

The Trump Travel Bans against Muslims, Statement at the United Nations

The following is a statement given by Inder Comar at a side event of the 35th Regular Session of the UN Human Rights Committee in Geneva, Switzerland, on June 19, 2017.

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Global Research, June 24, 2017

[Inder Comar](#) 22 June 2017

Region: [USA](#)

Theme: [Law and Justice](#), [Police State & Civil Rights](#), [Poverty & Social Inequality](#), [United Nations](#)

Thank you for the introduction. My name is Inder Comar and I am an attorney in The United States. I live and work in San Francisco and New York, and it's a great privilege to be here and to speak about this topic.

I'm going to focus my comments on what are called colloquially in the United States, 'The Travel Bans', and I don't know how they're called in other countries, but this is referring to two executive orders that were issued by our current President, President Donald Trump very soon after his inauguration and have been reviewed extensively now by the courts. At least one court of appeal has determined that the travel ban has been subject to, or was the source of discrimination; specifically religious discrimination against Muslims, that the ban targeted Muslims.

What I'll make clear, especially as I get to the end of my talk, is that we have to look at the travel bans in the context of American history. There are really two American histories; there's one that every American has the right and obligation to be proud of, in terms of our innovations with respect to due process, and with respect to really remedying and attacking this form of race hatred that has existed in a lot of different places, but also in the United States.

But there is also another America that is really important to talk about that doesn't get talked a lot about, and that is an America that unfortunately both from a cultural and a government perspective has the unfortunate tendency of labeling certain groups as enemies, or as others. Then supporting through law forms of discrimination against those 'others'. So, when we're talking about the travel bans, the travel bans start to make a lot of sense in that historical tradition.

First, I want to talk about the travel bans. There have actually been two travel bans:

The first travel ban was issued one week after the inauguration of Donald Trump, so it was issued on January 27, 2017.

In the first travel ban, the President suspended for ninety days both the immigrant and nonimmigrant entry of foreign persons from seven predominantly Muslim countries: Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen.

The First Executive Order also placed a lot of constraints on the admission of refugees into the country. So, it dropped the number of refugees who could be admitted to just 50,000 and it barred indefinitely the admission of Syrian refugees. Id. § 5(c)-(d). So Syrian refugees were just not permitted at all. It further ordered the government to review this program and then when it resumed doing this type of work, the Secretary of State was to prioritize refugee claims made by individuals of religious minority groups only. So, the idea being that only Christians or Sabeans, Yazidis, or minorities, non-Muslims could apply for refugee status.

As noted in court papers throughout the US court system, the President issued these Orders without consulting any relevant national security agencies whatsoever, and in fact prevented and shielded the acting Attorney General at the time from even learning about the contents of the Order. So a lot of people learned about the Order when they read the news or turned on the television that day.

As we all know now, the ban resulted in chaos. One of the primary results of the ban was to target family groups and to threaten families from being joined together. People who were coming back from visiting from overseas, and as I'll get to at the end of my comments, destruction of the family or targeting the family is part of this other American tradition. When we talk about this American tradition of stigmatizing and vilifying, the primary mechanism that you see in American history is threats and targets of the family.



Activists have gathered outside US airports, as seen here at Portland International Airport on Jan 29, to protest against Mr Trump's travel ban. (Source: The Straits Times)

What happened at that point, is two American states, the states of Washington and the state of Minnesota immediately challenged the ban. They won at the district court, the lower court level. That went up on appeal, and on appeal, the Ninth Circuit court of appeal which is the Federal Court of Appeal, concluded the travel ban was illegal on the grounds of Due Process. So, it didn't touch the religious claims, or the discrimination claims, but it said as a matter of just sheer Due Process, what you've done, it's just not going to work, and we're not going to let you do it.

So, in response to that, President Trump issued a second ban. He told the Court,

'O.K., you won, I'm not going to fight this, and I'm going to issue a second ban, so give me a couple weeks to do that.'

He got a couple weeks and he issued the Second Travel Ban, and that was issued on March 6, 2017.

Basically what happened there, is the list of seven countries dropped down to six, so Iraq was removed from the list. The second ban did not bar lawful refugees as the first ban had. It also did not talk about preferential treatment for religious minorities.

Right after the second travel ban was released, two reports that came out from the US Department of Homeland Security, both of those reports concluded that they did not reference the ban but they concluded that the ban was kind of useless. The first report stated that increased vetting was unlikely to reduce terrorism-related offenses. A separate report indicated that citizenship is not a reliable indicator of whether anyone poses a terrorist threat.

The second ban was immediately subject to further litigation, and just a couple weeks ago, and as early as last week, we have a couple more court orders.

So the first is from the 4th Circuit Court of Appeal, which is a Federal Court of Appeal, and it covers Maryland, the Carolinas, the Virginias. It issued its opinion on May 25, 2017, and that court said that the second ban was likely unconstitutional on the grounds of religious discrimination. So what it did is it looked at pre-administration statements, statements that President Trump had made in the campaign trail. It also looked at Statements that the Administration had made while in office. It easily concluded that the ban was a targeting of Muslim people. It went behind the Administration's defense is, the Administration says that there's no mention... the word Muslim doesn't appear in the ban, was basically the defense.

What this court has said was, no actually, what you said on the campaign trail, and I can list some of the comments... I have a list here... On the campaign website, the Trump Campaign Website had proposed "a total and complete shut down of Muslims entering into the United States." This link was only taken down March 2017.

In January, former New York mayor, Rudolph Giuliani issued a statement on Fox News where the President reportedly called him up and said,

'How do we make this legal?'

And Giuliani said,

'Well don't focus on the religion, talk about the countries and that's how it'll be legal.'

The Court look at all that stuff and said,

'You can't... this is a pre-text... you can't have said all these things on one side of your mouth and now you're coming to us and claiming that it's neutral. That's not how this works.'

So that decision is now up on appeal to the Supreme court.

Just a week ago the 9th Circuit, so a different Federal Court, it also said the ban was unconstitutional but it didn't reach the religious issues. It said that it was unconstitutional on the basis of immigration law. So now all of these decisions are going to be reviewed, they are being reviewed as we speak by the US Supreme Court.

Historical context

As I wanted to do earlier, I want to talk about the historical context of these bans, because when you look at the history of this historical legacy, I think the bans are quite naked in terms government-sanctioned targeting of an "other".

Slavery offers the most well-known example of this and discrimination against people with dark skin, black skin in the United States. There's a recent book by Professor James Whitman at Yale Law School, who examines the ways in which German National Socialists in the 1930s, their lawyers actually picked up on and studied American Jim Crow laws in depth to understand how they could model their laws to define how Jews should be discriminated against. They were really interested in how America and US States defined terms such as "Negro" or "Mongol." So National Socialist lawyers were looking at this stuff.

The destruction of indigenous communities by state and federal governments, whether it was through their own conduct or in turning a blind eye to mob violence, is another example of a group of people who were deemed unworthy and unfit to belong to the definition of what it meant to be "American" - which has always carried a historical overture of being people with white skin.

In the 4th Circuit's recent opinion, which I talked about, there are several citations to *Korematsu v. United States*, 323 U.S. 214 (1944). This is a very famous Supreme Court opinion which approved of the internment of Japanese individuals, or individuals of Japanese descent, including American citizens, based on the fact that they were Japanese. So this was permitted and approved, and Japanese people were stuck in camps. And as noted in a dissent the decision to intern people of Japanese ancestry was based on little more than, and I'm quoting now "misinformation, half- truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices—the same people who have been among the foremost advocates of the evacuation." The parallels with the Travel Bans are clear.

But I want to talk about another, largely unknown case that I think provides the best comparison with the travel bans, and then I'm going to finish up. This is the case *United States v. Bhagan Singh Thind*, 261 U.S. 204 (1923). In this case, a Punjabi-born Indian male, he applied for U.S. citizenship on the basis that he was a high-born caste member in India, and he was a member of the "Aryan race" and that he was "Caucasian," meaning, that his ancestors had from the Caucasus Mountains. The immigration court bought it and said, 'Yea, that sounds right.' And they gave him his citizenship, at a time when Indians did not get citizenship in the United States. The government appealed, and this went all the way up to the Supreme Court.

The Supreme Court reviewed this and said,

“Look, your theories of Aryanism are interesting, but we don’t buy them. We also reject the idea that you’re “Caucasian,”.”

The Court concluded, and I think it is worth reading their conclusion in full:

“The children of English, French, German, Italian, Scandinavian, and other European parentage, quickly merge into the mass of our population and lose the distinctive hallmarks of their European origin. On the other hand, it cannot be doubted that the children born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry.” The Court concluded that the great body Americans would instinctively recognize such differences and “reject the thought of assimilation.”

The Travel Bans, and the demagoguery that produced the bans, can be traced very clearly back at least through that decision, and its conclusion that the law in the United States was “intended to include only the type of man whom [the original framers of the law] knew as white.”

Thinking people have to confront the reality that a de facto, race-based society remains alive and well in the United States, that’s in competition with some of these other American values. There’s a real battle right now in the hearts and minds of Americans, is that how that’s going to turn out.

The Travel Bans are a symptom of a long disease which, however in remission it may have been, is now in violent metastasis. Instead of the Irish, the Italians, the Mexicans, or the Japanese, it is now Muslims, and particularly Arab Muslims, who are being targeted and labeled as an enemy, as an “other”, and who are being subject to discrimination both culturally, and by the government. And by a government that can barely seem to hide avowedly racist and discriminatory priorities.

When you think about the slave market, the native reservation, Jim Crow, the prison system in the United States which is overwhelmingly black and brown, Japanese concentration camps, you should think about too, Arab and Muslims detainees in Guantanamo, being held without trial, and the numerous unlawful and criminal wars of aggression that target weak and largely brown and black nations. These are the cousins and colleagues of the Travel Bans. It is no longer possible for good thinking people to aid and abet these policies.

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