

Center for Constitutional Rights

Discrimination, Detention, and Deportation: Immigration & Refugees

<https://ccrjustice.org/home/get-involved/tools-resources/publications/muslim-ban-discriminatory-impacts-and-lack>

Policy Issue Resources

The below submission is presented by five organizations across the United States (U.S.): Asian Americans Advancing Justice- Asian Law Caucus,^[i] Center for Constitutional Rights,^[ii] Council on American-Islamic Relations-San Francisco Bay Area,^[iii] Iranian American Bar Association,^[iv] and the National Immigration Law Center.^[v]

The U.S. and the international community is grappling with the discriminatory and devastating impacts of Presidential Proclamation 9645 (also described as Muslim Ban 3.0 or Travel Ban 3.0 or the Proclamation), which was the third attempt to deliver on then-candidate Trumps call for a total and complete shutdown of Muslims entering the United States until our countrys representatives can figure out what is going on.^[vi] As described in detail below in Section V, Muslim Ban 3.0 indefinitely suspends the issuance of the vast majority of immigrant and non-immigrant visas to all nationals from five Muslim-majority countries.

The impacts of Muslim Ban 3.0 go far beyond travel restrictions. Solely based on religion or national origin, Muslim Ban 3.0 has indefinitely separated families, disrupted educational and academic pursuits, kept individuals from life-saving medical treatment, harmed the U.S. and world economies, stigmatized migrants, and stoked the flames of hate.

Muslim Ban 3.0 is in clear violation of the U.S.s international human rights obligations because of the undeniable discrimination based on race, religion, and national origin, as well as the devastating impacts of family separation.

In light of the fact that Muslim Ban 3.0 was not proposed or in effect during the last periodic review of U.S. compliance with its obligations under the International Covenant on Civil and Political Rights (ICCPR), this issue has not been addressed in any prior reports, nor have there been any prior recommendations by the Committee on this issue specifically. However, several of the Committees general comments (discussed in Section VI) discuss at length the importance of the rights implicated by this issue.

Several Articles enshrined in the ICCPR relate directly to this issue:

Article 2(1): each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 18: everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

Article 23(1): the family is the natural and fundamental group unit of society and the State.

Article 26: all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27: in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

On September 24, 2017, U.S. President Trump issued Presidential Proclamation 9645,^[vii] Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats (Muslim Ban 3.0 or Travel Ban 3.0 or the Proclamation). The Proclamation is the third iteration of what has come to be called the Muslim Ban or Travel Ban. The first, issued within days of Trump taking office, was hastily rolled out, and provided little guidance to implementing agencies and on-the-ground officials. Chaos immediately ensued at the nations airports. It was almost immediately halted by multiple federal courts, finding that challenges to the constitutionality of the Muslim Ban would likely succeed due to evidence of its being driven by anti-Muslim animus and national origin discrimination. A second iteration was similarly stayed by federal courts for the same reasons. The third iteration, the Proclamation, has been in effect since December 2017, when the U.S. Supreme Court granted the Trump administrations request to allow the Proclamation to take full effect while the case is being litigated. As described below, the Supreme Court upheld the Proclamation in June 2018.

The Proclamation indefinitely suspends the issuance of the vast majority of visas sought by individuals from Iran, Libya, North Korea, Somalia, Syria, Yemen, and Venezuela. It applies to individuals who (1) were outside of the U.S. on October 10, 2017; (2) did not have a valid visa on that date, or (3) have not obtained a waiver (described below). Additionally, there are some country-by-country exemptions:

Country

Non-Immigrant Visas

Immigrant Visas (including Diversity Visas)

Iran
No non-immigrant visas except F, M, and J visas, who will be subjected to enhanced screening and vetting requirements
No immigrant or diversity visas

Libya
No B-1, B-2, and B-1/B-2 visas
No immigrant or diversity visas

North Korea
No non-immigrant visas
No immigrant or diversity visas

Somalia
No immigrant or diversity visas

Syria
No non-immigrant visas
No immigrant or diversity visas

Venezuela
No B-1, B-2 or B-1/B-2 visas of any kind for officials for certain government agencies and their immediate family members.

Yemen
No B-1, B-2, or B-1/B-2 visas
No immigrant or diversity visas

Although the Proclamation included two non-Muslim majority countries, Venezuela and North Korea, their addition had nearly no impact on the number of those affected by the Proclamation. The restrictions against Venezuela were limited to only specific government officials and their families. Similarly, immigration from North Korea to the U.S. is nearly non-existent. By contrast, the Proclamation categorically bars all immigrant visas for individuals from the Muslim-majority countries. As a result, the Proclamation disproportionately discriminates against Muslims and individuals from Muslim-majority countries.

The only hope for a visa for affected individuals is under what the Proclamation refers to as the case-by-case waiver process; a waiver is supposed to function as an exception allowing the visa to be issued for otherwise banned individuals. The burden is on the applicant to demonstrate that they satisfy the following three criteria: (1) denying them entry to the U.S. would cause them undue hardship; (2) their entry would not pose a threat to the national security of the United States; and (3) their entry would be in the national interest of the U.S.

Seemingly, thousands of families and applicant should be able to satisfy these broad requirements. However, the waiver process has been elusive, opaque, and arbitrary. Initial data released in February 2018 by the U.S. Department of State (DOS) to Senator Van Hollen showed that between December 08, 2017 and February 15, 2015 all but two (2) individual visas out of 6,555 had been denied, reflecting a 99.97 percent rejection rate.^[viii] Subsequent data provided by DOS to Senator Van Hollen over the next several months showed that approximately 2 percent of waivers are being granted; still reflecting nearly 98 percent that are either pending or denied. Despite the governments ongoing representations that nationals of the listed countries were not banned because they could obtain a visa through the waiver process, implementation of Proclamation and the data released confirms that it is designed to reject and ban as many individuals as possible. Indeed, a former U.S. government consular officer has stated that [t]he waiver process is a superficial and wasteful bureaucratic exercise designed to hide the true intent of the travel ban: to keep an arbitrary group of Muslim travelers and immigrants from ever reaching the shores of the United States.^[ix] At least two federal class action lawsuits currently challenge the unlawful implementation of the Proclamation and several U.S. congressional representatives have proposed policies calling for accountability on the so-called waiver process.

The resulting impact of the Proclamation on U.S. citizens and lawful permanent residents (LPRs or green card holders), as well as their families abroad, goes far beyond travel restrictions. Solely based on national origin and religious discrimination, families are facing

indefinite separation^[x] and are unable to practice their faith together or in their communities, and in many cases, are stranded in conflict zones, forced to spend their life savings, awaiting reunification.

On June 26, 2018 the U.S. Supreme Court issued a controversial 5-4 decision in *Trump v. Hawaii*, upholding Muslim Ban 3.0. In a troubling endorsement of executive overreach, the majority found that the Proclamation did not exceed the president's statutory power. However, in her dissenting opinion, Justice Sotomayor, joined by Justice Ginsburg, found that the Muslim Ban was clearly motivated by unconstitutional animus.^[xi] Justice Sotomayor states that the full record paints a far more harrowing picture, from which a reasonable observer would readily conclude that the Proclamation was motivated by hostility and animus toward the Muslim faith.^[xii] Moreover, she drew parallels to the U.S. Supreme Courts 1944 *Korematsu v. United States* decision, which upheld the legality of Executive Order 9066 and the incarceration of over 120,000 Japanese Americans in internment camps during WWII. Finally, in his dissenting opinion, Justice Breyer, joined by Justice Kagan, flagged concerns with the waiver process, and added that by excluding individuals who are not detrimental to the U.S., the U.S. governments national security justifications for the sweeping order are significantly weakened.^[xiii]

General Comment No. 18,^[xiv] along with General Comment No. 31,^[xv] discusses the importance of Article 2, specifically its nondiscrimination provision, Article 2(1), in ensuring that the rights of all individuals within the territory and/or jurisdiction of the State are protected and guaranteed by the State, regardless of an individuals race, religion, political or other opinion, national or social origin (to name a few), rights which are undeniably violated by the Proclamations discriminatory intent and effect on Muslims and nationals from Muslim-majority countries.

General Comment No. 22 to Article 18 requires States to guarantee and protect the freedoms of thought, conscience, and religion and prohibits States from limiting these in any way, even in the case of a public emergency.^[xvi] Particularly, it states that the Committee views unfavorably any discrimination against any religion for any reason, which unquestionably encompasses the Proclamation at issue because it directly and specifically targets individuals who are Muslim and nationals from Muslim-majority countries.

General Comment No. 19 to Article 23 discusses the importance of the family and the obligation of the State to ensure that the rights of families are not discriminated against.^[xvii] Specifically, it requires the State to ensure the unity and reunification of families when they are separated, a right that the Proclamation unarguably violates by refusing immigrant and non-immigrant visas to family members of U.S. citizens and LPRs.

General Comment No. 18, in relation to Article 26, and in combination with Article 2(1), prohibits the State from discriminating against individuals because of their race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.^[xviii] In particular, it states that nondiscrimination includes the basic principles of both equality before the law and equal protection of the law; principles that the Proclamation clearly violates with its unequal and disparate treatment of Muslim Americans and their relatives overseas under immigration laws.

General Comment No. 23 discusses the importance of Article 27 and the broad scope of rights protected by it, in the interest of preserving the rights and cultures of ethnic and religious minorities in the State.^[xix] It especially emphasizes the right of minorities to enjoy their culture and profess and practice their own religion. The Proclamation directly impedes the enjoyment of these rights for a significant swath of the American population by denying visas to religious leaders and ethnic and linguistic artists from the impacted countries.

We recommend that the Committee pose the following questions to the U.S.:

In light of the fact that the Proclamation violates U.S. obligations under the ICCPR, we urge the Committee to recommend:

[i] Asian Americans Advancing Justice- Asian Law Caucus (AAAJ-ALC) seeks to promote, advance, and represent the legal and civil rights of Asian Pacific Islander communities. As part of its mission, AAAJ-ALC challenges national laws, policies, and practices that lead to racial and religious profiling of Arab, Middle Eastern, Muslim, and South Asian communities in the United States. *See* <https://www.advancingjustice-alc.org/>.

[ii] Center for Constitutional Rights (CCR) stands with social justice movements and communities under threatfusing litigation, advocacy, and narrative shifting to dismantle systems of oppression regardless of the risk. *See* <https://ccrjustice.org/>.

[iii] Council on American-Islamic Relations- San Francisco Bay Area (CAIR-SFBA) is an office of CAIR, Americas largest Muslim civil liberties and advocacy organization. Its mission is to enhance the understanding of Islam, encourage dialogue, protect civil liberties, empower American Muslims, and build coalitions that promote justice and mutual understanding. *See* <https://ca.cair.com/sfba/>.

[iv] Iranian American Bar Association (IABA) is the only national association of Iranian-American judges, attorneys, scholars, and law students in the United States with over 1,500 members. Part of IABAs mission is to protect and advance the legal rights of Iranian-Americans and other minority communities. *See* <https://iaba.us/>.

[v] National Immigration Law Center (NILC) was established in 1979 and is one of the leading organizations in the U.S. exclusively dedicated to defending and advancing the rights of immigrants with low income. *See* <https://www.nilc.org/>.

[vi] Jenna Johnson, *Trump calls for total and complete shutdown of Muslims entering the United States* (Dec. 7, 2015), WASH. POST, https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?noredirect=on&utm_term=.0de32510d03e.

[vii] Proclamation No. 9645, 82 Fed.Reg. 45161 (September 27, 2017).

[viii] Yeganeh Torbati, Mica Rosenberg, Exclusive: Visa waivers rarely granted under Trumps latest U.S. travel ban: data, REUTERS (MAR. 6, 2018), <https://www.reuters.com/article/us-usaimmigration-travelban-exclusive/exclusive-visa-waivers-rarely-granted-under-trumps-latest-u-s-travel-ban-data-idUSKCN1GI2DW>. (discussing Feb. 2018 letter).

[ix] Christopher M. Richardson, *The Supreme Court Needs to Know the Truth About Trumps Travel Ban*, Slate.com (June 21, 2018, 4:25 PM), <https://slate.com/news-and-politics/2018/06/a-consular-officer-on-how-the-travel-ban-waiver-process-is-a-sham.html>.

[x] Center for Constitutional Rights & Rule of Clinic Yale Law School, *Window Dressing the Muslim Ban: Reports of Waivers and Mass Denials from Yemeni Americans Stuck in Limbo* (2018), https://ccrjustice.org/sites/default/files/attach/2018/06/CCR_YLS_June2018_Report_Window-Dressing-the-Muslim-Ban.pdf.

[xi] *Trump v. Hawaii*, 138 S. Ct. 2392, 2433 (Sotomayor, J., dissenting) (2018).

[xii] *Id.* at 2435.

[xiii] *Id.* at 2431 (Breyer, J., dissenting).

[xiv] HRC Genl Comments, 37th Sess., U.N. Doc. CCPR/C/GC/18 (Nov. 10, 1989), *available at* <https://www.refworld.org/docid/453883fa8.html>.

[xv] HRC Genl Comments, 80th Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004), *available at* <https://www.refworld.org/docid/478b26ae2.html>.

[xvi] HRC Genl Comments, 48th Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.4 (July 30, 1993), *available at* <https://www.refworld.org/docid/453883fb22.html>.

[xvii] HRC Genl Comments, 39th Sess., U.N. Doc. CCPR/C/19 (July 27, 1990), *available at* <https://www.refworld.org/docid/45139bd74.html>.

[xviii] GC/18, *supra* note 14.

[xix] HRC Genl Comments, 50th Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Apr. 8, 1994), *available at* <https://www.refworld.org/docid/453883fc0.html>.

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