



**The Travel Ban Decision and
Family Separation:
What you Need to Know
Penn State Law Center for Immigrants'
Rights
July 5, 2018
NOON**



Disclaimer

This presentation and its content should not be a substitute for legal advice. Sensitive and individual information should not be raised. Please contact the Office of Global Programs, clinic or an immigration attorney for individual questions.

Views expressed and recommendations are in my own capacity and do not reflect views of the University.



Center for Immigrants' Rights Clinic



Terminology

- Immigrant
- Nonimmigrant
- Lawful Permanent Resident (green card holder)
- Executive Order
- Proclamation
- Immigration and Nationality Act
- Bona fide relationship



How did Travel Ban 3.0 Reach the Supreme Court?

December 4: Supreme Court issues orders reinstating Ban 3.0

December 22: Ninth Circuit blocks the ban on statutory grounds with a “bona fide” exception

January 19: Supreme Court agrees to hear arguments re: legality of Ban 3.0

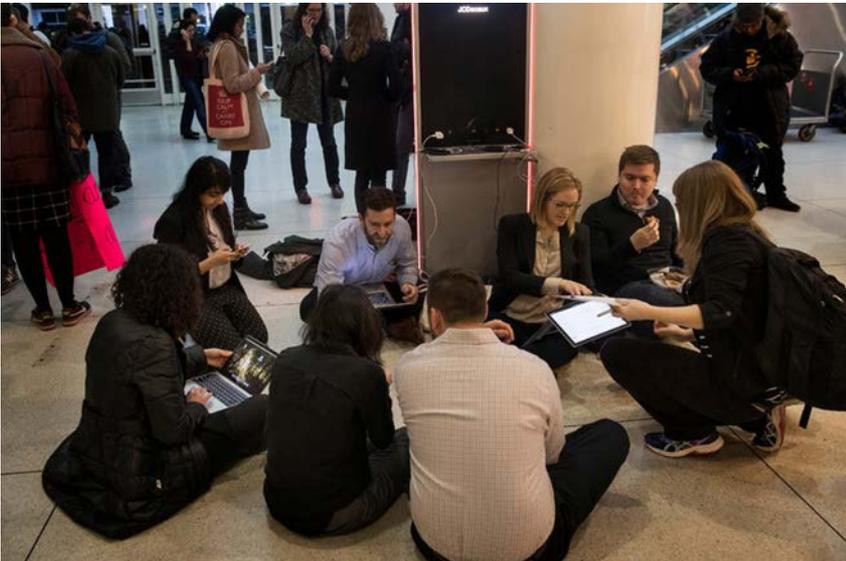
February 15: Fourth Circuit blocks the ban on constitutional grounds with a “bona fide” exception

June 26: Supreme Court upholds Ban 3.0 in full



Travel Ban 3.0 Litigation

Immigration and Nationality Act



Immigration and Nationality Act

- Passed by Congress in 1952 and amended several times since
- Sections in Play:
 - §103
 - § 202(a)
 - § 212(a) (3)
 - § 212(f)



Majority Opinion

Chief Justice Roberts wrote the majority opinion, in which Justices Kennedy, Thomas, Alito, and Gorsuch joined in full

- Held: The Proclamation is squarely within the scope of Presidential authority under the INA
- Held: Plaintiffs did not demonstrate a likelihood of success on the merits of their constitutional claim



Chief Justice Roberts on the INA

- 8 U.S.C. §1182(f) is a “comprehensive delegation” which “exudes deference to the President in every clause.”
- President has authority to determine whether, when, who, and on what conditions to exclude foreign nationals.
- 8 U.S.C. § 1152(a)(1)(A), which prohibits discrimination on the basis of race, sex, or nationality in the issuance of immigrant visas, did not conflict because the INA clearly distinguishes “admissibility determinations and visa issuance.”



Chief Justice Roberts on the First Amendment/Constitution

Sale (reviewability), *Mandel* (starting point), Rational Basis Test

- Standard is whether the law or policy is “inexplicable by anything but animus.”
- The Court “may consider plaintiffs’ extrinsic evidence but will uphold the policy so long as it can be reasonably understood to result from a justification independent of unconstitutional grounds.”
- The President is due a higher level of deference in the context of foreign policy and national security.



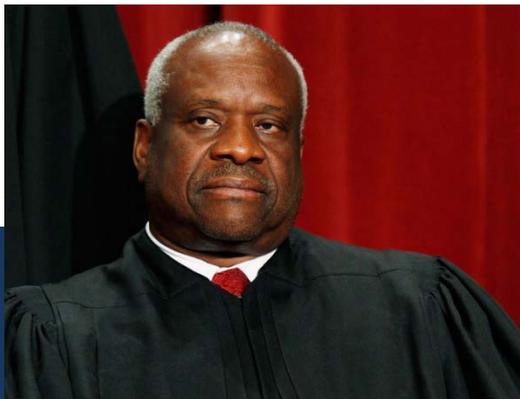
Concurrence by Justice Kennedy

“There are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention. That does not mean those officials are free to disregard the Constitution and the rights it proclaims and protects. . . . Indeed, the very fact that an official may have broad discretion, discretion free from judicial scrutiny, makes it all the more imperative for him or her to adhere to the Constitution and to its meaning and its promise.”



Concurrence by Justice Thomas

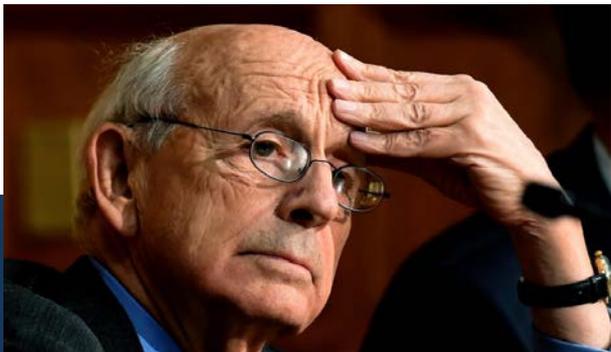
- The President’s authority for the Proclamation need not rely on 8 U.S.C. § 1182(f), because the President has inherent authority to exclude foreign nationals.
- The Establishment Clause “does not create an individual right to be free from all laws that a ‘reasonable observer’ views as religious or antireligious.”
- Spoke more broadly about his concern over the use of nationwide injunctions by federal district courts.



Dissent by Justice Breyer

Focused on the Proclamation's exemptions and waivers:

- Lawfulness of the bans and waivers is strengthened if the exemptions and waivers are working
- If the waivers and are not working then the lawfulness becomes weaker and the Proclamation is more of a “Muslim Ban.”
- Relies on data, briefs and other evidence to conclude the waiver process amounts to “window dressing”



Dissent by Justice Sotomayor

Held: Proclamation violated the Establishment Clause because it was motivated by an unconstitutional animus



Who is covered by Travel Ban 3.0?

- **Libya and Yemen:** all immigrants and those entering as tourists or business travelers
- **Iran:** all immigrants and nonimmigrants, EXCEPT F, J and M visa holders (extra scrutiny)
- **North Korea and Syria:** all immigrants and nonimmigrants
- **Somalia:** immigrants (and nonimmigrants subject to extra scrutiny)
- **Venezuela:** certain government officials and their family members



What is the scope of Travel Ban 3.0?

- Outside the United States on the applicable effective date
- Do not have a valid visa on the applicable effective date
- Do not qualify for a visa or other valid travel document (based on a visa revoked or cancelled visa due to the first Executive Order)



Who is Exempt from Travel Ban 3.0?

- Lawful Permanent Residents.
- Dual nationals.
- Those granted asylum, admitted as a refugee; or granted withholding of removal.
- Those traveling on a diplomatic or similar visa.
- Those in the U.S. on the effective date.
- Those who had a valid visa on the effective date.



Who is Eligible for a Waiver?

- Denying entry would cause the foreign national undue hardship
 - Entry would not pose a threat to national security or public safety, AND
 - In the national interest
- *10 Examples in the Proclamation



How Do I Apply for a Waiver?

From AILA MEIG Practice Pointer:

“Several members report having their clients submit the waiver request at the time of the visa interview. Others have requested to submit a waiver application via letter or email to the U.S. Consulate post - interview. Other members requested to submit a waiver but received a response from the U.S. Consulate to wait until administrative processing was complete. ...Others have not explicitly submitted a waiver request, but have received written indication that the post is reviewing the case for waiver eligibility.” <https://www.aila.org/infonet/applying-for-a-waiver-pursuant-to-presidential>



Is the waiver process working?

State Department statistics show that U.S. consular officers issued waivers to the ban in 2% of visa applications over the course of nearly five months.

<https://www.reuters.com/article/us-usa-immigration-ban/u-s-issued-waivers-to-trumps-travel-ban-at-rate-of-2-percent-data-shows-idUSKBN1JN07T>

Visa Applicant:

This is to inform you that a consular officer found you ineligible for a visa under Section 212(f) of the Immigration and Nationality Act, pursuant to Presidential Proclamation 9645. Today's decision cannot be appealed.

☑ Taking into account the provisions of the Proclamation, a waiver will not be granted in your case. However, you may reapply for a visa at any time. If you decide to reapply, you must submit a new visa application form and photo, pay the visa application fee again, and make a new appointment to be interviewed by a consular officer. If you choose to reapply, you should be prepared to provide information that was not presented in your original visa application, or to demonstrate that your circumstances have changed since that application.

☐ مراعاة للأحكام والقرارات المعطن إذ أنه لأمجال للإستثناء للمعاملتك يمكنك تقديم المعاملة من جديد في أي وقت وإذا ما قررت تقديم المعاملة من جديد يجب عليك تعبئة إستمارة معاملة وتقديم الصور ودفع رسوم التأشيرة من جديد بعد تكملت الإجراءات عليك طلب الموعد مقابلة القنصل إذا ما أتممت الإجراءات يجب أن تكون على إستعداد لتقديم معلومات لم تعرض في الطلب السابق أو إثبات أن ظروفك الحالية تغيرت منذ ذلك.

☐ The consular officer is reviewing your eligibility for a waiver under the Proclamation. To approve a waiver, the consular officer must determine that denying your entry would cause undue hardship, that your entry would not pose a threat to the national security or public safety of the United States, and that your entry would be in the national interest of the United States. This can be a lengthy process, and until the consular officer can make an individualized determination on these three factors, your visa application will remain refused under Section 212(f).

☐ يتم مراجعة معاملتك من قبل القنصل حول قابليتها للإستثناء للأحكام والقرارات المعطن . إذا ما تمت موافقة الإستثناء أو الإعفاء ما على القنصل سوى تحديد منع دخولك ليس سوى مشقة لا داعي لها. وأن دخولك لايشير الى تهديد للأمن القومي ولا إلى سلامة الأمة الأمريكية. وأن دخولك يتوافق مع المبادئ الأمة الأمريكية. ما يشير إلى طول المعاملة. حتى يتم تشخيص المحددات الثلاثة السابقة. تبقى معاملتك خاضعة للرفض تحت بند 212(f).

You should check the status of your visa online:



<https://ceac.state.gov/ceacstatracker/status.aspx>

Please wait at least 24 hours from the point your visa is issued before returning to the Embassy on **SUNDAYS** from 15:00 to 16:00.

- الرجاء الاطلاع على جاهزية التأشيرة عبر الإنترنت بعد ادخال رقم الملف على موقع التالي

<https://ceac.state.gov/ceacstatracker/status.aspx>

يجب الانتظار 24 ساعة بعد التأكد من جاهزية التأشيرة على الموقع قبل الحضور للقنصلية لاستلام الجواز. يمكن استلام التأشيرات **الأحد فقط** بين الساعة 15:00 والساعة 16:00 (3:00 و 4:00)



Penn State Law

One Year of Resistance



Les Talusan
PHOTOGRAPHY

Photo Credit to Les Talusan Photography



What is Family Separation?



Lidia K. Souza with her son Diogo, 9, on Thursday. They crossed illegally from Mexico last month. Credit Alyssa Schukar for The New York Times



Family Separation: Major Players

- **Department of Homeland Security**

- Immigration Customs Enforcement
- Customs Border Protection
- US Citizenship Immigration Services

Department of Justice

- Executive Office for Immigration Review
- United States Attorney

Department of Health and Human Services

- Office Of Refugee Resettlement



Family Separation: 5 Facts

1. Family separation is a self-created crisis new to the Trump administration and not required by law;
2. A June 20 Executive Order seeks to maximize family detention, claims to end family separation and leaves “zero tolerance” in place;
3. Prosecuting parents, separating children and detaining families are policy choices;
4. The *Flores Settlement* sets a national standard for the detention, release and treatment of all children;
5. The law is clear that any noncitizen on U.S. soil is eligible to apply for asylum.



Family Detention: Current Bed Capacity

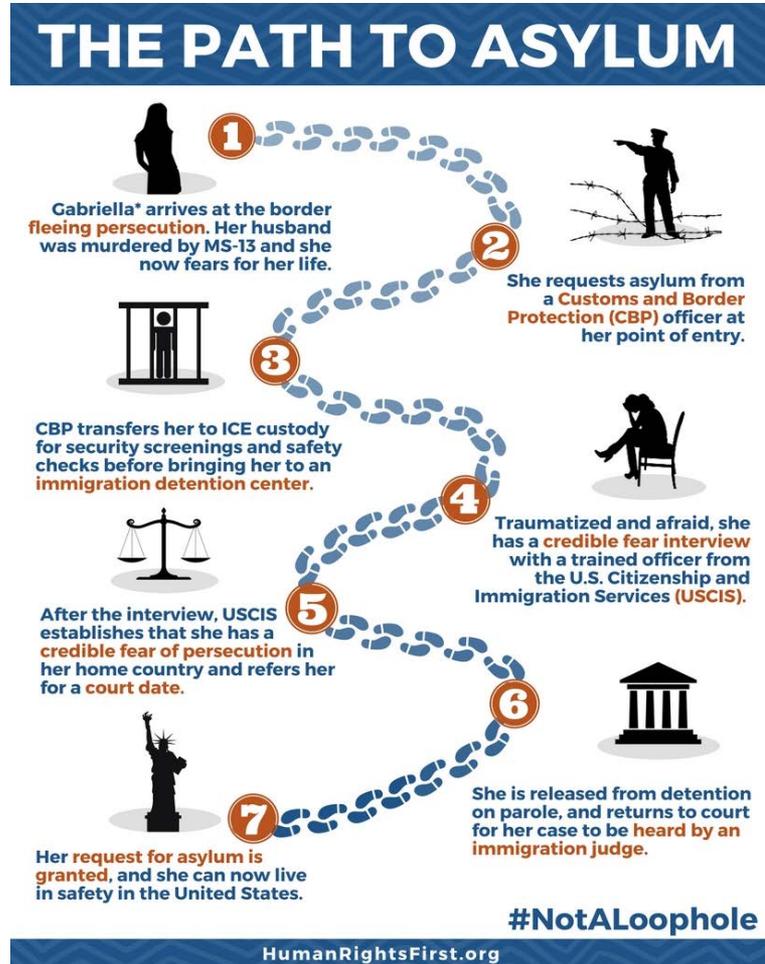
- Dilley Family Residential Center: 2400 beds
- Karnes Family Residential Center: 850 beds
- Berks Family Residential Center: 100 beds

Slide Credit: National Immigration Law Center



How Does the Asylum Process Work?

- Affirmative Asylum
- Defensive Asylum
- Asylum Seekers at the Border



Family Separation In the Courts

- ***Ms. L v ICE* (argued by American Civil Liberties Union): A federal judge issued a nationwide injunctions on June 29, 2018.** The injunction requires family reunification for all children within 30 days of the order, and for children under the age of 5, within 14 days of the order.
- **Washington Attorney General Bob Ferguson and 17 other Attorneys General file a lawsuit on June 26, 2018.**





Separated Parent's Removal Form

Purpose: This form is for detained alien parents with administratively final orders of removal who are class members in the *Ms. L. v. I.C.E.*, No. 18-0428, (S.D. Cal. Filed Feb. 26, 2018) lawsuit. Class members are entitled to be reunited with their child(ren) and may choose for their child(ren) to accompany them on their removal or may choose to be removed without their child(ren). Any such decision must be made affirmatively, knowingly, and voluntarily.

Instructions: This form must be read to the alien parent in a language that he/she understands. The alien parent should indicate which option he/she is choosing by signing the appropriate box below.

Parent Name / Nombre de Padre: _____
Parent A # / A # de Padre: _____
Country of Citizenship / Pais de Ciudadania: _____
Detention Facility / El Centro de Detención: _____

Child(ren) Name(s) / Nombre de Hijo: _____
Child(ren) A # / A # de Hijo: _____
Shelter / Albergue: _____

English: *I am requesting to reunite with my child(ren) for the purpose of repatriation to my country of citizenship.*

Signature / Firma: _____

English: *I am affirmatively, knowingly, and voluntarily requesting to return to my country of citizenship without my minor child(ren) who I understand will remain in the United States to pursue available claims of relief.*

Signature / Firma: _____

Certificate of Service

I hereby certify that this form was served by me at _____
(Location)
on _____ on _____, and the contents of this
(Name of Alien) (Date of Service)
notice were read to him or her in the _____ language.
(Language)

Name and Signature of Officer

Name or Number of Interpreter (if applicable)



Family Separation: Legal and Practical Challenges

- Prosecution of parents eligible for asylum;
- Reuniting a parent and child when detained hundreds or thousands of miles apart;
- Potential sponsors who lack immigration status;
- Confirmed reports that some parents are threatened by CBP, i.e. the U.S. ““will not give [her] asylum” and that she “w[ould] not see [her] son again until he turns 18;”
- Access to Counsel and difficulty preparing a case from detention;
- Conditions of ICE and CBP detention facilities;
- Misstatements about law and policy by the government.



What are the Next Steps?

- Parents need to be reunited with their children and access lawyers to pursue asylum claims;
- ICE needs to reconsider whether to detain families and consider alternatives.

What Can I Do?

- Rely on accurate information from people informed about immigration law and the situation at the border;
- Consider language and terminology;
- Support an end to “Zero Tolerance” and family detention.





Questions? Thank you!

