



Discriminatory Bans and 212(f) Authority

The Trump administration repeatedly used its authority under Section 212(f) of the Immigration and Nationality Act (INA) to unilaterally and retrogressively reshape the U.S. immigration policy, including by reintroducing open religious and racial discrimination in defiance of the civil rights-focused overhaul of immigration law that Congress enacted in 1965.

President Donald Trump referred to Section 212(f) as his “magical authority” to restrict immigration¹ and turned to it in the first week of his presidency to institute the Muslim ban that he had promised as a candidate. Although district and appellate courts roundly rejected the Muslim ban as unconstitutional religious discrimination, contrary to immigration law, or both,² the Supreme Court upheld the ban in a 5-4 decision that stands among its greatest failures, reminiscent of its decisions allowing the discriminatory incarceration of Japanese Americans.

That decision predictably emboldened the Trump administration, which expanded the Muslim ban to 13 countries total, including more Muslim-majority countries and targeting particularly large numbers of Africans.³ In addition to these bans, the administration abused Section 212(f) repeatedly to target Black and Brown immigrants and advance other aspects of its restrictionist agenda. Trump’s 212(f) invocations include numerous iterations of the Muslim ban including refugees (Executive Orders 13769 and 13780 and Proclamations 9645 and 9983), Asylum Ban 1 (Proclamations 9822, 9842, and 9880), Health Care Ban (Proclamation 9945), bans on various classes of immigrants and nonimmigrants based upon alleged harm to the economy (Proclamations 10052, 10014), a ban on Chinese students and researchers (Proclamation 10043), and additional bans purportedly related to COVID-19 (Proclamations 9992, 9993, 9996, and 10041-42).

The swiftest way to end these bans and begin to rectify the Trump administration’s misuse of the 212(f) authority is for a new administration to rescind all of the Trump 212(f) orders in their entirety.

Furthermore, Congress must put a more stringent standard in place for presidents acting to suspend or restrict entry or immigration benefits such as that in the original National Origin-Based Antidiscrimination for Nonimmigrants Act (NO BAN Act, H.R. 2214/S. 1123) so that this blanket authority can never be used to discriminate against people again. As President-elect Joe Biden has already supported the NO BAN Act, the president should ensure that any invocation of the 212(f) authority meets the standards set forth in that legislation.

Muslim Ban, Particularly Targeting of Africans

In the first week of his presidency, Trump acted on his xenophobic campaign promise to ban Muslims from coming to the United States by issuing the first version of the Muslim ban.⁴

¹ Caitlin Dickerson & Michael D. Shear, “Before Covid-19, Trump Aide Sought to Use Disease to Close Borders,” *The New York Times*, May 3, 2020, <https://www.nytimes.com/2020/05/03/us/coronavirus-immigration-stephen-miller-public-health.html>.

² See, e.g., *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 579, 606 (4th Cir. 2017) (en banc); *Hawaii v. Trump*, 859 F.3d 741, 760, 789 (9th Cir. 2017) (per curiam).

³ American Civil Liberties Union, MUSLIM BAN FACT SHEET, https://www.aclu.org/sites/default/files/field_document/muslim_ban_fact_sheet.pdf (last visited June 5, 2020).

⁴ Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

Thousands of people, including members of Congress, immediately rushed to airports in protest, calling for people from the banned countries to be let in and sending the message that people were outraged by the administration's discrimination against Muslims. Trump's signature action quickly created one of the most unifying moments in American history and serves as a reminder of what is possible when we demand justice.

The Trump administration had to issue three separate iterations of this ban in its attempt to legitimize it in the courts. The first two versions targeted nationals from Muslim-majority countries and refugees—many of whom are also Muslim. The version currently in effect removed refugees from the ban (placing it in a separate order) and added a small number of people from non-Muslim-majority countries in a thinly veiled attempt to argue it was no longer a Muslim ban. Then, as now, Trump's agenda remains clear—to keep Muslims and other communities of color out of our country, to punish those that are here, and to turn our backs on the Constitution and the America we aspire to be.

Citing the Muslim ban orders, the Trump administration has taken numerous steps to expand social media vetting and share potentially bad information across government agencies, raising constitutional concerns regarding rights to due process, freedom of speech and expression, and the privacy of millions living in the United States, including U.S. citizens. The administration has issued numerous regulations regarding social media vetting, often under the label of “extreme vetting,” initially targeting Muslim, Arab, Middle Eastern, and South Asian applicants, and then expanding to include all immigrant and nonimmigrant applicants—over 15 million people.⁵

Additionally, in February 2017, the DHS Inspector General's 2017 report raised concerns that social media pilot programs lacked criteria for measuring success.⁶ Advocacy organizations have raised numerous concerns regarding monitoring and surveillance, including that it cannot be carried out fairly and effectively, is ripe for discrimination and profiling, lacks safeguards to protect against arbitrary information, and is ineffective and wasteful.⁷ It also raises concerns regarding the free speech and expression of those living in the United States, including U.S. citizens, who may be swept up in these searches because they are contacts of applicants (e.g., Twitter followers or likes, Facebook friends, dating applications, etc.). Per DHS's own documentation, previous social media vetting pilots produced little to no results and indicated a lack of clarity regarding what constitutes “national security concerns.”⁸ Additionally, in September 2017, DHS made clear that it is retaining social media data of some immigrants—and by default their contacts—throughout the immigration process, possibly for decades to come.⁹

Finally, the Trump administration has used misleading reports as cover to employ widespread social media and internet surveillance to flag people for deportation, border searches, or visa

⁵ “Timeline of Social Media Monitoring for Vetting by the Department of Homeland Security and the Department of State,” Brennan Center for Justice, <https://www.brennancenter.org/our-work/research-reports/timeline-social-media-monitoring-vetting-department-homeland-security-and> (last visited Nov. 16, 2020).

⁶ Office of Inspector General, “DHS’ Pilots for Social Media Screening Need Increased Rigor to Ensure Scalability and Long-Term Success (Redacted),” *OIG-17-40*, Feb. 27, 2017, <https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-40-Feb17.pdf>.

⁷ Manar Waheed, “New Documents Underscore Problem of ‘Social Media Vetting’ for Immigrants,” ACLU, Jan. 3, 2018, <https://www.aclu.org/blog/privacy-technology/internet-privacy/new-documents-underscore-problems-social-media-vetting>.

⁸ *Id.*

⁹ *Id.*

denials by inaccurately claiming that immigrants and foreign-born individuals are responsible for most terrorist attacks.¹⁰ This harmful agenda has been further exacerbated by the consolidation of these programs and information-sharing through the creation of the “National Vetting Center.”¹¹

Today, the Muslim ban has become the premise of numerous policies targeting immigrant communities and extending into the lives of Americans across the country, potentially monitoring their social media and resulting in scrutiny by government and law enforcement agencies. Millions are banned from America¹²—families are separated, people in need of life-saving care are left to languish, and businesses and universities are unable to hire qualified employees and enroll students. The impact is far-reaching and devastating for Muslims and so many more.

Refugee Muslim Ban

After targeting the U.S. Refugee Admissions Program (USRAP) with a 120-day suspension, and specifically Syrian refugees with an indefinite suspension in the executive order from January 27, 2017,¹³ the Trump administration has functionally closed the refugee program to many majority-Muslim countries. New policies have imposed security restrictions in USRAP for nationals of 11 Muslim-majority countries and close relatives attempting to join family members already resettled in the United States. These security restrictions have led to delays and application denials for resettlement under the false premise of national security—without any proven benefit. Additionally, DHS has implemented so-called security enhancements to USRAP, including screening those from “high-risk” countries and administering the program in a more “risk-based” manner.¹⁴ Rather than focusing on the immediate danger and vulnerabilities facing refugees as is the intent of this system, the Trump administration has shifted this into a suspect, fear-based model.

As a result, resettlement of nationals from the impacted countries has drastically fallen despite ongoing humanitarian needs, functionally banning most Muslim refugees. This is evident from the 17% admissions rate for Muslims, compared to 63% of Christians in the first half of FY18.¹⁵ The numbers become starker when looking at the specific countries impacted by the ban. In 2016, the United States resettled 12,587 Syrian refugees, but in 2018 that number dropped to only 62.¹⁶ Somali refugees also faced significant decreases, with 9,020 people admitted in 2016, but only 257 in 2018.¹⁷ In early 2017, nearly half of the refugees admitted to the United States

¹⁰ Hugh Handeyside, “Leaked DHS Report Uses Junk Science to Argue for Surveillance of Muslims,” ACLU, Feb. 7, 2018, <https://www.aclu.org/blog/national-security/discriminatory-profiling/leaked-dhs-report-uses-junk-science-argue>.

¹¹ *Id.*

¹² Respondents’ Opposition to Application for Stay, Donald J. Trump v. International Refugee Assistance Project, No. 17A560 (Nov. 28, 2017).

¹³ Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

¹⁴ “An Overview of U.S. Refugee Law and Policy,” American Immigration Council, Jan. 2020, https://www.americanimmigrationcouncil.org/sites/default/files/research/an_overview_of_us_refugee_law_and_policy.pdf.

¹⁵ Manar Waheed, “Trump Announces Plan to Admit Fewer Refugees Than Any Previous President,” ACLU, Sept. 27, 2019, <https://www.aclu.org/blog/immigrants-rights/trump-announces-plan-admit-fewer-refugees-any-previous-president>.

¹⁶ Chantal Da Silva, “America Helped 12,587 Syrian Refugees in 2016. In 2018 It Was Just 62. What Will 2019 Bring?” *Newsweek*, May, 9, 2019, <https://www.newsweek.com/america-helped-12587-syrian-refugees-2016-2018-it-was-just-62-what-will-2019-1420836>.

¹⁷ Bill Frelick, “Trump’s Policies Are Harming Refugees Worldwide,” *Foreign Policy in Focus*, May 30, 2019, <https://fpif.org/trumps-policies-are-harming-refugees-worldwide/>.

were Muslim.¹⁸ The significant drop in numbers from these countries reflects the thousands of Muslim refugees who otherwise would have found safety in the United States but were turned away by this ban.

In addition to unlawful discrimination, these unnecessary and arbitrary security measures prevent the U.S. Refugee Admissions Program from fulfilling its mission of assisting the most vulnerable refugees, undermining the program's integrity at a time of great international need.

Health Care Ban

On October 4, 2019, Trump issued a proclamation that would deny certain people entry into the United States if they are unable to show that they will be covered by certain insurance products within 30 days after entering the country or that they have the financial resources to pay out of pocket for “reasonably foreseeable medical expenses.”¹⁹ This unconstitutional health care ban would affect approximately 375,000 people each year—or two-thirds of all future immigrants—separating families, harming businesses, and undermining equal rights.²⁰ This proclamation claims INA 212(f) as its authority, penalizing future immigrants for the inadequacies of the U.S. health care system and further stigmatizing immigrant communities.

COVID-Era Bans

Since the onset of the COVID-19 pandemic in early 2020, Trump has issued nearly 20 executive orders or proclamations, many of which cite INA 212(f). These orders have included bans on people traveling from (in whole or in part) China, Iran, the Schengen area, the United Kingdom, the Canadian and Mexico borders, and Brazil, as well as refugees, business workers, and others. In many cases, including the bans instated on family members of lawful permanent residents and on employment visas, these executive actions do not even allege that there is any public health basis for the ban, and instead seek to scapegoat immigrants for the economic downturn caused by the pandemic and use COVID-19 as an excuse to impose immigration restrictions that the administration long sought to pursue its anti-immigrant agenda.

Any limitations on travel and immigration benefits under the premise of the pandemic must be based in science, not politics. Particularly in light of the Trump administration's well-documented politicization of the COVID-19 response, the president must start by wiping the slate clean. If, and only if, there is then a genuine need for targeted entry restrictions to address COVID-19 health risks, the president could issue a new proclamation that is consistent with the limitations in the original NO BAN Act, along with a transparent explanation of the scientific findings and process that support those restrictions.

¹⁸ Manar Waheed, “Trump Announces Plan to Admit Fewer Refugees Than Any Previous President,” ACLU, Sept. 27, 2019, <https://www.aclu.org/blog/immigrants-rights/trump-announces-plan-admit-fewer-refugees-any-previous-president>.

¹⁹ Proclamation No. 9945, 84 Fed. Reg. 53,991 (Oct. 4, 2019).

²⁰ Julia Gelatt & Mark Greenberg, “Health Insurance Test for Green-Card Applicants Could Sharply Cut Future U.S. Legal Immigration,” MIGRATION POLICY INSTITUTE, Oct., 2019, <https://www.migrationpolicy.org/news/health-insurance-test-green-card-applicants-could-sharply-cut-future-us-legal-immigration>.

Recommendations to the President

All 212(f) Bans

First 100 Days

- Rescind *all* executive orders, proclamations, and corresponding regulations, guidance, memos, and other implementing documents based upon INA 212(f) authority issued under the Trump administration in their entirety.
- Issue a statement that as President-elect Biden has supported the NO BAN Act, he is committing that any use of INA 212(f) authority will meet the stricter standards of that legislation, including that any use of this authority must be based upon credible facts to address specific acts that have already occurred and must be narrowly tailored, using the least restrictive means possible to achieve a compelling government interest. Furthermore, use of this authority must not discriminate based upon any protected characteristic.

Beyond the First 100 Days

- Determine whether any previous orders should be reissued regarding specified officials or individuals based upon particular activity and harm to the United States under the standard in the original NO BAN Act, as supported by President-elect Biden.

Specific Actions on Particular Bans

Muslim Ban

First 100 Days

- Rescind Executive Orders 13769 (Muslim Ban 1.0) and 13780 (Muslim Ban 2.0) and Presidential Proclamations 9645 (Muslim Ban 3.0) and 9983 (Expanded Muslim Ban) in their entirety, along with implementing memos and guidance by the Department of State and DHS.

Beyond the First 100 Days

- Rescind all regulations and policy memoranda corresponding to Executive Orders 13769 and 13780, and Presidential Proclamations 9645 and 9983, including those regarding social media vetting.
- Disband the “National Vetting Center.”
- Issue a government-wide policy memo discontinuing social media reviews based upon due process rights, freedom of speech and expression, and privacy, including policies of automated vetting/machine learning, preventing the use of fictitious accounts, and searches of social media devices at points of entry.
- Issue a government-wide policy to purge social media information in A-files.
- Issue new *Guidance Regarding the Use of Race* for Department of Justice and DHS, prohibiting discriminatory profiling and closing national security and border security loopholes.
- Rescind the following specific regulations and forms:

1. Notice of Information Collection under OMB Emergency Review: Supplemental Questions for Visa Applicants²¹
2. 60-Day Notice of Proposed Information Collection: Supplemental Questions for Visa Applications²²
3. 30-Day Notice of Proposed Information Collection: Supplemental Questions for Visa Applicants²³
4. Privacy Act of 1974; System of Records (notice of data retention, including social media for 100 years)²⁴
5. 60-Day Notice of Proposed Information Collection: Application for Nonimmigrant Visa²⁵
6. 60-Day Notice of Proposed Information Collection: Application for Immigrant Visa and Alien Registration²⁶
7. Agency Information Collection Activities: Generic Clearance for the Collection of Social Media Information on Immigration and Foreign Travel Forms²⁷

Refugee Muslim Ban

First 100 Days

- Rescind agency memoranda—including the memoranda from October 23, 2017,²⁸ and January 29, 2018²⁹—that instituted additional security measures targeting 11 countries and the refugee follow-to-join program following the reopening of USRAP.
- Return refugee admissions to 125,000 annually.

Beyond the First 100 Days

- Conduct evaluation of security checks or “vetting” for redundancy, arbitrary denials, and violations of due process and First Amendment-protected activities (e.g., social media vetting).
- Issue policy guidance returning the U.S. Refugee Admissions Program to evaluation based upon refugee vulnerability rather than a “risk-based” approach (implemented following Executive Order 13780).

²¹ Notice of Information Collection Under OMB Emergency Review: Supplemental Questions for Visa Applicants, 82 Fed. Reg. 20,956 (May 4, 2017).

²² 60-Day Notice of Proposed Information Collection: Supplemental Questions for Visa Applicants, 82 Fed. Reg. 36,180 (Aug. 3, 2017).

²³ 30-Day Notice of Proposed Information Collection: Supplemental Questions for Visa Applicants, 82 Fed. Reg. 56,099 (Nov. 27, 2017).

²⁴ Privacy Act of 1974; System of Records, 82 Fed. Reg. 43,556 (Sept. 18, 2017).

²⁵ 60-Day Notice of Proposed Information Collection: Application for Nonimmigrant Visa, 83 Fed. Reg. 13,807 (Mar. 30, 2018).

²⁶ 60-Day Notice of Proposed Information Collection: Application for Immigrant Visa and Alien Registration, 83 Fed. Reg. 13,806 (Mar. 30, 2018).

²⁷ Agency Information Collection Activities: Generic Clearance for the Collection of Social Media Information on Immigration and Foreign Travel Forms, 84 Fed. Reg. 46,557 (Sept. 4, 2019).

²⁸ Memorandum from the Dept. of State, the Dept. of Homeland Sec., & the Office of the Dir. of Nat'l Intelligence to the President (Oct. 23, 2017),

https://www.dhs.gov/sites/default/files/publications/17_1023_S1_Refugee-Admissions-Program.pdf.

²⁹ Press Release, Dept. of Homeland Sec., DHS Announces Additional, Enhanced Security Procedures for Refugees Seeking Resettlement in the United States (Jan. 29, 2018),

<https://www.dhs.gov/news/2018/01/29/dhs-announces-additional-enhanced-security-procedures-refugees-seeking-resettlement>.

Health Care Ban

First 100 Days

- Rescind Proclamation 9945, “Suspension of Entry of Immigrants Who Will Financially Burden the United States Healthcare System, in Order To Protect the Availability of Healthcare Benefits for Americans.”
- Issue guidance directing the Department of State not to implement the Health Insurance Proclamation for people seeking immigrant visas from abroad and to not factor in health insurance status when adjudicating visa decisions.
- Update the Foreign Affairs Manual by removing health insurance as a factor in determining public charge.

COVID-19-Related Bans

First 100 Days

- Rescind all executive orders, proclamations, and corresponding guidance, memos, and regulations issued using INA 212(f) authority since January 2020 under the premise of the COVID-19 pandemic. Any future orders must be firmly rooted in science and public health.
 - Proclamation 9984: Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus and Other Appropriate Measures To Address This Risk³⁰
 - DHS Regulation: U.S. Citizen Quarantine - China³¹
 - Proclamation 9992: Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus³²
 - Proclamation 9993: Proclamation—Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus³³
 - Proclamation 9996: Proclamation on the Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus³⁴
 - Proclamation 10041: Suspension of Entry of Immigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak³⁵
 - Proclamation 10042: Amendment to Proclamation of May 24, 2020, Suspending Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus³⁶
 - Executive Order 13928: Executive Order on Blocking Property Of Certain Persons Associated With The International Criminal Court³⁷

³⁰ Proclamation No. 9984, 85 Fed. Reg. 6709 (Jan. 31, 2020).

³¹ Notification of Arrival Restrictions Applicable to Flights Carrying Persons Who Have Recently Traveled From or Were Otherwise Present Within the Countries of the Schengen Area, 85 Fed. Reg. 15,059 (March 17, 2020).

³² Proclamation No. 9992, 85 Fed. Reg. 12,855 (Feb. 29, 2020).

³³ Proclamation No. 9993, 85 Fed. Reg. 15,045 (Mar. 11, 2020).

³⁴ Proclamation No. 9996, 85 Fed. Reg. 15,341 (Mar. 14, 2020).

³⁵ Proclamation No. 10041, 85 Fed. Reg. 31,933 (May 24, 2020).

³⁶ Proclamation No. 10042, 85 Fed. Reg. 32,291 (May 25, 2020).

³⁷ Exec. Order No. 13928, 85 Fed. Reg. 36,139 (Jun. 11, 2020).

- Proclamation 10052: Proclamation Suspending Entry of Aliens Who Present a Risk to the U.S. Labor Market Following the Coronavirus Outbreak³⁸
- Proclamation 1054: Amendment to Proclamation 10052³⁹

Legislative Recommendations

- Endorse formally, pass, and sign into law H.R. 2214/S. 1123, the National Origin-Based Antidiscrimination for Nonimmigrants Act (NO BAN Act), in its original form to provide a more stringent standard for suspension of visas under INA 212(f) and prevent abuses by future presidents.⁴⁰

³⁸ Proclamation No. 10052, 85 Fed. Reg. 38,263 (Jun. 22, 2020).

³⁹ Proclamation No. 10054, 85 Fed. Reg. 40,085 (Jun. 29, 2020).

⁴⁰ National Origin-Based Antidiscrimination for Nonimmigrants Act, H.R. 2214, 116th Cong. (2019).