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## THE BAN AND ITS ENDURING BANDWIDTH

*Khaled Ali Beydoun<sup>†</sup>*

*This Essay is a contribution to the Michigan Journal of Race & Law's special issue marking the 20<sup>th</sup> anniversary of September 11, 2001 and the ensuing War on Terror. It reflects on Executive Order 13769, widely known as the "Muslim Ban," years after it was signed into law, as an extra-legal catalyst of state-sponsored and private Islamophobia that unfolded outside of the United States.*

### INTRODUCTION

Hours after newly inaugurated President Trump signed Executive Order 13769 into law, airports across the United States were instantly transformed into holding cells.<sup>1</sup> Muslim visa holders from seven Muslim-majority countries were denied entry into the United States.<sup>2</sup> In addition to these immigrants, those applying for status as lawful permanent residents were also barred entry in the immediate wake of the Ban.<sup>3</sup>

The swift enforcement of the Ban sowed chaos, and instant legal challenge. On the other side of the airport checkpoints, protesters stormed the terminals in defense of the Muslim travelers-turned-captives, challenging a ban that would become the Trump Administration's hallmark policy. Virtually overnight, the American people were awakened to

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1. See Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017). Revoked by Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

2. Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) The first version of the Ban listed Libya, Iran, Iraq, Somalia, Sudan, Syria, and Yemen as the restricted states.

3. Amrit Cheng, *The Muslim Ban: What Just Happened?* AMERICAN CIVIL LIBERTIES UNION (Dec. 6, 2017), <https://www.aclu.org/blog/immigrants-rights/muslim-ban-what-just-happened>.

the violent reality of state-sponsored Islamophobia.<sup>4</sup> This system of *othering* Muslims defined the security state since the 9/11 terror attacks. However, it was not until Trump's Muslim Ban that most Americans were able to connect the force of state action with the anti-Muslim animus that loomed over the nation for two decades.<sup>5</sup> With the Muslim Ban, American Islamophobia was a focal point of media and legal concern, and rose to become a primary American racial and social justice concern moving forward.<sup>6</sup>

Yet, the ramifications of the Ban and its subsequent forms did not stop at with the American experience, nor at the American border. The policy stood at the center of a powerful transnational discourse that explicitly sanctioned Islamophobia and encouraged kindred governments across the globe to follow suit. The Ban was precisely what Chief Justice John Roberts, who wrote the majority opinion in *Trump v. Hawaii*, ruled that it was not – the heartbeat of a broader dialectic that trumpeted “Islam hates us.”<sup>7</sup> A heuristic that global populists and hatemongers adopted – by way of state policy or private vigilantism – to wreak havoc against Muslim populations across the globe. Echoing Justice Sonia Sotomayor's dissent in *Hawaii*, Trump's “[repeated] statements alluding to a desire to keep Muslims out of the country” before his election, which continued during his presidency and materialized with the signing of the Ban,” formed a transnational dialectic that generated Islamophobic violence.<sup>8</sup>

These transnational effects of the Ban were on vivid display in the direct aftermath of its signing, and well after Trump's presidential successor Joe Biden lifted it on his first day in the White House.<sup>9</sup> Reflecting on the Ban, and the twenty-year War on Terror, this Essay examines how the Ban endures as a resonant symbol of Islamophobia that emboldens state-sponsored and private Islamophobia on a global scale.

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4. Khaled A. Beydoun, *Islamophobia: Toward a Legal Definition and Framework*, 116 COLUM. L. REV. ONLINE 108, 114 (2016). The author defined state-sponsored, or “structural” Islamophobia, “as the fear and suspicion of Muslims on the part of institutions – most notably, government agencies – that is manifested through the enactment and advancement of *policies*.” [hereinafter Legal Islamophobia].

5. See Elsadig Elsheikh, Basima Sisemore & Natalia Ramirez Lee, *Legal Othering: The United States of Islamophobia*, HAAS INSTITUTE (Sep. 2017).

6. See generally KHALED A. BEYDOUN, AMERICA ISLAMOPHOBIA: UNDERSTANDING THE ROOTS AND RISE OF FEAR (2018), for a historic and contemporary analysis of Islamophobia in the United States.

7. *Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018) (holding that “[t]he President lawfully exercised that discretion based on his finding . . . that entry of the covered aliens would be detrimental to the national interest”).

8. *Id.* at 72 (Sotomayor, S., dissenting).

9. *Proclamation on Ending Discriminatory Bans on Entry into the United States*, Proclamation No. 10141, 86 Fed. Reg. 7,005 (Jan. 20, 2021).

## THE DISCURSIVE POWER OF LAW

Before it was standing immigration policy, the Muslim Ban was dubbed an “un-American” measure that an upstart presidential dark-horse deployed as a heuristic.<sup>10</sup> On December 7, 2015, then candidate Donald Trump introduced a proposal for, “a total and complete shutdown of Muslims entering the United States.”<sup>11</sup> The proposed measure propelled him from fringe candidate to a Republican favorite, showcasing the potency of anti-Muslim rhetoric fourteen years into the War on Terror. With the centering of the Muslim Ban as a focal election issue, the Muslim Ban was no longer a political experiment but a full-fledged campaign strategy charted to lure voters primed by the War on Terror and emboldened by the culture of anti-Muslim animus.<sup>12</sup>

This “dialectical Islamophobia” was a winning strategy for Trump.<sup>13</sup> More enduringly, the anti-Muslim dog whistles and explicit scapegoating remained a touchstone of his presidency. The Muslim Ban stood lucidly and luridly at the center of it all, amplifying the damaging Orientalist tropes “redeployed” by the US PATRIOT ACT, the National Entry and Exit Registration System (NSEERS), and the War on Terror machine that facilitated the rise of Trump and primed the polity for his Islamophobia.<sup>14</sup> Robust and institutionalized, a nearly two-decades long War

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10. Pundits and politicians, among them Republicans, indicted Trump’s proposal made into law to be “un-American.” Certain discussions describes Trump’s policies as unprecedented in U.S. history, see e.g., Olga Khazan, *How Trump’s Order Ended Decades of American Openness to Refugees*, THE ATLANTIC (Jan. 30, 2017), <https://www.theatlantic.com/politics/archive/2017/01/why-trumps-refugee-ban-is-so-unprecedented/514916/>, despite an established American immigration history that denied immigration and naturalization on account of racial and religious identity. See IAN HANEY-LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996). This history includes the denial of naturalized citizenship to Muslim immigrants, which lasted from 1790 until 1952. See Khaled A. Beydoun, *Between Muslim and White: The Legal Construction of Arab American Identity*, 69 NYU ANN. SURV. OF AMER. L. 29 (2013).

11. Jenna Johnson, *Trump Calls for ‘Total and Complete Shutdown of Muslims Entering the United States,’* WASH. POST, Dec. 7, 2015, <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/>.

12. See Khaled A. Beydoun, “*Muslim Bans*” and the (Re)Making of Political Islamophobia, U. ILL. L. REV. 1733, 1756–7 (2017).

13. The author defined dialectical Islamophobia as, “[A] systematic, fluid, and deeply politicized dialectic between the state and its polity: a dialectic whereby the former shapes, reshapes, and confirms popular views or attitudes about Islam and Muslim subjects inside and outside of American borders.” *Legal Islamophobia*, *supra* note 4, at 119.

14. Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1586 (2002), referencing the longstanding misrepresentations branded upon Islam, and Muslims, by the epistemological dialectic Edward Said coined as “Orientalism.” See also Marie A. Failinger, *Islam in the Mind of American Courts: 1800 to 1960*, 32 B.C.J.L. & SOC. JUST. 1 (2012).

on Terror formed a legal architecture that policed Muslims domestically and punished them abroad. But just as potently, the War on Terror formed an evocative discourse from which the Muslim Ban fed, then delivered on in terms more explicit and ominous than the two previous presidential administrations.

This discourse illuminated law's capacity to shape popular ideas and behavior.<sup>15</sup> Law scholar Naomi Mezey theorizes, "[L]aw's power is discursive and productive as well as coercive. Law participates in the production of meanings within the shared semiotic system of a culture, but is also a product of that culture and the practices that reproduce it."<sup>16</sup> Beyond merely shaping ideas, law also spurs action. This "productive" power of law is especially potent with regard to discriminatory policy targeting radical and religious minorities, and during the War on Terror, measures demonizing Muslims. This is evidenced by the prolific rise in hate crimes against Muslims after 9/11, which was rivaled only by the figures following the introduction of Trump's Muslim Ban.<sup>17</sup>

But this hate didn't stop at the border. Converging with a moment of digital globalization and new wave populist movements that directed their ire on Islam, the Muslim Ban's discursive force traveled transnationally and spread as potent political propaganda.<sup>18</sup> It traveled furiously, finding receptive ears from politicians and state leaders emboldened by the American legal template that wrote Islamophobia into standing immigration policy.

#### THE BAN AND ITS LEGAL PROGENY

On February 25, 2020, Trump stood alongside Indian Prime Minister Narendra Modi before 100,000 people packed into a new cricket stadium in New Delhi. The image of the kindred populists that claimed power off of anti-Muslim scapegoating fueled riots in the streets of the Indian capital. This violence ended with the destruction of mosques, the ransacking of Muslim households, and the murder of residents in Ashok

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15. See Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35 (2001).

16. *Id.* at 47.

17. Eric Lichtblau, *Hate Crimes Against American Muslims Most Since Post-9/11 Era*, N.Y. TIMES (Sept. 17, 2016), <https://www.nytimes.com/2016/09/18/us/politics/hate-crimes-american-muslims-rise.html>.

18. See Renee Hobbs, *Propaganda in an Age of Algorithmic Personalization: Expanding Literacy Research and Practice*, 55 READING RSCH. Q. 521, 526 (2020), for an analysis of how algorithms personalized on social media and online channels facilitate the spread of propaganda.

Nagar – a Muslim enclave of Delhi.<sup>19</sup> Trump’s India tour was more than merely an official visit by an American president, but a victory lap for a demagogue who served as the ideal show-horse for the Indian strongman that sought to follow in his policy footsteps.

Months before Trump’s visit, the Indian legislature enacted the Citizenship Amendment Act (CAA).<sup>20</sup> Spearheaded by Modi’s Bharatiya Janata Party (BJP), the measure fed off the Hindu nationalist vision that conflated Indian identity with Hinduism. Muslim identity, for Modi and his legions of *Hindutva* nationalists, was a disqualifier.<sup>21</sup> This baseline characterized the “undoing” of substantive citizenship for Muslim Americans during the War on Terror, and colored the telos of a Muslim Ban that oriented Muslim identity as antithetical with Americanness.<sup>22</sup>

Modi aimed to construct that very divide in India with the CAA, widely dubbed as “India’s Muslim Ban.”<sup>23</sup> Home to nearly 210 million Muslims, the second largest population in the world behind Indonesia, poised to surpass it in 2050, Modi remade India into an epicenter of global Islamophobia.<sup>24</sup> His Muslim Ban, like the American template, focused on nationals from nearby Muslim majority countries. The CAA – standing immigration policy in India – prohibits Muslim immigrants from Afghanistan, Bangladesh, and Pakistan from becoming naturalized citizens.<sup>25</sup> Like the first version of the Muslim Ban, which carved out exceptions for non-Muslim immigrants from Muslim-majority states, the CAA “creates specific exemptions for Hindus, Buddhists, Sikhs, Christians, Jains and members of other faiths.”<sup>26</sup> The Islamophobia driving the CAA

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19. Robert Mackey, *Trump Praises Modi’s India, Ignoring Anti-Muslim Violence*, THE INTERCEPT (Feb. 25, 2020, 8:37 PM), <https://theintercept.com/2020/02/25/trump-praises-modis-india-muslims-beaten-street-mosque-defiled/>.

20. The Citizenship (Amendment) Act, 2019, <https://egazette.nic.in/WriteReadData/2019/214646.pdf> [hereinafter CAA].

21. For an analysis of the CAA, and the BJP’s anti-Muslim vision that drove its introduction and enactment, see *Citizenship Amendment Bill: India’s New ‘Anti-Muslim’ Law Explained*, BBC NEWS (Dec. 11, 2019), <https://www.bbc.com/news/world-asia-india-50670393>.

22. Leti Volpp, *Citizenship Undone*, 75 FORDHAM L. REV. 2579, 2584 (2007).

23. See Sadanande Dhume, *India’s Government Considers a ‘Muslim Ban,’* WALL ST. J. (Apr. 18, 2019), <https://www.wsj.com/articles/indias-government-considers-a-muslim-ban-11555629051>.

24. Shailaja Neelkantan, *‘By 2050, India will have most Muslims in world,’ said the Pew Research Center*, TIMES OF INDIA (Mar. 3, 2017), <https://timesofindia.indiatimes.com/india/by-2050-india-will-have-most-muslims-in-world-said-the-pew-research-center-recently/articleshow/57428340.cms>.

25. CAA, *supra* note 20, at 2.

26. Khaled A. Beydoun, *Modi’s Crusade: Citizenship Amendment Bill Paves the Way for an India Without Islam*, THE NEW ARAB (Dec. 13, 2019), <https://english.alaraby.co.uk/opinion/modis-crusade-building-india-without-islam>.

came to bear again in August of 2021, following the Taliban takeover of Afghanistan. Following this event, India claimed it would give “priority” to Hindu and Sikh refugees fleeing – implicitly invoking the prohibition against Muslims pushed out of the war-torn nation.<sup>27</sup>

More than just immigration policy, the CAA threatened the status of Indian Muslims. The policy paved the road for the possible stripping of undocumented Muslim Indians of citizenship, sowed by the Hindu nationalist portrait that painted this population as “alien citizens” on account of religious identity.<sup>28</sup> This policy is both a policing tentacle of the CAA, and an ethnic cleansing tentacle to remake India into a Hindu homeland. Modi and BJP leadership openly call Muslims “infiltrators,” appealing to the very Orientalism that moves Trump to classify Muslims as inherently un-American.<sup>29</sup>

The CAA, in spirit and aim, is a copycat Muslim Ban measure. While measuring the degree of influence Trump’s Ban had on the CAA is impossible, popular discourses instantly made the connection. The two populists shared the same stage in these conversations, and a cricket stadium bound together by kindred Muslim Bans.

#### MUSLIM BAN VIGILANTISM

Before brandishing guns that unleashed rounds of deadly fire that left 51 Muslims dead, Brenton Tarrant praised Donald Trump, “As a symbol of renewed white identity and common purpose.”<sup>30</sup> The white terror attack in Christchurch signaled that Islamophobia sat at the very heart of a revitalized global white supremacy, and that Trump’s measure to ban Muslims could spawn collateral forms of Islamophobic vigilantism. The productive power of the Ban, like the network of War on Terror policies that preceded it, incited “rage” on the part of private actors bent

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27. Karan Deep Singh & Suhasini Raj, *India Says It Will Prioritize Hindus and Sikhs in Issuing ‘Emergency Visas’ to Afghans*, N.Y. TIMES (Aug. 17, 2021), <https://www.nytimes.com/2021/08/17/world/asia/india-afghanistan-visas.html>.

28. See Leti Volpp, *Impossible Subjects: Illegal Aliens and Alien Citizens*, 103 MICH. L. REV. 1595, 1626 (2004) (using the term “alien citizens” to describe the dissonance between the legal status of citizenship and the political branding of Muslims as pariahs, eternal immigrants, or enemies of the state).

29. Shane Croucher, *5 Ways India’s Narendra Modi is Like Donald Trump*, NEWSWEEK (May 23, 2019, 11:57 AM), <https://www.newsweek.com/india-modi-trump-comparison-nationalist-media-democratic-truth-1433676>.

30. *New Zealand Mosque Attacks Suspect Praises Trump in Manifesto*, AL JAZEERA ENGLISH (Mar. 16, 2019), <https://www.aljazeera.com/news/2019/3/16/new-zealand-mosque-attacks-suspect-praised-trump-in-manifesto>.

on prosecuting Muslims – regardless of their legal status or location – extrajudicially.<sup>31</sup>

White supremacists embraced the Muslim Ban and the foundation of Islamophobic populism atop which it sat. While traditionally guided by anti-Blackness and anti-Semitism, Trump and his Ban pushed Islamophobia further into the center of the grand white supremacist mandate. This shift was initiated by the Tea Party, and most sharply, the “Anti-Sharia Movement” it fueled by way of state legislative measures stigmatizing Islamic law and the Free Exercise liberties of Muslims.<sup>32</sup> However, Trump’s Ban pushed Islamophobia into the very marrow of modern white supremacy, and marked Muslims – and “Muslim looking” communities such as Sikhs and Arab Christians – as targets for white supremacist vigilantes.

In addition to praising the “renewed white” hope Trump embodied, Islamophobia pervaded Tarrant’s *Great Replacement* manifesto.<sup>33</sup> His words matched the alarmist rhetoric that opened the door for the Muslim Ban,

We are experiencing an invasion on a level never seen before in history. Millions of people pouring across our borders, legally. Invited by the state and corporate entities to replace the White people... This crisis of mass immigration... is an assault on the European people that, if not combated, will ultimately result in the complete racial and cultural replacement of the European people.<sup>34</sup>

Trump’s grand narrative of “Make America Great Again” carried the very spirit of Tarrant’s cautioning of a “white genocide,” which mandated an immediate stoppage of Muslim immigration into nations of the nations populated and presided over by “European peoples.”<sup>35</sup> The United States, Australia, and New Zealand, where the Australian Tarrant enforced a gruesome Muslim Ban by way of ammunition instead of executive order, are all settler-colonial states where Islamophobia emerged on the back of rising white anxiety.

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31. Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259 (2004).

32. See Yaser Ali, *Shariah and Citizenship – How Islamophobia Is Creating a Second Class Citizenry in America*, 100 CAL. L. REV. 1027, 1061-66 (2012). For a comprehensive examination of the Anti-Sharia Movement, see Khaled A. Beydoun, *On Sacred Land*, 105 MINN. L. REV. 1803, 1828-36 (2021).

33. Brenton Tarrant, *The Great Replacement* 5, available at [https://img-prod.ilmfoglio.it/userUpload/The\\_Great\\_Replacementconvertito.pdf](https://img-prod.ilmfoglio.it/userUpload/The_Great_Replacementconvertito.pdf) (last viewed on Aug. 2, 2021).

34. *Id.* at 4.

35. *Id.*

Within the halls of the Al-Noor Mosque and the Linwood Islamic Center on March 15, 2019, the letter of the Muslim Ban was morbidly translated into mass murder.<sup>36</sup> Armed to the teeth, Tarrant walked into mosques on Friday, Islam's holy day, and fired indiscriminately at the crowds of men and women while they worshipped. More than a desire for mass murder, he too was guided by a broader mission. Tarrant livestreamed the bloodshed, airing the graphic episodes of Muslims being gunned down in real time for ideological acolytes watching at home. After the first theatre of terror, Tarrant drove east to Christchurch's Linwood mosque where he killed 7 more people. At the end of the carnage, 51 victims – Muslims of various racial and national backgrounds, from the ages of 3 to 77 – were wiped from the face of the earth.<sup>37</sup>

The New Zealand terror attack signaled the intimate convergence of the War on Terror with white supremacy. The loaded anti-Muslim tropes and scapegoating endorsed by three American presidential administrations, climaxing with the express Islamophobia of the Muslim ban, fed into the white anxiety that galvanized disparate white supremacist outfits globally. And, in New Zealand, on an unholy Friday in March of 2019, pushed a member of those ranks to take the Muslim Ban into his own hands.

## CONCLUSION

The Muslim Ban has been legally annulled. However, its political and popular resonance remains indelible and international. The Supreme Court upheld the Ban through a textual analysis that examined the legality of the Ban devoid of the discriminatory electioneering and rhetoric that drove it. But those very catalysts fuel the Ban's enduring impact and generative legacy.

These catalysts, like the War on Terror that spawned them, are adaptive and dynamic. In India, Modi stretched the anti-Muslim scapegoating that colored his immigration ban by blaming the nation's Muslim population for India's March 2020 coronavirus outbreak.<sup>38</sup> In France, Emmanuel Macron – once dubbed the “progressive alternative” to the Islamophobic Marine Le Pen – championed the wildly intrusive “Islamic

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36. *New Zealand Mosque Attack: Who Were the Victims?*, AL JAZEERA ENGLISH (Mar. 22, 2019), <https://www.aljazeera.com/news/2019/3/22/new-zealand-mosque-attack-who-were-the-victims>.

37. *Id.*

38. Jeffrey Gettleman, Kai Schultz & Suhasini Raj, *In India, Coronavirus Fans Religious Hatred*, N.Y. TIMES (Apr. 12, 2020), <https://www.nytimes.com/2020/04/12/world/asia/india-coronavirus-muslims-bigotry.html>.

Charter,” which aims to reform the faith in line with French values.<sup>39</sup> The Muslim Ban’s imprint, whether prominent or persuasive, is evident in these measures and more. Illustrating that the policy remembered as Trump’s hallmark measure, even years after his ouster from office, endures in pronounced state measures and profound public rage.

The rage of the Muslim Ban carried onward while the law is, at least for now, removed from the books. We see in the renewed rhetoric against Afghan refugees fleeing by the droves after the Taliban took rule, again, twenty years after the War on Terror started with the bombing of that war-torn nation.<sup>40</sup> While Islamophobic policies, like the Muslim Ban may come and go, the bandwidth of their bigotry is deeply resilient and resonant – and remains with us today.

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39. Alain Gaibon, *Macron’s Islamic Charter is an Unprecedented Attack on French Secularism*, MIDDLE EAST EYE (Feb. 3, 2021), <https://www.middleeasteye.net/opinion/macrons-islamic-charter-unprecedented-attack-french-secularism>.

40. Stephen Castle, *20-Year U.S. War Ending as It Began, with Taliban Ruling Afghanistan*, N.Y. TIMES (Aug. 15, 2021), <https://www.nytimes.com/live/2021/08/15/world/taliban-afghanistan-news>.

