The Travel Ban Decision and Family Separation: What you Need to Know
Penn State Law Center for Immigrants’ Rights
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NOON
Disclaimer

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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

We the People
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)
Travel Ban 3.0 at the Supreme Court

On June 26, 2018, the Supreme Court of the United States issued an opinion in the case of *Trump v. Hawaii*.

- 5-4 decision reversed and remanded
- Travel Ban 3.0 continues
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.

One Year of Resistance

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
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 injunction 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.**
Separation 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. J.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 / País de Ciudadanía: ________________
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
Notice were read to him or her in the ____________________________ language.
(Name of Alien) (Date of Service)

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 “would 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!