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U.S. Supreme Court upholds Trump travel ban and Presidential power

By Will Krasnow
Boston Office

In a big victory for President Trump and for Presidential power to determine who enters the United States, **the U.S. Supreme Court, in a 5 to 4 decision written by Chief Justice John Roberts, upheld President Trump's third travel ban**, which was issued on September 24, 2017, as a Proclamation. The majority deferred to Presidential authority, even though it recognized the claims that, based on candidate Trump's campaign statements, the Proclamation discriminated against Muslims. According to the majority, "[B]ecause 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."

As we have previously reported, "Travel Ban No. 3" was broader and more nuanced than earlier travel bans and applied to eight nations - Iran, Libya, Somalia, Syria and Yemen, all of which were covered by the original travel ban issued on March 6, 2017, plus Chad, North Korea and Venezuela. Sudan, which was included in the March 6 travel ban, was removed from the list of restricted nations and recently Chad, based on further government review in accordance with the Proclamation, was removed from the list.

We noted in September 2017, "[Travel Ban No. 3] was issued after the government determined which foreign nationals posed a risk to the United States and established 'global requirements for information sharing in support of immigration screening and vetting.' The eight nations covered by [Travel Ban No. 3] were found deficient with respect to their compliance with these standards and to pose a security risk." As a result, the travel restrictions for the covered countries were tailored to the security risk posed by nationals of those countries.

Yesterday's Supreme Court decision emphasized that it has historically deferred to the President's authority regarding the admission and exclusion of foreign nationals. Further, the majority said that the Immigration and Nationality Act gave the President broad authority, if it would be detrimental to the interests of the United States, to "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate." The Court, therefore, applied a low-level "rational basis review" standard. Concluding that the



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standard was met, the Court found that the Proclamation was a proper exercise of the President's authority "quite apart from any religious hostility."

The dissenting Justices, in particular Justice Sonia Sotomayor, who was joined by Justice Ruth Bader Ginsburg, voted to strike down the Proclamation because it was based on discriminatory animus. (There was a separate dissent by Justices Stephen Breyer and Elena Kagan.)

Effect of the Supreme Court's decision

The Court's decision means that the Proclamation will remain in effect as long and in such form as the President determines. As with the removal of Chad from the Proclamation, changes may be made based on security risks. This could include changes to the list of restricted countries as well as changes to the nature of the restrictions. Challenges to the Proclamation, either in its current form or as it may be amended in the future, would appear to have little chance of success.

It is important to remember that, not only do the restrictions on travel to the United States vary by covered country, but also that there are several exceptions for various categories of foreign nationals from the impact of the Proclamation as well as a waiver program by which foreign nationals from the covered countries can seek relief from the Proclamation.

As a reminder, here are the travel restrictions by country, and the exceptions and waivers:

Travel restrictions by country

Country	Suspension
North Korea and Syria	No entry as immigrants or nonimmigrants
Yemen, Libya	No entry as immigrants or nonimmigrants on business or tourist visas
Somalia	No entry as immigrants; nonimmigrants subject to enhanced screening and vetting
Iran	No entry as immigrants or nonimmigrants except under valid student and exchange visitor visas; enhanced screening and vetting
Venezuela	No entry for certain government officials or their immediate family members as nonimmigrants on business or tourist visas

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Exceptions and waivers

The Proclamation does not apply to entries to the United States by

- Any foreign national with a valid visa as of the effective date of the Proclamation (September 24, 2017).
- Any lawful permanent resident of the United States.
- Any person paroled into the United States.
- Any person holding a valid travel document in effect on the effective date of the Proclamation.
- Any dual nationals of a nation covered by the Proclamation when the individual is traveling on a passport issued by a nation that is not covered by the Proclamation.
- Any person on a diplomatic visa or others, such as those granted asylum or already admitted to the United States as refugees.

Waivers of the Proclamation may be granted on a case-by-case basis if (1) denial of entry would cause clear hardship to the individual, (2) the individual does not pose a threat to the national security or public safety of the United States, and (3) entry would be in the national interest.

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