

April 12, 2021

The Honorable Jerrold Nadler Chairman U.S. House Committee on the Judiciary 2138 Rayburn House Office Building Washington, D.C. 20515 The Honorable Doug Collins Ranking Member U.S. House Committee on the Judiciary 2142 Rayburn House Office Building Washington, D.C. 20515

Dear Chairman Nadler, Ranking Member Collins, and members of the Committee:

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 safeguard our constitutional values of religious freedom and equality. The Trump Administration prohibited entry into the United States by nationals of 13 primarily Muslim-majority countries. President Trump's proclamations purported to be data-driven, focused on countries that failed to comport with information-sharing and identity-management protocols; but it is clear the proclamations were jerry-rigged to target Muslims. As we argued in a Supreme Court amicus brief on behalf of members of Congress, Trump'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 both to make the law and then to 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

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

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).

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, Trump's proclamations overrode Congress's carefully chosen provisions governing terrorism-related inadmissibility and flouted 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, Trump's Muslim Ban violated 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." 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. We believe this decision joins the ranks of such past (and later overturned) opinions as *Dred Scott, Korematsu*, and *Plessy* which, respectively, stripped African Americans, 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, and President Biden rescinded all versions of the Muslim Ban on his first day in office, Congress has an opportunity and an obligation to act to ensure no President ever again misuses the INA for such discriminatory purposes, furthering our Constitution's values of religious neutrality and freedom.

CAC strongly supports a clean markup of H.R. 1333, the NO BAN Act, which includes three critical components to prohibit potential discrimination in the future by: (1) requiring the executive branch to meet a more stringent and reasonable standard before issuing future bans; (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. The NO BAN Act is a critical step towards ensuring that Muslims and members of other communities are not subjected to unlawful and unconstitutional discrimination ever again.

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.