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Donald Trump and the Constitution

[By ERWIN CHEMERINSKY](#)

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How can anyone who cares about the Constitution support Donald Trump? Once more, Trump has shown a profound lack of understanding of the Constitution and a willingness to make dangerous, false accusations.

Last week, Trump accused President Barack Obama of treason. At a rally in Florida, Trump said: “In many respects, you know, they honor President Obama. He’s the founder of ISIS. He’s the founder of ISIS. He’s the founder. He founded ISIS.” On Thursday morning, conservative radio host Hugh Hewitt, who has endorsed Trump, gave the candidate a chance to clarify his remarks. Hewitt said to Trump: “I know what you meant. You meant that [Obama] created the vacuum, he lost the peace.” To which Trump promptly responded: “No, I meant that he’s the founder of ISIS, I do.” Then, during a speech later that day, Trump declared: “I call President Obama and Hillary Clinton the founders of ISIS. They’re the founders.”

Later Trump said that this was sarcasm. But his words said that President Obama and Hillary Clinton committed treason. Article III of the Constitution says, “Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.”

It received less publicity, but in an interview last week with the Miami Herald, Trump said that he doesn’t “at all” like the idea of trying terrorist suspects in the civilian court system. He added that he would be “fine” with trying U.S. citizens in military tribunals at Guantanamo Bay. “Well, I know that they want to try them in our regular court systems, and I don’t like that at all. I don’t like that at all,” he told the Herald. “I would say they could be tried (in military commissions), that would be fine.”

Trying U.S. citizens in military tribunals in Guantanamo almost surely would be unconstitutional. Article III of the Constitution says “[t]he trial of all crimes shall be held in the state where the said crimes shall have been committed.” Moreover, the Supreme Court has held that it violates separation of powers to take judicial matters away from the federal courts. After the Civil War, the Supreme Court ruled that President Abraham Lincoln’s use of military tribunals was unconstitutional. It said that so long as civilian courts were open they had to be used.

After 9/11, President George W. Bush issued an executive order creating military tribunals for non-citizens accused of terrorist acts. When Congress passed a statute, the Military Commission Act, creating authority for military tribunals, it was careful to do so only for alleged terrorist acts of non-citizens.

It is essential that there be public confidence in the fairness of any proceeding. But prosecuting terrorist suspects in military tribunals never will be perceived as providing them a fair trial. Military tribunals never will have the credibility and the perceived impartiality of a federal court.

Never does Trump explain why federal courts cannot be trusted to handle terrorism prosecutions. In fact, on countless occasions before and after 9/11, the federal courts handled terrorism trials. Perhaps Trump's comments reflect a lack of awareness of this history, or perhaps they are about his desire to have terrorism cases heard in tribunals that are more likely to side with the government. But that is exactly why such cases should be heard in a federal court.

It also is troubling that Trump not only wants to keep the prison at Guantanamo open, but expand its use. Guantanamo has been a failure. Although it has been used as a prison for terrorist suspects since January 2002, only a handful of prisoners have been tried. Some of have been held for over 14 years – longer than any way in American history – without a trial. The overwhelming majority of those held were cleared and released. Guantanamo has become a symbol across the world of this country's violation of rights.

This is not the first time Trump has advocated proposals that are clearly unconstitutional and undesirable. He repeatedly has urged the barring of all Muslims from entering the country, an unquestionable denial of equal protection and free exercise of religion. Never should the government be able to presume someone to be dangerous on account of religion, race or group characteristics. He said that he wants to have the U.S. torture those it apprehends, saying that the country should engage in “a hell of a lot worse than waterboarding.” He says that we should not only go after terrorists, but also kill their families. All of this would be illegal and unconstitutional.

Never have I seen a candidate so willing to say anything, no matter how reckless. Never have I seen a presidential candidate so ignorant and so disdainful of the Constitution and its requirements.

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