaps Trump should have replied to Khizr Khan and said something about "strict scrutiny" and a "compelling state interest," which would at least dispel the smug conviction of so many that a ban on Muslim immigration "of course is unconstitutional." That's what most people think. It's not nearly that simple.

But the second, and much more important chance, that the Trump camp passed up was this: Trump ought to have appeared a day or two after Khan's appearance, holding in his hand a "pocket Koran," which could be the full Koran, or, more usefully, an abridged version, containing the 100-odd "jihad verses." Trump would hold up that version of the Koran, saying: "Have you even read the Koran, Mr. Khan? Why don't you look for the words 'Jihad' and 'Jizyah' and 'Kafir'? What do you make, Mr. Khan, of such verses as 9:5 and 9:29? I'm sure you've read them. You know, there's the one about "slay the idolaters whenever you find them. Arrest them, besiege them, and lie in ambush everywhere for them." And the other one – "Fight those who believe not in Allah nor the Last Day, nor hold that forbidden which hath been forbidden by Allah and His Messenger, nor acknowledge the Religion of Truth, from among the People of the Book, until they pay the Jizyah with willing submission, and feel themselves subdued." I'm sure you know those, Mr. Khan. Oh, and by the way, folks, I ordered a few hundred copies of this abridged version of the Qur'an, which you should have found on your seats this morning, but if not, just ask my staff for a copy. It makes for interesting reading. And I'm sure your readers and viewers would like you to tell them more about them."

What, after all, would Khan reply? That he's never heard of those verses? Or that he has, but they are being "taken out of

context"? Or would he simply try to shut that discussion down: "Never mind about the Koran, I was talking about the Constitution. The Koran is irrelevant." But most Americans will not be convinced by such a reply and, their curiosity piqued, will want to find out for themselves just what is in this Koran that Khan wants to keep from having discussed. Now that these words – "jihad," "jizyah," "kafir" – and specific verses would have been pushed by Trump into the wider public consciousness, even the most partisan of journalists will have to talk about them, and ideally, will feel compelled to discuss not just the particular verses – 9:5 and 9:29 – quoted by Trump, but others in that abridged Koran, and will have to start reporting on that list of "jihad verses" that has been thrust into his hands.

But Trump didn't do this. He missed an opportunity to help himself and educate the public. Perhaps, even now, there's still time to hold up that pocket Koran. If not Trump, then could someone else come riding to the pedagogic rescue?

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