

NEARLY THREE YEARS AFTER THE MUSLIM BAN, CONGRESS SEEKS CLARITY ON THE BAN AND ITS WAIVER PROGRAM

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More than two and a half years after President Donald Trump enacted the Muslim ban,¹ two House subcommittees² finally held their first hearing on the matter.³ This hearing launched congressional oversight of the ban's exclusion of entry of individuals from mostly Muslim-majority countries into the United States.⁴ The Subcommittee on Immigration and Citizenship and the Subcommittee on Oversight and Investigations hosted the joint hearing on September 24, 2019;⁵ Members of Congress sought to understand how the ban was being implemented, its waiver program, and its effect on U.S. citizens and individuals from the affected countries. This piece will briefly address the ban's history, the NO BAN Act, and a key component of the ban that was addressed in the joint hearing: the waiver program.

The ban is formally known as the "Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats,"⁶ but critics labeled the ban the "Muslim ban" due to President Trump's targeted actions towards the Muslim community.⁷ Specifically, the President called for "a total and complete shutdown of Muslims entering the United States until our

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1. The current ban in effect was established through Presidential Proclamation 9645 on September 24, 2017. President Trump released the initial version of the ban on January 27, 2017 through Executive Order 13769.

2. *Oversight of the Trump Administration's Muslim Ban: Hearing Before the Comm. on the Judiciary's S. Comm. on Immigration and Citizenship and Comm. on Foreign Affairs' S. Comm. on Oversight and Investigation*, 116th Cong. (2019) (hereinafter *Oversight of the Trump Administration's Muslim Ban*).

3. *Id.* (statement of Rep. Lofgren, Chairwoman, Subcomm. on Immigration and Citizenship).

4. *Id.*

5. *Id.*

6. Proclamation No. 9645, 82 Fed. Reg. 186,45161 (Sept. 24, 2017).

7. See Sirine Shebaya, *Current Developments in Immigration Law: The Permanent Muslim Ban*, 32 GEO. IMMIGR. L.J. 249, 250–51 (2018). The ban has also been referred to as the "travel ban."

country's representatives can figure out what the hell is going on,"⁸ during a December 2015 campaign rally.⁹ He has employed additional negative rhetoric targeting Muslims¹⁰ and implemented further measures that have negatively impacted the Muslim refugee community.¹¹ While President Trump signed the ban on the basis of national security and counterterrorism purposes,¹² former national security officials deemed the ban unnecessary for national security.¹³ Moreover, the Ninth Circuit held that the ban violates the Immigration and Naturalization Act's non-discrimination provision¹⁴ as it "withholds visas on the basis of nationality,"¹⁵ and the District Court of Maryland noted that U.S. citizens felt discriminatory harm because of the ban.¹⁶ Meanwhile, rights organizations have criticized the ban for its violations of international norms against religious and nationality-based discrimination.¹⁷

President Trump promulgated revised versions of the Muslim ban after its initial release on January 27, 2017.¹⁸ About a month after the first order, President Trump issued a second order (Executive Order 13780),¹⁹ following lawsuits and subsequent injunctions from a Virginia district court and the Ninth Circuit, who critiqued the first order's national security premises.²⁰ The second order attempted to further justify the ban's national security grounds,²¹ but it also faced backlash in federal courts.²² About six months after the second order, the President signed the current ban into effect through Presidential Proclamation No. 9645 on September 24, 2017.²³ The ban affects

8. *Presidential Candidate Donald Trump Rally in Mount Pleasant, South Carolina*, C-SPAN (Dec. 7, 2015), <https://www.c-span.org/video/?401762-1/presidential-candidate-donald-trump-rally-mount-pleasant-south-carolina&live=>.

9. *Id.*

10. See Shebaya, *supra* note 7, at 250–51.

11. See *id.* at 249–50.

12. Proclamation No. 9645, *supra* note 6.

13. Shebaya, *supra* note 7, at 253.

14. See *id.* at 252 (citing *Hawaii v. Trump*, 878 F.3d 662, 695 (9th Cir. 2017)).

15. *Hawaii v. Trump*, 878 F.3d 662, 695 (9th Cir. 2017).

16. Tally Kritzman-Amir and Jaya Ramji-Nogales, *Nationality Bans*, 2019 U. ILL. L. REV. 563, 604 (2019) (citing *Int'l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 601 (D. Md. 2017)).

17. See Asian Americans Advancing Justice-Asian Law Caucus et al., *Suggested Questions Submission for Upcoming Review of U.S. Compliance with the ICCPR. The Muslim Ban: Discriminatory Impacts and Lack of Accountability*, CTR. FOR CONST. RIGHTS (Jan. 14, 2019), https://ccrjustice.org/sites/default/files/attach/2019/01/2019.01.14_MuslimBanICCPRLIOSubmission__ALC_CCR_CAIRSFBA_IABA_NILC.pdf.

18. Exec. Order No. 13769, 82 Fed. Reg. 20,8977 (Jan. 27, 2017).

19. Exec. Order No. 13780, 82 Fed. Reg. 45,13209 (Mar. 6, 2017).

20. Kritzman-Amir and Ramji-Nogales, *supra* note 16, at 582.

21. *Id.* at 583. The second order also included changes such as providing exceptions for asylees and removing Iraq as a country, since the Iraqi government agreed to "share security information" with the United States. *Id.* at 582–83.

22. The Hawaii federal district court enjoined the ban due to a lack of finding that the order would serve national security interests. Kritzman-Amir and Ramji-Nogales, *supra* note 16, at 584 (citing *Hawaii v. Trump*, 241 F. Supp. 3d 1119, 1140 (D. Haw. 2017)). The Maryland federal district court followed suit and also enjoined the order based on "strong indications" that the ban was for religious discrimination as opposed to national security purposes. *Supra* note 16, at 585 (citing *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 606, 562–63 (4th Cir. 2017)).

23. Proclamation No. 9645, *supra* note 6.

individuals from Iran, Libya, Syria, Yemen, Somalia, Chad, North Korea, and Venezuela,²⁴ and was recently expanded to six more countries—Myanmar, Eritrea, Kyrgyzstan, Nigeria, Sudan, and Tanzania.²⁵ With no end date,²⁶ the ban’s stated main purposes are guarding national security and encouraging foreign governments to share and improve their identity-management protocols to detect any threat from an individual seeking entry.²⁷

The joint hearing on the Muslim ban came about five months after Representative Judy Chu introduced the National Origin-Based Anti-discrimination for Nonimmigrants Act (the NO BAN Act) in the House of Representatives on April 2019.²⁸ The NO BAN Act seeks to amend the Immigration and Nationality Act²⁹ to restrict the President’s power to temporarily suspend or impose restrictions on the entry of any aliens.³⁰ Some of the proposed limitations include requiring the President, Secretary of State, and the Secretary of Homeland Security to provide “specific evidence”³¹ and “specify the duration of the suspension or restriction and set forth evidence justifying such duration.”³² The NO BAN Act, which several advocacy groups endorse,³³ and the joint hearing mark affirmative legislative steps taken to mitigate the ban’s negative effects. Despite the hearing’s increased insight into the ban, the ban and lack of clarity on its implementation continue to separate families³⁴ and hinder those fleeing conflict from seeking refuge in the United States.³⁵

24. *Id.* at § 7(b).

25. See WHITE HOUSE, STATEMENT FROM THE PRESS SECRETARY (2020), <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-108/>.

26. Kritzman-Amir and Ramji-Nogales, *supra* note 16, at 587.

27. Proclamation No. 9645, *supra* note 6, at § 1.

28. H.R. 2214, 116th Cong. (2019).

29. *Id.* § 3.

30. *Id.* § 3(2).

31. *Id.*

32. *Id.*

33. See e.g., Rob Boston, *Americans United Endorses Legislation To Overturn Trump Muslim Ban*, AMERICANS UNITED (May 2019), <https://www.au.org/church-state/may-2019-church-state-magazine/people-events/americans-united-endorses-legislation-tohttps://www.au.org/church-state/may-2019-church-state-magazine/people-events/americans-united-endorses-legislation-to>; Ronald Newman and Manar Waheed, *RE: ACLU Endorses the NO BAN Act*, AM. CIVIL LIBERTIES UNION (March 25, 2019), <https://www.aclu.org/letter/aclu-endorsement-no-ban-acthttps://www.aclu.org/letter/aclu-endorsement-no-ban-act>; *The NO BAN Act Would Block the Discriminatory Muslim Ban and Prevent Future Abuses of Power*, ASIAN AMERICANS ADVANCING JUSTICE, <https://advancingjustice-aaajc.org/sites/default/files/2019-07/2019.07.23%20Muslim%20Ban%20Legislation%20Factsheet%20affiliation.pdf>; Press Release, Muslim Advocates, *Muslim Civil Rights Group Urges Congressional Action on NO BAN Act to Halt Muslim Ban Expansion* (Nov. 1, 2019), <https://muslimadvocates.org/2019/11/muslim-civil-rights-group-urges-congressional-action-on-no-ban-act-to-halt-muslim-ban-expansion/>.

34. See Aidan Gardiner, *Iranian Families Divided by the Trump Travel Ban Tell of Holidays Apart and Lives on Hold*, N.Y. TIMES (Dec. 20, 2019), https://www.nytimes.com/2019/12/20/reader-center/trump_travel_ban.html.

35. See Yael Schacher, *Voices of the Banned: The Trump Administration’s Exclusion of Muslims Seeking Refuge*, REFUGEES INT’L, 2-4 (Oct. 24, 2019), <https://www.refugeesinternational.org/reports/2019/10/22/trump-administrations-exclusion-of-muslims-seeking-refuge>.

During the joint hearing, Members of Congress attempted to understand the ban's waiver program. One of the Supreme Court's justifications in upholding the Proclamation's constitutionality in *Trump v. Hawaii*³⁶ was that the Proclamation's waiver program supports the "Government's claim of a legitimate national security interest" in establishing the ban.³⁷ The waiver "may be granted" to individuals if they satisfy three prongs: (1) show that a denial would cause undue hardship, (2) demonstrate that entry would not threaten the United States' national security or public safety, and (3) show that it would be in the United States' national interest to admit the individual.³⁸ To benefit from the waiver, individuals affected by the ban must apply for a visa, like any other non-citizen seeking entry.³⁹ If the individual is approved for a visa, then the consular officer will check to see if the individual fits the ban's exceptions⁴⁰ or the waiver prongs.⁴¹ Consular officers focus on the first and the third prongs of the waiver program: whether the individual is facing undue hardship and whether it would be in the United States' national interest to admit them.⁴² With regards to the second prong—whether an individual is a national security threat—consular officers used to send each individual's case to Washington D.C. for an interagency security assessment but they now use an electronic system recently created by the Department of State.⁴³

While the waiver program may appear to be a way for individuals to bypass the ban, individuals have faced near impossibility in obtaining visas.⁴⁴ Critics have dubbed the program a "sham,"⁴⁵ with one consular officer describing the program as "window dressing."⁴⁶ One difficulty with the program is the limited scope of who qualifies for a waiver. The waiver program requires applicants to prove that they would face "undue hardship" if denied a visa, but consular officers do not consider country conditions—including

36. *Trump v. Hawaii*, 138 S. Ct. 2392, 2402 (2018).

37. *Id.* at 2422.

38. Proclamation No. 9645, *supra* note 6, at § 3(c)(i).

39. Testimony of Edward Ramotowski, Deputy Assistant Secretary, Bureau of Consular Affairs, U.S. Department of State, 2 (Sept. 24, 2019), <https://docs.house.gov/meetings/JU/JU01/20190924/109976/HHRG-116-JU01-Wstate-RamotowskiE-20190924.pdf> (hereinafter Testimony of Ramotowski).

40. The ban does not apply to specified groups, including U.S. lawful permanent residents, dual national citizens who travel on a country not listed on the ban and individuals granted asylum or admitted refugees. See Proclamation No. 9645, *supra* note 6, at § 3(b).

41. Testimony of Ramotowski, *supra* note 39, at 2.

42. *Oversight of the Trump Administration's Muslim Ban* (statement of Edward Ramotowski) (hereinafter Statement of Edward Ramotowski).

43. Testimony of Ramotowski, *supra* note 39, at 3. This manual process contributed to delays in applications because it created a "large backlog." However, the Department of State established an electronic system in July 2019 aimed at increasing the efficiency of the security review. Testimony of Ramotowski, *supra* note 39, at 3.

44. Kritzman-Amir and Ramji-Nogales, *supra* note 16, at 597.

45. *One year after the SCOTUS Ruling: Understanding the Muslim Ban and How We'll Keep Fighting It*, NAT'L IMMIGRATION LAW CTR (June 2019), <https://www.nilc.org/wp-content/uploads/2019/06/Impacts-of-the-Muslim-Ban-2019.pdf>.

46. *Trump v. Hawaii*, 138 S. Ct. 2392, 2431 (2018) (citing Decl. of Christopher Richardson, Alharbi v. Miller, No. 1:18-cv-2435 (June 1, 2018)).

ongoing conflict—in assessing the “undue hardship” prong.⁴⁷ As a result, individuals fleeing conflict-affected areas such as Somalia, Syria, and Yemen face further difficulty in proving “undue hardship” and in seeking refuge in the United States.⁴⁸

Additionally, there have been significant delays in visa applications as a result of the ban.⁴⁹ Edward Ramotowski, Deputy Assistant Secretary at the Department of State’s Bureau of Consular Affairs, acknowledged that the waiver process was created rapidly and officers who did not have familiarity with the process had to be briefed on the subject.⁵⁰ As previously addressed, there have been backlogs in waiver cases. Ramotowski furthered acknowledged the problem of resources at embassies and agencies in previously performing the manual aspects of the waiver program.⁵¹ Though media or public attention on a specific waiver may hasten the waiver process,⁵² it is unrealistic that all waiver cases will receive media attention. Furthermore, not everyone is able to file a lawsuit against the government to bring attention to his or her case.⁵³

Lastly, the government has not been transparent with the waiver program and its reports, which has resulted in obscuring the application process for individuals affected by the ban.⁵⁴ The Department of State is required to provide quarterly reports on the ban’s implementation.⁵⁵ However, at the September 2019 joint hearing, the Department of State’s last publicly available report on the ban’s implementation was from March 2019—two quarters prior.⁵⁶ Additionally, the Department of State has not explained clearly why waiver applicants have been denied visas. According to a State report, 12,959 out of a total 56,320 visa applicants considered for a waiver from December 8, 2017 to October 31, 2019 were issued visas, while the remaining were deemed ineligible.⁵⁷ The report stated that the remaining 45,662 applicants would likely be issued a visa after further national security checks, as they

47. Resources on Travel Ban Waivers, INT’L REFUGEE ASSISTANCE PROJECT, <https://refugeerights.org/travel-ban-waivers/> (last visited Feb. 1, 2020).

48. See Schacher, *supra* note 35, at 3–5.

49. See e.g., *Suggested Questions Submission for Upcoming Review of U.S. Compliance with the ICCPR*, *supra* note 17, at 5; *One year after the SCOTUS Ruling: Understanding the Muslim Ban and How We’ll Keep Fighting It*, *supra* note 45 at 19–20.

50. Statement of Edward Ramotowski, *supra* note 42.

51. *Id.*

52. Betsy Fisher & Samantha Power, *The Trump Administration Is Making a Mockery of the Supreme Court*, N.Y. TIMES (Jan. 27, 2019), <https://www.nytimes.com/2019/01/27/opinion/trump-travel-ban-waiver.html>.

53. Deepti Hajela & Amy Taxin, *To overcome travel ban, some Americans taking cases to court*, ASSOCIATED PRESS (Dec. 26, 2019), <https://apnews.com/fceee2a8b90ccd528676246575162341>.

54. See *Oversight of the Trump Administration’s Muslim Ban* (statement of Farhana Khera, President and Executive Director Muslim Advocates), <https://docs.house.gov/meetings/JU/JU01/20190924/109976/HHRG-116-JU01-Wstate-KheraF-20190924.pdf>.

55. *Oversight of the Trump Administration’s Muslim Ban*, *supra* note 2 (statement of Rep. Pramila Jayapal, Congresswoman) (referring to the S. Rep. No. 115-282 at 22 (2019)).

56. *Id.*

57. *Implementation of Presidential Proclamation (P.P.) 9645: December 8, 2017 to October 31, 2019* (U.S. Dep’t of State Oct. 2019) at 3.

had not initially met the second prong of the waiver program of not posing a threat to national security.⁵⁸ But beyond this reasoning, the Department did not explain why the remaining applications were rejected, contributing to an unclear waiver process.

As the ban continues to expand,⁵⁹ the NO BAN Act and the September 2019 joint hearing have marked initial steps by Congress to ensure better accountability on behalf of the President, Department of Homeland Security, and Department of State in implementing the ban. The Department of State's July 2019 enhancement to its screening and vetting process⁶⁰ may mitigate some of the administrative roadblocks. But, as the Muslim ban continues to run without an end date, the waiver program requires increased guidance and transparency so that impacted families do not have to be separated⁶¹ and individuals may continue to seek refuge in the United States.

58. *Id.*

59. See WHITE HOUSE, STATEMENT FROM THE PRESS SECRETARY, *supra* note 25; Ted Hesson, *Trump's expanded travel ban targets Nigeria, five other countries*, REUTERS (Jan. 31, 2020), <https://www.reuters.com/article/us-usa-immigration-ban/trumps-expanded-travel-ban-targets-nigeria-five-other-countries-idUSKBN1ZU2WD>.

60. See Testimony of Ramotowski, *supra* note 43 and accompanying text.

61. See Gardiner, *supra* note 34.