

Management Alert



The Anatomy of the Travel Ban

By Dawn M. Lurie

Seyfarth Synopsis: *The Supreme Court affirmed President Trump's authority to ban certain foreign nationals from entering the country, finding that such travel restrictions are justified based on national security concerns.*

On June 26, a deeply divided Supreme Court issued a 5-4 ruling upholding the latest iteration of the "Travel Ban" or "Travel Ban 3.0." The Court held that the September 2017 order, which created the Ban and targeted individuals from mainly Muslim countries, was a lawful exercise of presidential authority (*Trump vs. Hawaii*). Employers with employees from Iran, Libya, North Korea, Somalia, Syria, Venezuela and Yemen will now need to review travel-related risks in order to ensure continuity of business operations. Individuals will also need to be familiar with the specific visa and entry permissions for each country while universities will need to consider foreign student-related issues.

Background

We have written previously about the [January 27, 2017 Executive Order, \(EO 13769\)](#), [the second, March 6, 2017 Executive Order, \(EO 13780\)](#) as well as the third September 24, 2017 Presidential [Proclamation 9645](#), or Travel Ban 3.0, entitled *Enhancing Vetting Capabilities and Processes For Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats*. We followed along as federal judges in Hawaii and Maryland issued orders, blocking major portions of President Trump's September 24, 2017 Presidential Proclamation. We also blogged about the Supreme Court's previous ruling, which had partially enforced the Travel Ban by staying the preliminary injunctions issued by U.S. District Courts in Hawaii and Maryland that had partially blocked Travel Ban 3.0 for those individuals who could demonstrate they had a bona fide relationship with a person or entity in the United States. We then chronicled the Administration as it amended the [Presidential Proclamation on April 10, 2018](#), removing restrictions imposed on nationals of Chad, citing the country's improvements to security.

For some critics of the President's policies, the most problematic aspect of the Travel Ban was the anti-Muslim bias that led to allegations of religious-based discrimination. The later iterations of the Travel Ban were "watered down," according to the President, and nationals of non-Muslim majority countries were added to the list of affected nations. The concern that the Travel Ban is actually a Muslim ban is still very much alive. The final 3.0 version had been reviewed and blessed by the Justice Department, Department of Homeland Security and Department of State. Critics argued that the Travel Ban violated the Constitution and federal immigration law, but at the end of the day, the Court found that the travel restrictions were justified by the government's national security concerns.

The Opinion

Writing for the majority, Chief Justice John Roberts stated that “because there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification.” The opinion also stated “under these circumstances, the Government has set forth a sufficient national security justification to survive rational basis review.” The opinion confirmed that the President retains the authority under the Immigration and Nationality Act (INA) to “suspend entry of the aliens into the United States.” The INA, Justice Roberts wrote, “exudes deference” to the President providing him “broad discretion to suspend” the entry of noncitizens into the United States. Justices Anthony Kennedy, Clarence Thomas, Samuel A. Alito Jr. and the Court’s newest member, Justice Neil Gorsuch, joined the majority opinion. Justice Kennedy filed a concurring opinion in which he warned the Administration that “they must not disregard the Constitution.” “An anxious world must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts,” cautioned Kennedy.

With the plaintiffs suggesting President Trump’s anti-Muslim statements illustrated religious animus—thereby invalidating the Travel Ban under the Establishment Clause of the Constitution—the Court addressed the relevance of President Trump’s anti-Muslim statements. Justice Roberts noted that the Court needed to balance the president’s comments with his national security responsibilities, as he was protecting the country and improving vetting procedures. “The issue before us is not whether to denounce the statements,” Chief Justice Roberts wrote. “It is instead the significance of those statements in reviewing a presidential directive, neutral on its face, addressing a matter within the core of executive responsibility.” “In doing so,” he continued, “we must consider not only the statements of a particular president, but also the authority of the presidency itself.” While many argued that President Trump’s statements crossed a constitutional line, the majority of the Court rejected the argument that the President had overstepped his constitutional authority, finding there had been no religious discrimination.

Justice Sonia Sotomayor, in her dissent, argued that the Court had “blindly” sanctioned “a discriminatory policy motivated by animosity toward” Muslims.

Who Is and Who Is Not Affected by the Ban?

Which countries are affected?

Due to the Administration’s concerns that certain countries remain deficient with “respect to their identity-management and information-sharing capabilities, protocols, and practices,”¹ the Travel Ban affects nationals of seven countries (Iran, Libya, North Korea, Somalia, Syria, Venezuela and Yemen). The Ban places varying degrees of restrictions on the entry of certain citizens of those countries. The Supreme Court’s ruling allowed the Travel Ban to fully go into effect, and be enforced, consistent with its previous order of December 4, 2017.

What is the scope of the current travel ban?

The Ban only applies to specific individuals from the above-mentioned countries who:

1. Are outside of the U.S.;
2. Do not have a visa that was valid as of the applicable effective date (either September 24, 2017 or October 18, 2017 as elaborated in the Proclamation); **and**
3. Do not have a waiver or other travel document.

The Ban impacts individuals who are seeking both temporary nonimmigrant visas and immigrant visas for permanent resident (or green card) status.

¹ See the Proclamation at <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-enhancing-vetting-capabilities-processes-detecting-attempted-entry-united-states-terrorists-public-safety-threats/>

It is critical to note that existing visa holders, including H-1Bs, may continue to enter on visas that were previously issued, but these visa holders should expect “extreme vetting” by Customs and Border Protection (CBP) at entry. The State Department has stated that no visas will be revoked pursuant to the Travel Ban and noted that consular officers will determine whether an otherwise qualified visa applicant may be eligible for a waiver under the Travel Ban (see discussion below).

The Cheat Sheet

Country	Nonimmigrant Visas	Immigrant and Diversity Visas
Iran	No nonimmigrant visas except F, M, and J visas	No immigrant or diversity visas
Libya	No B-1, B-2, and B-1/B-2 visas	No immigrant or diversity visas
North Korea	No nonimmigrant visas	No immigrant or diversity visas
Somalia		No immigrant or diversity visas
Syria	No nonimmigrant visas	No immigrant or diversity visas
Venezuela	No B-1, B-2 or B-1/B-2 visas of any kind for officials (and their immediate family members) of the following government agencies: Ministry of Interior, Justice, and Peace; the Administrative Service of Identification, Migration, and Immigration; the Corps of Scientific Investigations, Judicial and Criminal; the Bolivarian Intelligence Service; and the People’s Power Ministry of Foreign Affairs.	
Yemen	No B-1, B-2, and B-1/B-2 visas	No immigrant or diversity visas

**Courtesy of the [Department of State](#).*

Are there exceptions?

In addition to exceptions for any national who was in the U.S. and any national who had a visa on the effective date of the Proclamation, (regardless of immigration status), the following are **exempt** from the Travel Ban: permanent residents (or green card holders); dual nationals traveling on a passport from a country that is not affected by the Travel Ban; diplomats; individuals who were paroled into the U.S. on or after the applicable effective date; and, foreign nationals traveling with documents other than visas. Refugees who are already in the U.S., asylees granted asylum by the U.S., and individuals granted withholding, advance parole or protection based on the Convention Against Torture are also not affected by the Court’s decision.

Are there any waivers?

The Travel Ban theoretically provides for **waivers**. A waiver is permission to obtain a U.S. visa, even though the Travel Ban renders an individual ineligible to obtain the visa. There are certain exceptions available for people who can:

1. Demonstrate that they will suffer “undue hardship” if denied entry;
2. Demonstrate that their entry would not pose a threat to the national security or public safety of the United States; **and,**
3. Demonstrate that their entry would be in the national interest.

Unlike the past decisions, this decision does NOT allow for an exception for “Bona Fide” relationships, including close family ties, unless the ties are for a refugee-related claim. The Travel Ban states “The Secretary of State and the Secretary of Homeland Security shall coordinate to adopt guidance addressing the circumstances in which waivers may be appropriate

for foreign nationals seeking entry as immigrants or nonimmigrants.” Unfortunately, there is currently a lack of information and guidance on the logistics of how State Department consular officers or CBP officers have been, or will be making, such waiver determinations. There is also no formal application in which to apply for such waiver.

These waivers are clearly discretionary and are granted on a case-by-case basis according to information provided by the State Department. As of June 30, 2018, 898 applicants were cleared for a waiver after a consular office determined that all criteria had been satisfied and all processing had been completed. Immigration advocacy groups have filed a lawsuit to obtain more information about the waiver process. In Justice Stephen Breyer’s dissenting opinion, which was joined by Justice Elena Kagan, he described the waiver process as “window dressing,” noting there was no judicial review contemplated. Only time will tell how transparent, fair and effective the waiver process will be.

What about students?

While the Supreme Court decision granted exceptions for student visas issued to nationals of Iran, the road ahead will likely be difficult for these students. This is important due to the high number of Iranian students in the U.S. According to a Washington Post article, “17,000 students from the list of banned countries studying in American colleges and universities. More than 12,000 them were Iranian.”² Some experts are expecting lengthy visa application wait times and, even after a visa is issued, extreme vetting by CBP at the U.S. border. Others in the education field are hopeful that returning students will be allowed an unfettered return in August. Most agree, however, that it is not unreasonable to expect a decline in enrollment, as students may look elsewhere for school in order to ensure continuity and peace of mind.

What Should Employers and Universities Do Now?

The Travel Ban saga is complicated. There is plenty of confusion regarding the government’s restrictions on travel to the U.S. It is critical that competent counsel be retained for complex situations such as urgent business needs. In the interim, all parties should educate themselves on the effects of the Travel Ban, including risks of travel, especially for those who are eligible to enter the U.S. as nationals of one of the affected countries. The State Department recently issued an overview discussing the [June 26 Supreme Court Decision on Presidential Proclamation 9645](#). The State Department link includes a FAQ section that attempts to distill down the Ban and answer anticipated questions.

At this juncture, the most conservative approach for those with affected nationalities already in the U.S. suggests foregoing travel plans, whether for work or pleasure. For example, applying an abundance of caution, H-1B holders may opt not to leave the U.S. While legally unaffected by the Ban, some permanent residents are also choosing to remain lodged in the U.S. For those who must travel, especially for individuals who will need to renew or apply for a visa, a careful review of the visa history, baseline visa eligibility, as well as something as innocuous as social media account review should be considered.

Given the potential of the Travel Ban to affect more than 135 million people worldwide, employers and universities should prepare for the impact by offering access to correct advice—ensuring everyone is educated about travel-related matters is critical.

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² See, the article at https://www.washingtonpost.com/news/global-opinions/wp/2018/06/26/call-trumps-travel-ban-what-it-is-an-iran-ban/?utm_term=.31329d5dfe4f

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