



February 11, 2020

The Honorable Jerrold Nadler
U.S. House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Doug Collins
U.S. House Committee on the Judiciary
2142 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Nadler and Ranking Member Collins:

The Constitutional Accountability Center (CAC) is a non-profit law firm, think tank, and action center dedicated to the text, history, and values of the Constitution. We work in our courts, through our government, and with legal scholars to preserve the rights and freedoms of all and to protect our judiciary from politics and special interests. Through our expert commentary, issue briefs, narratives, and testimony to Congress, we inform the public and America's elected leaders with analysis of pressing topics in modern constitutional and federal law.

On behalf of CAC, I am writing to urge Congress to act and protect our constitutional value of religious freedom and equality. The Trump Administration has prohibited entry into the United States by nationals of 13 primarily Muslim-majority countries. The President's proclamations purport to be data-driven, focused on countries that fail to comport with information-sharing and identity-management protocols; but it is clear the proclamations were jerry-rigged to target Muslims. As we argued at the United States Supreme Court on behalf of members of Congress, the President's proclamations cannot be squared with either our Constitution's system of separation of powers or the First Amendment's promise of religious neutrality.¹

The best way to protect the nation's security, while also upholding foundational American values, is to respect the Constitution's fundamental protections and the laws passed by Congress. The Framers of our Constitution took pains to create a system that denied the President the power to both make the law and then execute it, recognizing that such concentrated power threatens liberty. The Framers gave the legislative power, including the authority to make rules concerning immigration, to Congress, ensuring that control of our borders would not be left to the "absolute dominion of one man."²

¹ Brief of Members of Congress as *Amici Curiae* In Support of Respondents, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965), available at https://www.theusconstitution.org/wp-content/uploads/2018/03/Trump_v_Hawaii_Cert_Amicus_Final.pdf.

² Kentucky Resolutions of 1798, in 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 543 (Jonathan Elliot ed., 1836).

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Congress chose to delegate a limited portion of these powers to the Executive in the Immigration and Nationality Act (“INA”). However, the INA does not give the President the power to override the parts of the INA he dislikes in favor of his own preferred policy. By treating all persons from the designated Muslim-majority countries as potential terrorists, his proclamations override Congress’s carefully chosen provisions governing terrorism-related inadmissibility and flout Congress’s explicit prohibition against discrimination on account of “nationality, place of birth, or place of residence,” in the issuance of immigrant visas.³

Furthermore, the President’s Muslim Ban violates the First Amendment prohibition of a governmental disapproval of a religious minority. The Establishment Clause is clear: “one religious denomination cannot be officially preferred over another.”⁴ Because the proclamations are shot through with anti-Muslim animus, they violate the Constitution’s promise of religious neutrality and equality.

Ultimately, the Court did not agree with these arguments after a series of lower court decisions to the contrary, issuing a 5-4 ruling that allowed the Muslim Ban to remain in place.⁵ We believe this decision joins the ranks of such past (and later overturned) opinions as *Dred Scott*, *Korematsu*, and *Plessy* which, respectively, stripped African American people, whether free or enslaved, of the promise of citizenship; the incarceration of Americans of Japanese descent during World War II; and the insidious principle of “separate but equal.” While the Court failed to impose a proper check on Trump’s clear abuse of executive authority, Congress has an opportunity and an obligation to act, enforcing our Constitution’s enduring values of religious neutrality and freedom.

CAC strongly supports a clean markup of H.R. 2214, the NO BAN Act, which includes three critical components to fighting the Muslim Ban by: (1) repealing two iterations of the Muslim Ban; (2) amending the INA’s nondiscrimination provision to explicitly prohibit discrimination based on religion and to apply all non-discrimination protections to immigrant and non-immigrant visa applicants alike; and (3) limiting overly broad executive authority to issue future bans by, among other things, imposing stricter reporting requirements to Congress. CAC would also support an amendment updating Section 4(a) of the Act to address Presidential Proclamation 9984,⁶ which was issued by the President after the introduction of the bill. The NO BAN Act is a critical step towards ensuring that Muslims and other communities are not subjected to unlawful and unconstitutional discrimination.

Sincerely,



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³ 8 U.S.C. § 1152(a)(1)(A).

⁴ *Larson v. Valente*, 456 U.S. 228, 244 (1982).

⁵ *Trump*, 138 S. Ct. 2392.

⁶ *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 Risk*, 85 Fed. Reg. 6709 (Feb. 5, 2020).