

THE NO BAN ACT (HR 2214 | S 1123)

Section 212(f) of the Immigration and Nationality Act (INA) permits the president to indefinitely bar or restrict people from coming to America upon finding that their entry “would be detrimental to [U.S. interests].”¹ This provision was used to enact the discriminatory ban on travel from a set of predominantly Muslim countries, which has now been in place for over two years despite the expert consensus that national security cannot justify it. Today, the travel ban continues to stigmatize Muslims, tear apart thousands of American families, muzzle creative expression, and damage U.S. businesses.

As the travel ban shows, **212(f) is ripe for abuse.** There is a better way to provide the president with the flexibility he needs in a crisis, while also ensuring that actions he takes are based on **proof, not prejudice.** In addition to repealing the travel ban, the National Origin-Based Antidiscrimination for Nonimmigrants (**NO BAN**) Act would amend the INA to **incorporate basic checks and limits** on executive decisions to bar people from the United States.² **Congress should act now** to pass this common-sense reform.

What Does the NO BAN Act Do?

- **Expands the INA provision that bars discrimination** on the basis of race, sex, nationality, place of birth, and place of residence in the issuance of permanent visas to add religion to the list of protected categories, and applies the nondiscrimination provision to most immigration benefits, including temporary visas. It also explicitly prohibits discrimination in actions taken under 212(f).
- **Requires travel restrictions be supported by credible facts**, of a defined duration, and tailored to address specific acts that threaten the safety of the American public, human rights, democracy, or international stability. A ban may only be used if less severe policy options would not work, it is crafted to affect no more people than is essential to accomplish its purpose, and there is a rebuttable presumption in favor of granting family-based and humanitarian waivers from it.
- **Includes checks and balances.** Demands **reporting** to: 1) Congress, without which any action will lapse; and 2) the public, including certain data on restrictions that reflects their impacts. It also affirms the availability of **judicial review**.
- **Repeals the three “travel ban” orders**, as well as orders that instituted heightened vetting for certain refugees and attempted to limit those lawfully eligible to be considered for asylum.

Aligning the Law and Historical Practice

- Over the past four decades, there have been 43 actions taken under 212(f). Of these, **98 percent** targeted people based on their **personal conduct**, rather than their national origin or another identifying trait.³ Further, **93 percent** required those affected to be **specifically named by the Department of State.**

¹ Immigration and Nationality Act (INA) of June 27, 1952, Pub. L. No. 82-414, § 212(e), 66 Stat. 163 (1952) (codified as amended in 8 U.S.C. § 1182(f)), <https://www.law.cornell.edu/uscode/text/8/1182>.

² National Origin-Based Antidiscrimination for Nonimmigrants Act (NO BAN Act), H.R. 2214, 116th Cong., <https://www.congress.gov/116/bills/hr2214/BILLS-116hr2214ih.pdf>.

³ David Bier, *Prior Presidents’ “Travel Bans” Are Different From President Trump’s Ban*, CATO (Nov. 16, 2017), <https://www.cato.org/blog/prior-presidents-travel-bans-are-different-president-trumps-ban>.

- There have been two bans targeted at entire nationalities, **both of which addressed concrete diplomatic emergencies.** In 1986, President Reagan barred Cubans from entering the U.S. as immigrants in response to the Cuban government's breach of an immigration agreement that "disrupt[ed] normal migration procedures between the two countries[.]"⁴ As part of a package of sanctions responding to the 1979 Iranian Hostage Crisis, President Carter relied on a similar INA provision to bar Iranian nationals from holding or being issued U.S. visas.⁵

Blanket Bans are Bad Policy

- Broad, national-origin based bans are **widely opposed by national security experts**, who point out they are a "**radical[] depart[ure]**" from a system of individualized vetting that multiple administrations have used for "compelling national security reasons."⁶ As more than 50 former national security officials who served both Democratic and Republican presidents wrote in court filings opposing it: "Overwhelming evidence demonstrates that the [travel ban] **has not only failed to advance our national security or foreign policy interests, but is seriously damaging those interests.**"⁷ According to these officials, bans can stoke anti-American sentiment overseas and stifle countries' economic and political links with the U.S., making it harder to cooperate on diplomatic and security-related matters.
- Even outside the national security context, blanket travel bans tend to be bad policy. For example, there is a **near consensus among public health experts that bans hamper disease containment efforts.**⁸ During a serious 2014 outbreak of Ebola in West Africa, the government's range of measures prioritizing engagement overseas as well as improved screening and preparedness at home was credited with curbing the spread of the disease.⁹

The Brennan Center would welcome the opportunity to further discuss the NO BAN Act. Please contact **Harsha Panduranga** (pandurangah@brennan.law.nyu.edu) for more information.

⁴ Proclamation No. 5,517, 51 Fed. Reg. 30,470 (Aug. 22, 1986), <https://www.govinfo.gov/content/pkg/STATUTE-100/pdf/STATUTE-100-Pg448o.pdf>.

⁵ Exec. Order No. 12,172, 44 Fed. Reg. 67,947 (Nov. 28, 1979); Exec. Order No. 12,206, 45 Fed. Reg. 24,101 (Apr. 7, 1980).

⁶ Brief of Amici Curiae Former National Security Officials in Support of Respondents, at 3, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965), https://www.supremecourt.gov/DocketPDF/17/17-965/42290/20180404123144117_17-965AmicusBriefofFormerNationalSecurityOfficials.pdf

⁷ *Id.*

⁸ Jad Mouawad, *Experts Oppose Ebola Travel Ban, Saying It Would Cut Off Worst-Hit Countries*, NEW YORK TIMES (Oct. 17, 2014), <https://www.nytimes.com/2014/10/18/business/experts-oppose-ebola-travel-ban-saying-it-would-cut-off-worst-hit-countries.html>; Julia Belluz and Steven Hoffman, *The Evidence on Travel Bans for Diseases like Ebola is Clear: They Don't Work*, VOX (Oct. 18, 2014), <https://www.vox.com/2014/10/18/6994413/research-travel-bans-ebola-virus-outbreak>.

⁹ White House, *President Obama Provides an Update on the U.S.-Led Response to Ebola* (Feb. 11, 2015), <https://obamawhitehouse.archives.gov/ebola-response>; George E. Condon Jr. and National Journal, *Obama's Ebola Victory Lap*, ATLANTIC (Feb. 11, 2015), <https://www.theatlantic.com/politics/archive/2015/02/obamas-ebola-victory-lap/442554/>; Julie Beck, *HHS Secretary Defies Trump on Ebola Travel Ban*, ATLANTIC (June 25, 2017), <https://www.theatlantic.com/health/archive/2017/06/hhs-secretary-disagrees-with-trump-on-ebola-aid-workers/531558/>.