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ISSUE BRIEF: MUSLIM AND REFUGEE BANS

Muslim Ban History and Legal Challenges

The first significant policy change made by President Trump after being sworn in to office was to effectuate his campaign promise of a Muslim ban. On January 27, 2017, the president issued Executive Order (EO) 13769 “Protecting the Nation From Foreign Terrorist Entry into the United States,” which immediately suspended the entry of nationals of Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen into the U.S. for 90 days. It also immediately suspended the U.S. Refugee Admissions Program (USRAP) for 120 days, with an exception for religious minorities, and indefinitely banned the entry of refugees from Syria. In addition, the EO reduced the number of refugee admissions for 2017 to 50,000, well below the prior year’s cap of 110,000. With no planning nor guidance to the government agencies charged with enforcing this order, people with valid visas and green cards were immediately detained at ports of entry within the U.S. and barred from getting on planes headed to the U.S. Chaos ensued with mass protests of the ban at airports as lawyers tried to get access to detained individuals.¹⁴⁵

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This first iteration of the Muslim ban was immediately challenged in the courts, and on February 3, 2017, a federal court issued a nationwide temporary injunction in *Washington v. Trump*, preventing the federal government from enforcing EO 13769. After appellate courts upheld the injunctions, the president revoked EO 13769 and signed EO 13780 on March 6, 2017—the Muslim Ban 2.0. The new ban extended to nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen for a period of 90 days and took Iraq off the list of banned countries. It also maintained the same refugee cap as the first EO and required the suspension of travel for refugees for an additional 120 days. On June 26, 2017, the Supreme Court allowed the ban to go into partial effect, applying it to foreign nationals and refugees “who lacked any bona fide relationship with a person or entity in United States.” The Trump administration interpreted this narrowly to mean that a refugee’s ties to resettlement agencies do not constitute a “bona fide” relationship.¹⁴⁶

On September 24, 2017, when the time provisions of the Muslim Ban 2.0 expired, the president issued Presidential Proclamation 9645, dubbed Muslim Ban 3.0. This proclamation placed country-by-country restrictions on nationals of Chad, Iran, Libya, North Korea, Syria, Yemen, and certain diplomatic officials from Venezuela.¹⁴⁷ It also removed Sudan from the list following the state’s cooperation with U.S. allied war efforts in Yemen.¹⁴⁸

The Muslim Ban 3.0 was immediately challenged in federal courts. In *Hawai'i v. Trump*, Judge Watson issued a temporary restraining order on Establishment Clause grounds. In *IRAP v. Trump*, Judge Chuang issued a nationwide preliminary injunction barring the federal government from enforcing the travel ban on people from all of the covered countries, except for North Korea and Venezuela.¹⁴⁹

The federal government appealed the decisions to the Supreme Court. On December 4, 2017, the Supreme Court allowed the ban to go into full effect while litigation was pending. On June 26, 2018, the Court decided *Trump v. Hawaii*. In a 5-4 decision, Chief Justice John Roberts allowed the Muslim Ban 3.0 to permanently remain in effect. Specifically, the Supreme Court held that the president has wide authority to suspend classes of aliens from the U.S. based on nationality, that the Immigration and Nationality Act's nondiscrimination language does not apply to this authority, and that the Muslim Ban did not violate the Establishment Clause prohibiting discrimination because there was a facially neutral justification grounded in national security concerns. This was despite the fact that the president and his proxies repeatedly made clear that the goal of the ban was to prevent Muslims from coming to the U.S., and the justifications were added later in the third version of the ban. Justice Sotomayor's dissent countered that "a reasonable observer would conclude that the Proclamation was driven primarily by anti-Muslim animus, rather than by the Government's asserted national-security justifications." Since the decision, the Muslim Ban has continued to severely restrict the ability of nationals from five Muslim-majority countries from entering the U.S., with no end in sight.¹⁵⁰

On October 23, 2017, upon the expiration of the 120-day ban on refugee resettlement, the government issued guidelines blocking refugee resettlement from 11 mostly Muslim-majority countries for 90 days and indefinitely pausing the follow-to-join program designed to reunite refugee families. The next day, President Trump released EO 13815 "Resuming the United States Refugee Admissions Program with Enhanced Vetting Capabilities," putting the government's guidelines into legal effect and resuming USRAP under these directives.¹⁵¹

In a 5-4 decision, Chief Justice John Roberts allowed the Muslim Ban 3.0 to permanently remain in effect. Justice Sotomayor's dissent countered that "a reasonable observer would conclude that the Proclamation was driven primarily by anti-Muslim animus, rather than by the Government's asserted national-security justifications."

Number of People Affected

The number of foreign nationals worldwide who fall under the ban exceeds 170 million.¹⁵² Published data on the number of visas granted to nationals of the countries impacted by the Muslim Ban demonstrate dramatic decreases in the percentage of visas granted compared to the years prior to the EO. Each of the countries listed, with the exception of Venezuela and North Korea, has seen dramatic decreases in both immigrant and nonimmigrant visa issuances, which affect not only foreign nationals but also their families living in the U.S.

Immigrant Visa Issuances for Countries Impacted by the Muslim Ban
FY 2016–2018

FIGURE 22

	FY 2016	FY 2017	FY 2018	% Change FY 2016–2018
Iran	7,727	6,643	1,449	-81.2%
Libya	383	458	139	-63.7%
North Korea	9	3	5	-44.4%
Somalia	1,797	1,791	546	-69.6%
Syria	2,633	2,551	838	-68.2%
Venezuela	2,471	2,909	3,172	+28.4%
Yemen	12,998	5,419	1,195	-90.8%

Yemen has seen a 90.8% decrease in immigrant visas issued while in the midst of an international humanitarian crisis resulting from the U.S.-sanctioned war on Yemen by U.S. ally Saudi Arabia.

Nonimmigrant Visa Issuances for Countries Impacted by the Muslim Ban
FY 2016–2018

FIGURE 23

	B-1, B-2 Visas			H Visas			F Visas			J Visas		
	2016	2018	% Change	2016	2018	% Change	2016	2018	% Change	2016	2018	% Change
Iran	23,048	3042	-86.8%	213	29	-86.4%	3,139	1,643	-47.7%	1,220	662	-45.7%
Libya	1406	208	-85.2%	66	32	-51.5%	352	178	-49.4%	60	94	+56.7%
North Korea	52	0	-100%	0	0	0%	0	0	0%	0	0	0%
Somalia	221	38	-82.8%	1	0	100%	50	27	-46%	16	14	-12.5%
Syria	7,797	1,687	-78.4%	67	20	-70.1%	364	76	-79.1%	106	73	-31.1%
Venezuela	144,283	20,775	-85.6%	781	548	-29.7%	4139	1851	-55.3%	579	582	+0.5%
Yemen	3,786	535	-85.9%	9	8	-11.1%	840	243	-71.1%	62	42	-32.3%

FIGURE 22: U.S. Department of State, Bureau of Consular Affairs, "Table XIV, Immigrant Visas Issued at Foreign Service Posts (by Foreign State Chargeability) (All Categories), Fiscal Years 2009-2018," *Report of the Visa Office 2018*.

FIGURE 23: U.S. Department of State, Bureau of Consular Affairs, "Table XVII (Part I), Nonimmigrant Visas Issued, Fiscal Year 2016," *Report of the Visa Office 2016*; U.S. Department of State, Bureau of Consular Affairs, "Table XVII (Part I), Nonimmigrant Visas Issued, Fiscal Year 2018," *Report of the Visa Office 2018*.

While the government has exempted Iranian nationals applying for F and M (student) and J (exchange visitor) visas, these travelers are subject to enhanced screening and vetting requirements. Somali nationals entering the U.S. on nonimmigrant visas are also subject to additional scrutiny. Nonimmigrants from Chad, Libya, and Yemen may travel to the U.S. on the F, M, and J visas and are permitted to enter without being subject to additional scrutiny.¹⁵³ There also has been a negative impact on businesses, educational institutions, and health care agencies that had relied on people affected by the ban for work or study. The most dramatic reductions can be seen in the difference in the total number of B-1 (business) and B-2 (tourism) visas issued, which demonstrate -85% difference across all countries impacted. The only visa category type that has seen any increase between 2016 and 2018 is the J visa (exchange visitor for education or work), which was issued to 34 more Libyan and 3 more Venezuelan nationals in 2018.

Refugees Admitted

Since the implementation of EO 13815, USRAP has resumed with increasingly stringent vetting procedures and more limited yearly ceilings for refugee admissions. While the ceiling has averaged 96,000 per year in previous administrations, under President Trump, refugee admissions were limited

to 45,000 in fiscal year (FY) 2018 and 30,000 in FY 2019—the lowest since the beginning of the country’s refugee program. The number of refugees actually processed and admitted under these lowered ceilings has further decreased drastically across all geographical zones, with the exception of Europe. This is a stark departure from past precedent, which kept the ceiling and the admitted numbers in close alignment.¹⁵⁴

USRAP Refugee Ceilings and Actual Admissions 2016–2018

FIGURE 24

	2016		2017		2018	
	Ceiling	Admitted	Ceiling	Admitted	Ceiling	Admitted
Africa	27,500	31,624	35,000	20,232	19,000	10,459
East Asia	14,000	12,518	12,000	5,173	5,000	3,668
Europe	4,000	3,957	4,000	5,205	2,000	3,612
Latin America/ Caribbean	1,500	1,340	5,000	1,688	1,500	955
Near East/South Asia	38,000	35,555	40,000	21,418	17,500	3,797
Total	85,000	84,994	110,000	53,716	45,000	22,491

Legal and Policy Changes

Waiver Process under Proclamation 9645

The Court’s ruling in *Trump v. Hawaii* upholding the ban explicitly focused on Proclamation 9645’s assurance that the ban would be offset by a “robust” waiver process that would permit otherwise-banned individuals to obtain a visa. Consular officers and U.S. Customs and Border Protection (CBP) officers have the discretion to authorize waivers to impacted individuals. As of this writing, however, the State Department has no waiver application form. Instead, the State Department directs that “an individual who seeks to travel to the United States should apply for a visa and disclose during the visa interview any information that might demonstrate that he or she is eligible for a waiver.” The waiver determination hinges on whether (1) denying entry would cause undue hardship, (2) entry would pose a threat to national security or public safety, and (3) entry would be in the interest of the U.S. The grant of a waiver does not guarantee entry to the U.S.; a successful waiver applicant still must apply for and receive a visa.¹⁵⁵

To date, the State Department has reported that in FY 2018, 2,673 waiver and visa applicants were “granted waivers,” allowing them to receive a U.S. visa for travel. In comparison, the government denied waivers and consequently rejected the visa applications of 37,000 applicants, a 94% rejection rate that has led to charges that the waiver provision is a sham process.¹⁵⁶

Currently there are at least two federal class-action lawsuits challenging the waiver provision and unlawful implementation of the ban. On July 31, 2018, *Pars v. Pompeo* was filed, arguing that the government has failed to provide requisite and adequate guidance for the waiver provision resulting in its implementation “in such a haphazard, opaque, and capricious manner . . . that the process by which waivers are supposedly granted has become part and parcel of the ban itself.” On February 4, 2019, a number of civil rights organizations filed a class-action complaint in *Emami et al. v. Kirstjen Nielsen*, arguing that “the government’s failure to provide a meaningful, orderly, and accessible process” for a waiver violates the Administrative Procedure Act, the Immigration and Nationality Act, and the plaintiffs’ right to due process under the Fifth Amendment. If these cases move forward, they may result in transparency and accountability for the so-called waiver provision.¹⁵⁷

FIGURE 24: Department of State Bureau of Population, Refugees, and Migration Refugee Processing Center, “Summary of Refugee Admissions” (February 28, 2019).



Extreme Vetting Forms

On March 6, 2017, President Trump issued a memorandum titled “Implementing Immediate Heightened Screening and Vetting of Applications.” On May 4, 2017, the State Department announced its intention to obtain emergency review and approval of a massive new data collection effort to “more rigorously evaluate applicants for terrorism or other national security-related visa ineligibilities.” Subsequently, the Department of Homeland Security put forth Form DS-5535 “Supplemental Questions for Visa Applicants,” a standardized form requesting additional information from applicants who “warrant additional scrutiny in connection with terrorism or other national security-related visa ineligibilities.” The DS-5535 requires disclosure of all travel history, source of travel funding, and all employment during the last 15 years; social media handles used during the last 5 years; the names and dates of birth for all partners, siblings, and children; and all passport numbers and countries of issuance. In comparison, the regular form, DS-160, only asks for 5 years of employment and travel history. The collection of social media handles is troubling because there are no standards or parameters on social media vetting, which may raise First Amendment concerns for U.S. citizens, residents, and visitors. Although the Supreme Court upheld the Muslim Ban under the conditions of the case-by-case waiver process, the implementation of the extreme-vetting forms go beyond the countries listed under the ban and allows for discrimination under the radar and with little oversight.¹⁵⁸

Policy Recommendations

We should maintain an immigration system that is true to our American values and spirit as a land of opportunity for all people regardless of their race, religion, national origin, gender, or educational attainment. We must protect immigrants from discrimination based on religious animus, and we must prevent the abuse of executive power to deny entry to classes of people based on illegitimate reasons. Congress must defund and repeal all iterations of the Muslim Ban and prevent any future president from enacting any new, similar bans. Additionally, Congress should broaden nondiscrimination provisions within the Immigration and Nationality Act to add religion to the list of protected classes, and to cover all visa applicants, immigrant and nonimmigrant alike. We support the NO BAN Act (H.R. 2214 and S. 1123) to end the Muslim Ban and prevent discrimination on the basis of religion in immigration, as well as measures such as H.R. 810 and S. 246 to prohibit the Department of Homeland Security and other federal agencies from using funds, resources, or fees to implement or enforce the Muslim Ban.

Furthermore, Congress must lift the refugee ban that further harms Muslim immigrant communities. We recommend greater investment in refugee resettlement so that assistance is sufficient to meet refugees’ needs.

NOTES

- ¹⁴⁵ “Executive Office of the President, “Executive Order 13769 of January 27, 2019, “Protecting the Nation from Foreign Terrorist Entry into the United States,” *Federal Register* Vol. 82, No. 20 (February 1, 2017); John V. Kelly, “DHS Implementation of Executive Order #13769 ‘Protecting the Nation from Foreign Terrorist Entry into the United States,’” *U.S. Department of Homeland Security, Office of the Inspector General* (January 27, 2017).
- ¹⁴⁶ *State of Washington and State of Minnesota v. Trump*, 847 F.3d 1151 (9th Cir. 2017); Executive Office of the President, “Executive Order 13780 of March 6, 2017, Protecting the Nation from Foreign Terrorist Entry into the United States” *Federal Register* Vol. 82, No. 45 (March 9, 2017); *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 198 L. Ed. 2d 643 (2017).
- ¹⁴⁷ Chad was later removed from the list on April 10, 2018.
- ¹⁴⁸ Executive Office of the President, “Proclamation 9645 of September 24, 2017, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats,” *Federal Register* Vol. 82, No. 186 (September 27, 2017); Ryan Grim and Alex Emmons, “How Sudan Got Off Donald Trump’s Latest Travel Ban List,” *The Intercept* (September 25, 2017).
- ¹⁴⁹ *Hawai’i v. Trump*, 241 F. Supp. 3d 1119 (D. Haw. 2017); *Int’l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 565 (D. Md. 2017).
- ¹⁵⁰ *Trump v. Hawaii*, 138 S. Ct. 542, 199 L. Ed. 2d 382 (2017); *Trump v. Hawaii*, 138 S. Ct. 2392, 201 L. Ed. 2d 775 (2018).
- ¹⁵¹ Egypt, Iran, Iraq, Libya, Mali, North Korea, Somalia, Sudan, South Sudan, Syria, Yemen. With the exception of North Korea and South Sudan, all of these listed countries are Muslim-majority and account for the largest portion of refugees accepted into the U.S.
- ¹⁵² U.S. Central Intelligence Agency, *The World Factbook* (2018).
- ¹⁵³ Elizabeth Redden, “Travel Ban 3.0,” *Inside Higher Ed* (September 26, 2017).
- ¹⁵⁴ Dara Lind, “Trump Slashed Refugee Levels This Year. For 2019, He’s Slashing Them Even Further,” *Vox* (September 18, 2018); Department of State Bureau of Population, Refugees, and Migration Refugee Processing Center, “Summary of Refugee Admissions” (February 28, 2019).
- ¹⁵⁵ U.S. Department of State, Bureau on Consular Affairs website, “June 26 Supreme Court Decision on Presidential Proclamation 9645”; *Trump v. Hawaii*, 138 S. Ct. 2392, 201 L. Ed. 2d 775 (2018).
- ¹⁵⁶ State Department, “June 26 Supreme Court Decision on Presidential Proclamation 9645.”
- ¹⁵⁷ *Pars Equality Center et al. v. Mike Pompeo et al.*, 2018 WL 3730676 (W.D. Wash.); *Emami v. Nielsen*, No. 18-CV-01587-JD, 2019 WL 428780 (N.D. Cal. Feb. 4, 2019). The U.S. District Court for the Northern District of California denied Defendant’s motion to dismiss for Plaintiff’s Administrative Procedure Act claim, dismissed Plaintiff’s Fifth Amendment claim “with leave to file an amended complaint by February 25, 2019,” and dismissed Plaintiff’s mandamus claim “without prejudice to potential remedies if appropriate at a later stage.”
- ¹⁵⁸ Executive Office of the President, “Memorandum of March 6, 2017, Implementing Immediate Heightened Screening and Vetting of Applications for Visas and Other Immigration Benefits, Ensuring Enforcement of All Laws for Entry into the United States, and Increasing Transparency among Departments and Agencies of the Federal Government and for the American People,” *Federal Register* Vol. 82, No. 62 (April 3, 2017); U.S. State Department, “Notice of Information Collection under OMB Emergency Review: Supplemental Questions for Visa Applicants,” *Federal Register* Vol. 12, No. 85 (May 4, 2017); NAFSA: Association of International Educators, “6 March 2017 Presidential Memorandum on Heightened Screening, Vetting, and Enforcement” (October 26, 2017).