



Travel Ban 3.0 at the Supreme Court

Last Updated July 2, 2018

THE SUPREME COURT DECISION

On June 26, 2018, the Supreme Court of the United States [issued an opinion](#) in the case of *Trump v. Hawaii*. (Travel Ban 3.0). Writing for the five-justice majority, Chief Justice Roberts held [that President Trump's travel ban does not violate the constitution or the Immigration and Nationality Act (INA)]. The Proclamation will continue to be fully in force indefinitely. The Supreme Court of the United States [heard oral arguments](#) in the case of *Trump v. Hawaii* on April 25, 2018 (Travel Ban 3.0). The Supreme Court had asked both parties to answer the four following questions:

- 1) Can the Court review the respondent's challenge to Travel Ban 3.0?
- 2) Is Travel Ban 3.0 a lawful exercise of the President's authority?
- 3) Is a nationwide injunction impermissibly overbroad?
- 4) Does Travel Ban 3.0 violate the Establishment Clause of the First Amendment?

The Majority Opinion by Chief Justice Roberts: Addressing first the plaintiff's statutory claims, the Chief Justice said, "The [Proclamation](#) is squarely within the scope of Presidential authority under the INA." He described 8 U.S.C. §1182(f) as a "comprehensive delegation" which "exudes deference to the President in every clause." Within the statute he found authority for the President to determine whether, when, who, and on what conditions to exclude foreign nationals. The Chief Justice dismissed arguments made by plaintiffs and the dissent that Proclamation is inconsistent with the INA. He found, for example, that § 1152(a)(1)(A), which prohibits discrimination on the basis of race, sex, or nationality in the issuance of immigrant visas, did not conflict with the Proclamation because the INA clearly distinguishes "admissibility determinations and visa issuance."

The Chief Justice next addressed the plaintiffs' claims that the Proclamation violates the Establishment Clause of the Constitution because it is "motivated not by concerns pertaining to national security but by animus towards Islam." He held that it is not the role of the Court to "probe and test the justifications' of immigration policies." He explained that 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." Because he found the Proclamation to be "neutral on its face," he held that the plaintiffs failed to demonstrate a "likelihood of success on the merits of their constitutional claim." Accordingly, the preliminary injunction granted by the District Court was reversed, and the case was remanded. The Chief Justice was careful to add that the Court did not express any opinion on the soundness of the policy.

Concurring Opinion by Justice Kennedy: Justice Kennedy joined fully in the majority opinion. In his concurrence he said, "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

This document was prepared by Penn State Law's Center for Immigrants' Rights on July 2, 2018. This document is selective and not a substitute for legal advice.

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.”

Concurring Opinion by Justice Thomas: Justice Thomas also joined fully in the majority opinion. His concurrence touched lightly on what he thought were additional problems with the plaintiffs claim. He argued that the President’s authority for the Proclamation need not rely on §1182(f), because the President has inherent authority to exclude foreign nationals. He also argued that the Establishment Clause “does not create an individual right to be free from all laws that a “reasonable observer” views as religious or antireligious.

His concurrence spoke more broadly about his concerns over the use of nationwide injunctions by federal district courts. He found authority for such an injunction to be “legally and historically dubious,” and suggested that the Court may soon need to address the permissibility of nationwide injunctive relief.

Dissenting Opinion by Justice Breyer: Justice Breyer’s opinion was joined by Justice Kagan. His opinion addressed the claim that the Proclamation violated the Establishment Clause of the Constitution. He chose to focus his concerns on the Proclamation’s “elaborate system of exemptions and waivers.” He reasoned that if the exemptions and waivers were being applied as written, it would strengthen the Government’s claim that the purpose behind the Proclamation was national security. The Government would be able to demonstrate “that the Proclamation does not deny visas to numerous Muslim individuals (from those countries) who do not pose a security threat.” However, if the exemptions and waivers are not applied, it weakens the claim that the Proclamation rests on a finding that the excluded persons are “detrimental to the interests of the United States,” or that the national security justifications are genuine. “How could the Government successfully claim that the Proclamation rests on security needs if it is excluding Muslims who satisfy the Proclamation’s own terms?”

Justice Breyer found that the evidence supports the possibility that the waiver process is “window dressing,” and that waivers are not being applied in a meaningful way. He cited to data suggesting that most waiver-eligible people do not receive one. He also cited to anecdotal evidence suggesting that “waivers are not being processed in the ordinary way,” and to a sworn affidavit from a consular officer saying that officers did not even have discretion to grant waivers. In light of this evidence, Justice Breyer would have upheld the preliminary injunction against the Proclamation while the case continued to be litigated.

Dissenting Opinion by Justice Sotomayor: Justice Sotomayor’s opinion was joined by Justice Ginsburg. She held that the Proclamation violated the Establishment Clause because it was motivated by an unconstitutional animus. She criticized the Court for failing to “hold the coordinate branches to account when they defy our most sacred legal commitments,” and for the majority’s “apparent willingness to throw the Establishment Clause out the window and forgo any meaningful constitutional review at the mere mention of a national security concern.” Justice Sotomayor made reference to the recent Supreme Court decision in [Masterpiece](#), where the Court had considered statements by the state commissioners about religion “to be persuasive evidence of unconstitutional government action.” In contrast, Justice Sotomayor said “the majority here completely sets aside the President’s charged statements about Muslims as irrelevant.”

Justice Sotomayor acknowledged that national security is “an issue of paramount public importance,” but argued that “none of the features of the Proclamation highlighted by the majority supports the

This document was prepared by Penn State Law’s Center for Immigrants’ Rights on July 2, 2018. This document is selective and not a substitute for legal advice.

Government's claim that the Proclamation is genuinely and primarily rooted in a legitimate national-security interest. What the un rebutted evidence actually shows is that a reasonable observer would conclude, quite easily, that the primary purpose and function of the Proclamation is to disfavor Islam by banning Muslims from entering our country." This argument was supported with numerous examples of anti-Muslim statements by the President and his staff both before and after his inauguration.

WHAT YOU NEED TO KNOW

Below is some information about what you need to know. Please consult with an immigration attorney if you are in need of legal advice. [Here is a list of attorneys](#) who have graciously agreed to assist members in our community impacted by the ban.

When did the travel ban go into effect?

A: Travel Ban 3.0 has been in effect since December 4, 2017 because of orders by the Supreme Court prior to the decision. However, the ruling means that the ban will continue in its entirety until or unless the administration amends, replaces or repeals it. Procedurally, the Supreme Court remanded the case back to the lower courts for further proceedings.

Who is covered by Ban?

- **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 nonimmigrants government officials and their family members

What is the scope of the ban? The ban applies to those who:

- are outside the United States on the applicable effective date
- do not have a valid visa on the effective date
- do not qualify for a visa or other travel document by the terms of the Proclamation

Who is exempt from Ban 3.0?

- Lawful permanent residents (green card holders)
- Foreign nationals admitted or paroled to the United States on or after the effective date
- Foreign nationals with travel documents that are not visas that are valid before or issued after the effective date
- Dual nationals traveling on a passport that is not one of the affected countries
- Those traveling on a diplomatic or related visa
- Foreign nationals who have already been granted asylum, refugees who have already been granted admittance, and those who have been granted withholding of removal, advanced parole, or protections under the Convention Against Torture

Q: Am I eligible for a waiver?

A: In order to obtain a waiver, an applicant must demonstrate: 1) undue hardship if entry were denied, 2) entry would not pose a threat to national security, and 3) entry is in the national interest. This is a very difficult standard to meet. Although more than [8,400 people have applied](#) for a waiver, the [Department of](#)

[This document was prepared by Penn State Law's Center for Immigrants' Rights on July 2, 2018. This document is selective and not a substitute for legal advice.](#)

[State](#) has indicated that as of May 31, 2018, only 768 waivers were cleared. Of these 768, it is not known how many applicants actually received a visa.

Q: How do I apply for a waiver?

A: Waiver requests should be submitted to the consulate during a consular interview. They may also be mailed or emailed to a Consular post if a case is stuck in administrative processing. For detailed instructions on how to prepare a waiver request packet, or for assistance, please consult with an immigration attorney. You can also consult [this practice pointer](#) on how to apply for waiver from the American Immigration Lawyers Association (AILA)

Q: If I am already in the U.S., can I travel outside the country and then return?

A: Nationals from the banned countries should consult with an immigration attorney before making travel plans. By its terms, the ban exempts some nationals. Others may be able to apply for a waiver as detailed in Section 2 of the Proclamation. However, in practice, these waivers may be extremely difficult to obtain.

WHAT IS THE HISTORY OF TRAVEL BAN 3.0?

On September 24, 2017, the President issued a proclamation titled [Enhancing Vetting Capabilities and Processes For Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats](#) (Proclamation). Section 2 of the Proclamation suspends the entry of certain nationals from Chad, Iran, Libya, North Korea, Syria, Venezuela, Yemen, and Somalia based on the perceived threat posed by each country. Following its release, the Proclamation was challenged in federal courts.

On October 17, 2017, the federal district court in [Hawaii](#) issued a nationwide injunction blocking enforcement suspensions under Section 2, except those pertaining to North Korea and Venezuela. On December 22, 2017, the [Ninth Circuit Court of Appeals](#) upheld the district court’s decision, finding that the ban was inconsistent with INA § 202(a)(1)(A), the nondiscrimination clause, which says “no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person’s race, sex, nationality, place of birth, or place of residence.” The [court limited the injunction](#) to those “with a credible bona fide relationship with the United States” and then stayed its own decision pending a decision by the Supreme Court.

A second court case blocking the Proclamation was issued by a federal district court in Maryland, and upheld in a [Fourth Circuit decision](#) dated February 15, 2018. The Fourth Circuit focused on the constitutional arguments. The court held that the Proclamation likely violates the Establishment Clause of the Constitution. It found that the Proclamation is “unconstitutionally tainted with animus toward Islam.” The appellate court further found that “an objective observer could conclude that the President’s repeated statements convey the primary purpose of the Proclamation—to exclude Muslims from the United States. In fact, it is hard to imagine how an objective observer could come to any other conclusion when the President’s own deputy press secretary made this connection express.” The [court similarly limited the injunction](#) to “foreign nationals with a bona fide relationship with an individual or entity in the United States,” and also stayed its own decision pending the Supreme Court’s decision.

This document was prepared by Penn State Law’s Center for Immigrants’ Rights on July 2, 2018. This document is selective and not a substitute for legal advice.

Despite the robust activity in the district and appellate courts the Supreme Court issued twin orders on [December 4, 2017](#) to reinstate the full version Travel Ban 3.0. This meant that the Proclamation remained in effect while the Supreme Court decision was pending. On April 10, 2018, the White House [announced](#) that Chad will be removed from the travel ban after finding that the country met “baseline” security standards.

WHERE CAN I FIND MORE RESOURCES?

For a list of comprehensive resources on the travel ban visit [our website](#)

For access to the briefing in *Trump v. Hawaii*, see the [SCOTUSblog](#)

For information about your rights see this [factsheet](#) from the American Civil Liberties Union (ACLU)

More information and resources are available through [Muslim Advocates](#), the [American-Arab Anti-Discrimination Committee \(ADC\)](#), and the [American Immigration Lawyers Association \(AILA\)](#)

This document was prepared by Penn State Law’s Center for Immigrants’ Rights on July 2, 2018. This document is selective and not a substitute for legal advice.