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Islamic Law and Constitutional Liberties

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OPENING ADDRESS

ISLAMIC LAW AND CONSTITUTIONAL LIBERTIES

KEITH ELLISON*

Thanks Bryce,¹ for that great introduction and also thanks for this excellent gathering this morning. I think we're going to have an interesting set of conversations and actually contribute to a greater level of understanding. I think that clearly, we're at a time in our own country, and even in the world, where focusing on this issue of Islamic law and constitutional liberties is a very timely subject; it really cries out for a much greater focus and it needs the intellectual muscle that you bring to it.

When I say "you," I mean all of you, plus many more. So, thank you all for coming here this morning. My charge is simple. I'm not going to discuss the fine points of Sharia law or constitutional law or anything like that. I was told to talk about a personal narrative. So, I'm going to do that.

Let me first say that on March 18, 2006, I got a call from a friend that Congressman Martin Sabo would not be seeking an additional term. After twenty-eight years of service in the United States Congress, he was going to take his much-deserved retirement.

And obviously, on that day, anybody who had been in office for twenty-eight years, when they leave, is going to cause a major scramble for whoever's going to take their seat. Fourteen candidates jumped in the race. I jumped in the race and didn't expect to win at all. I was just really upset about the U.S. policy in Iraq, and therefore, wanted to enter the race as a state legislator, which I had been for about four years, in order to maintain a level of debate on this issue.

My purpose was to say, "I know you guys are going to win, but whoever wins is not going to avoid taking a thoughtful position on Iraq, because

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1. Bryce Young, Editor-in-Chief, *University of St. Thomas Law Journal*, 2009–2010.

I'm going to make that contribution to this dialogue." While I was a state legislator, I realized that you can't just run for Congress and talk about one issue. So, I started to share my ideas on healthcare, on financial reform, on working class prosperity issues, and how people who labor have been experiencing wage stagnation for thirty years.

Then I started talking about some of my ideas around labor law, and before you knew it, I somehow ended up with the DFL² endorsement for the seat. I was shocked, and I could assure you that between March 18, 2006, and May 6, 2006, nobody asked me about my religion. I had been in the state legislature for four years before, and obviously, I would duck out for prayer because, as a Muslim, you pray five times a day.

I never made it a huge deal, because I don't see my faith as other people's business. I see it as my own. But it was never an issue; it was known. A lot of people knew Keith was a Muslim, because I've been a Muslim since I was nineteen and was somewhat active in the Muslim community. I had never led a Friday prayer and had never given a sermon. I just go, pray, and do my thing. But I can be found around the mosque doing various things here and there and in the community.

But the fact is, I really wasn't a leader in the Muslim community, and people who are not Muslim knew it, but it never was a cause for any sort of attention. But after I got that DFL endorsement, which was really sort of a remarkable day because of the large number of candidates that came together on May 6, it really wasn't remarkable that people thought we would be there all night.³ People thought because of the large number of candidates there would be no endorsement, because you have to get sixty percent of the delegates to win the endorsement.⁴

But somehow, after the first ballot, I was looking pretty good; after the second one, it looked even better; and after the third one, it was all over. We thought we'd be there till eleven at night. We were done at around two thirty in the afternoon.

So, I'm thinking they're going to ask me, "Okay, you're the first black person who is going to represent Minnesota in the federal government, what about that?" I thought they were going to ask me, "Well, you were involved in environmental justice stuff. So, is that gonna be a center point?" Or, "What will your agenda be?"

The first question they asked me literally took me by surprise. The first question was, "Aren't you a Muslim?" The second question was, "If you get elected, will you be the first one?" I didn't know the answer to the second question. I hadn't concerned myself with the answer to that ques-

2. Democratic-Farmer-Labor Party.

3. The DFL nominating caucus occurred on May 6, 2010.

4. MINN. DFL CONST. & BYLAWS art. III, § 4, subsec. H, available at <http://dfi.org/sites/dfi.org/files/DFL%20Constitution%20and%20Bylaws.pdf>.

tion. It really, for some reason didn't matter to me, and I was taken by surprise that anybody would really care. And then the media barrage started coming.

By that fall, I was going to my son's football game and it was not uncommon for a van to pull up and twelve, thirteen, fourteen foreign journalists to pour out of the van carrying boom mics around and wanting to talk. I felt like I had my own personal paparazzi or something. It was a big deal and I never quite really understood why, but a few things did occur to me. A friend of mine said to me, "Keith, you going to Congress now, is kind of like a Japanese person going to Congress a few years after Pearl Harbor."

I think of myself as just little old me, a poor, honest lawyer from Minneapolis—emphasis on poor. But the fact is, I had become somewhat of a symbol without wanting to, without expecting to. And so, I began to try to think more broadly about this issue. And even, people who used to just sort of accept me as just a member of the Muslim community now began to turn to me and ask me about critical questions about my faith.

I didn't feel prepared to answer those questions because, in my legal career, I'd been a criminal defense lawyer and a civil rights lawyer. I spent my time working on those issues. But it became very, very clear to me, and I learned through anecdotes and through stories and through many other personal episodes how critical it was to work out this issue of Islamic understanding and Western understanding. I shared with a friend before I got here this morning that I've been in many conversations like this one, and often I walk into and approach these conversations with a degree of trepidation.

Because it feels like, and I'm talking about emotion now, the question is not really Islamic law and constitutional liberty, but Islamic law versus constitutional liberty. It feels like that's what's being proposed, and because it feels like that, sometimes there's a certain amount of reluctance to even want to be involved in that kind of conversation. But I'm really happy you have embarked on this conversation, because it doesn't say "versus." It says "and." And if it really does mean "and," and I believe that it does, what it means is that we are in a position to create a whole new level of understanding.

A whole new conversation, because the crisis and the horrible, unspeakable tragedy that unfolded on 9/11 didn't start there. And the feeling that a lot of American Muslims felt was that they were being held collectively responsible for the behavior of some fanatics—murderous fanatics.

We had all already been seasoned to a certain extent by this East versus West, Islam versus the West, and the West versus the rest of the world kind of framework. We had already been seasoned that way.

We are all familiar with *Clash of Civilizations* by Samuel Huntington.⁵ And that had set out the framework for the dialogue. The idea being that now that the Soviet Union has declined, who now will the West challenge to make sure it maintains supremacy? Maybe those Muslims are going to be a problem. We'll address them.

The idea, though, is that that's not the only way for us to conceive of this phenomenon. The fact is that Islamic society, as President Obama said very accurately in Cairo, almost a year ago, Islamic civilization and Western civilization have not always been in competition and don't need to be in competition. So, it makes a lot of sense for us to have this conversation and to see how we can contribute in a way that makes sense to benefit society in which Muslims are predominate, and here in the West, where the people who are not Muslim are in the majority, but there is a significant and growing Muslim presence. The fact is that this world is a small place and it's getting smaller every day. It's important for us to reach across various boundaries in order to better understand what we should know about each other and how we should live together.

I think another way to understand it is not the Samuel Huntington version, but perhaps Edward Said had something to contribute to this conversation. The book, *Orientalism*, stands in stark contrast to the other framework in *Clash of Civilizations*.⁶ Another way to look at this is the fact that we've all been here together for quite a long time and the problem is not that civilizations clash. It's the problem with civilizations, which have every reason to cooperate and sometimes don't. And how can we get that done?

Rather than go on all day, I wanted to just let you know that it's a great conversation you are going to have today. We need you to continue to pursue your understanding and build our collective understanding around these issues. I think at the end of the day, what you'll find is that Western society has much to contribute to the law and to Muslim thought and understanding. And it has over the years. You may also find that Islamic conceptions of law, and how people should live together, and the ordering of lives has a lot to contribute to our own society.

I think that you'll ask yourself good questions, and I hope we don't only stick on the usual topics. One of the usual topics is immigration and visas. That's a common topic. I hope you address that topic, because it's very, very important. But I hope you also delve into important topics like commercial topics. What is an Islamic understanding of interest, of insurance? And in a globalizing world, in which the United States is looking to increase its exports, how might we examine our commercial law in order to

5. SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996).

6. EDWARD W. SAID, *ORIENTALISM* (1978).

enhance opportunity for people in the United States and in the Muslim world?

These are important topics and I hope that we delve into them. I can tell you that other countries, for example, the United Kingdom, are ahead of us in this area, and we should, we need to catch up, if not surpass them. But I hope we also take up the tough topics. Can we talk about how America would face some of its security threats that we're looking at today? For example, one of the security threats that we're looking at is transnational stateless actors who use extreme acts of violence and who destabilize societies that they are in, in order to assault our society. What will we do about that?

We know unmanned aerial vehicles are growing in prominence. We see them in western Pakistan and in Afghanistan. Now Yemen and Somalia. What are the rules that govern this? What is the quantum of proof necessary to do a targeted action, killing? Let's just be plain, what is the tolerable level of collateral damage of the people who get killed, who you don't want to kill?

Have we as a society discussed this issue, or have we sort of just left it to those guys whose job it is to operate this kind of machinery? Have we engaged in any kind of deliberative process to make sure that we understand what we're doing, why we're doing it, and to find a justification for how it fits with our own constitutional democracy and even international norms of law? Let's talk about the tougher topics. Let's talk about those tough topics.

I already alluded to issues of immigration and visas. Let's talk about that. After the near miss represented by Abu Talha's behavior on Christmas Eve on the Amsterdam flight flying to Detroit, we had a rash of activity around this phenomenon.⁷ One of the responses from the United States government was to identify fourteen countries in which we would have heightened scrutiny on people coming from those countries.⁸

Let's look at whether that's our best option or whether that's our smartest move. The federal government has since said, "You know what, maybe we will not do it that way." But our initial reaction was to say we're going to get about 15–20 more minutes of scrutiny for each person coming from these fourteen countries. Now, what if we conceived of it differently?

What if we said, as opposed to additional scrutiny, we're going to have additional communication, additional relationships, additional information sharing, and we're not going to focus on these countries for a more confrontational relationship, but rather a closer level of engagement, so that we

7. Anahad O'Connor & Eric Schmitt, *Terror Attempt Seen as Man Tries to Ignite Device on Jet*, N.Y. TIMES, Dec. 25, 2009, <http://www.nytimes.com/2009/12/26/us/26plane.html>.

8. Eric Lipton, *U.S. Intensifies Air Screening for Fliers from 14 Nations*, N.Y. TIMES, Jan. 4, 2010, at A3, available at http://www.nytimes.com/2010/01/04/us/04webtsa.html?_r=1&page_wanted=all.

know and communicate in a more seamless way with them about what the threats may be? And we will share with them and they will share with us, because remember, Talha's father alerted authorities in the United States that he was a danger.⁹

If we could operationalize that information quicker and more seamlessly, maybe he would have never boarded that plane. These are questions that I hope you might spend a little time delving into—the questions we don't always talk about, and the questions we often talk about, but we have very little understanding of. So, today, I don't offer you any prescriptions. It's not my job to do that. My job is to get our meeting started off right, through my own personal narrative.

But I do want to challenge you to take up these difficult topics, because they're important, they're shaping the world that we live in, and what we need, as much as we need anything else, is the intellectual support for what we're doing. Often, technology and action precede thoughtful policy. We need you to get us some good policy and law and rules around our action so that we're governing and operating constitutionally, ethically, and doing it in a way that fits in and is well aligned with our values.

Final word. It will not be long before we come up on the anniversary of President Obama's Cairo speech.¹⁰ And I think that it's important for all of us here today to understand that no president, no prime minister, no king, no parliamentarian, and no member of Congress is really going to build an integrated, strong, durable relationship as President Obama envisioned in his speech. That's not what presidents and prime ministers do. Those bridges of understanding and cooperation will be built by people like us here, today.

They'll be built by business people who are pursuing their business interests in the Gulf and in the Levant and in the Magra and in different places all over the world. They'll be built by academics that are doing exchanges and bringing people together to create new levels of understanding about all these topics that affect human experience. They'll be built by artists, they'll be built by dancers, they'll be built by actors, and they'll be built by students coming to our country and us sending students there.

They'll be built on the ground. They're not built at the peak; they're built at the base. Part of what you're doing today is helping to fulfill the vision that President Obama articulated. Leaders like Obama articulate a vision, but it takes people on the ground, working hard on the difficult questions that may divide us in order to bring us together. So, I just want to say

9. Thomas L. Friedman, *Father Knows Best*, N.Y. TIMES, Jan. 6, 2010, at A23, available at <http://www.nytimes.com/2010/01/06/opinion/06friedman.html>.

10. President Barack Obama, Remarks by the President on a New Beginning (June 4, 2009) (transcript available at <http://www.whitehouse.gov/the-press-office/remarks-president-cairo-university-6-04-09>).

thank you for the work that you're doing. It's incredibly important. And I commend you for it and good luck.

Well, we have about five minutes. Anybody want to ask me anything or say anything? All these shy law students in here. Okay, good. We are going to be able to—Oh, there we go. *[Audience member asks question]* Well, let's talk about that, I think that's a great question. Well, there's the cab driver thing. There's the thing with scanning pork in the grocery store.

I think there's a case in Nebraska where when it's prayer time, there's a group of Muslims that want to take a break from the production line to do Salah.¹¹ There are a number of issues that have cropped up. Not just one. I think it's important for people who are scholars of Islam to talk about the flexibility within Islam. And I think it's important for us to talk about how this really is two sides of a coin.

Let me tell you a story about the cab driver. Now, I don't represent any of the parties, and I'm going to share an anecdote with you. I was talking with a friend, who is a cab driver. And he was telling me about how in Islam you cannot transport alcohol and this Haram, and you cannot do this and it's forbidden and all this stuff.¹² Now, you should understand that there is no Islamic pope. There is no one central figure who says, "This is okay, that's not."

Islam is a fairly decentralized religion. And so, if you find one who says it's absolutely Haram and forbidden and you cannot do it, you're going to find another who says, "No, it isn't." That's the reality of the situation. But I inquired a little bit with this gentleman. I said, "So, you're going to make this the hill you want to die on? And you're making a huge deal about this. Tell me what your work is like."

He said, "Well, let me tell you. The real problem is that as cabbies, they will not allow us to run into the airport to use the bathroom while our car is idling outside. Also, they make us leave our trunks open in the middle of the winter. The cold air is coming in and we're freezing. They allow the other drivers, the limousine drivers, to use the bathroom and they don't have to open their trunks and they can sit there as long as they want to."

Then he started listing a bunch of labor-related complaints that they were experiencing with regard to the airport condition.

I began to suspect that this issue with this alcohol really was sort of a symbolic gesture that they were taking in order to adjust a whole host of labor problems. I raised that question and they told me, "No, we do care about this issue." But let me tell you, we can maybe make some headway if we could talk about these labor issues.

11. "Salah" is a formal prayer that is one of the Five Pillars of Sunni Islam and one of the Ten Practices of the Religion of Shi'a Islam. This ritual prayer is conducted under prescribed conditions and times.

12. "Haram" is an Arabic term meaning "forbidden" in Islam.

In the American tradition, if you can make a religious accommodation, it is something that we do. When it comes to the Amish, they didn't want orange reflectors on their buggies. They got white reflectors on their buggies because it was less offensive to their commitment to simplicity.¹³ And so, if there's an accommodation that can be made, if you can designate a cab a smoking cab, can you designate one an alcohol cab? I don't know.

I'm not here to solve that problem, but what I am here to do is to say on the one hand, religious accommodation is part of the American constitutional framework. On the other hand, Islamic law is nowhere near as rigid as some people might represent it to be and they may have some other things on their mind. So how do we do this? There is room for negotiation on this. I do not believe that there is any Islamic scholar who will tell you that, even with regard to issues of pork and alcohol, that there are no exceptions and there are not ways to work these problems over. Islam has flexibility in it everywhere. During Ramadan, we're supposed to fast for thirty days. Well, if you're sick, you don't have to fast during that time. You can do other things. You can do service. If you're traveling and you're on an airplane during prayer time, you don't have to pray at that time. In fact, you can combine your prayers. There are a number of flexibilities within Islam. So, a hard, rigid nail-in-the-ground kind of position really is not what the religion is all about.

It's important for us to have the dialogue about Islamic law and constitutional liberty. It's important for us to have the conversation, because there is room for negotiation here. It's important that people understand that. And for people who have sort of a new familiarity with Muslims and Islamic law, a little bit of knowledge is always a dangerous thing. You need a lot of knowledge to be really dangerous sometimes. But the fact is that there is room for negotiation here. And it's a generalized conversation that we need to have day in, day out, on and off.

So, thank you for that question, because it really goes to the very heart of many issues that are played out right here on the ground among my own constituents. I think we're probably right there. I want to thank the organizers and all of you for being here today.

13. See JOE MACKALL, *PLAIN SECRETS: AN OUTSIDER AMONG THE AMISH* xxii (2007) ("The Swartzentruber Amish reject the sign, believing it to be too brightly colored and too 'of the world.' To them, accepting the slow-moving vehicle emblem would be akin to trusting in a symbol more than trusting in God to keep them safe.").