

The 4 Travel Ban Questions Before The High Court

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(April 24, 2018, 2:52 PM EDT)

On Wednesday, April 25, 2018, the U.S. Supreme Court will hear arguments in *Trump v. Hawaii*, the challenge by the state of Hawaii, the Muslim Association of Hawaii and its imam, Ismail Elshikh, and others to the Sept. 24, 2017, "Presidential Proclamation Enhancing Vetting Capabilities And Processes For Detecting Attempted Entry Into The United States By Terrorists Or Other Public Safety Threats." The proclamation is the third in a series of travel bans issued by President Donald Trump dating back to Jan. 27, 2017. The case will be the final oral argument of the current term. The proclamation, initially enjoined by lower courts in Hawaii and Maryland, was allowed to take full effect pending lower court litigation by order of the Supreme Court dated Dec. 4, 2017.

Background

The proclamation's country-specific restrictions affect travel to the United States by nationals of Chad, Iran, Libya, North Korea, Somalia, Syria, Yemen and certain employees of the Venezuelan government. According to the proclamation, these countries are "deficient at this time with respect to their identity-management and information-sharing capabilities, protocols, and practices. In some cases, these countries also have a significant terrorist presence within their territory." The country-specific restrictions are as follows:

Country	Restriction
Chad	Entry into the United States as immigrants and as business visitors (B-1) or tourists (B-2) is suspended indefinitely.
Iran	Entry into the United States as immigrants and as nonimmigrants is suspended indefinitely, except for students (F and M) and exchange visitors (J). Student and exchange visitors will be subject to enhanced screening and vetting requirements.
Libya	Entry into the United States as immigrants and as business visitors (B-1) or tourists (B-2) is suspended indefinitely.
North Korea	Entry into the United States as immigrants and as nonimmigrants is suspended indefinitely.
Somalia	Entry into the United States as immigrants is suspended indefinitely. Nonimmigrants will be subject to enhanced screening and vetting requirements.
Syria	Entry into the United States as immigrants and as nonimmigrants is suspended indefinitely.
Venezuela	Entry into the United States of certain Venezuelan government officials and their immediate family members as business visitors (B-1) or tourists (B-2) is suspended indefinitely.
Yemen	Entry into the United States as immigrants and as business visitors (B-1) or tourists (B-2) is suspended indefinitely.



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The proclamation does not apply to:

1. Any lawful permanent resident of the United States;
2. Any foreign national who is admitted to or paroled into the United States on or after the effective date of this proclamation;
3. Any foreign national who has a document valid on the effective date of this proclamation or issued on any date thereafter that permits him or her to travel to the United States and seek entry or admission, such as an advance parole document;
4. Any dual national of a country designated under Section 2 of this proclamation when the individual is traveling on a passport issued by a nondesignated country;
5. Any foreign national traveling on a diplomatic or diplomatic-type visa, North Atlantic Treaty Organization visa, C-2 visa for travel to the United Nations, or G-1, G-2, G-3 or G-4 visa; or
6. Any foreign national who has been granted asylum; any refugee who has already been admitted to the United States; or any individual who has been granted withholding of removal, advance parole or protection under the Convention Against Torture.

A federal judge for the U.S District Court for the District of Hawaii issued a nationwide order on Oct. 17, 2017, blocking implementation of the proclamation.[1] The decision, issued by Judge Derrick Watson, discussed the indefinite nature of the travel suspensions and confirmed that “[t]he generalized findings regarding each country's performance . . .do not support the vast scope of” the president’s directive.

Judge Watson further stated that the proclamation lacked sufficient evidence to support the breadth of the travel ban and:

“contains internal incoherencies that markedly undermine its stated 'national security' rationale. Numerous countries fail to meet one or more of the global baseline criteria described in [the directive], yet are not included in the ban ... Moreover, [the order's] individualized country findings make no effort to explain why some types of visitors from a particular country are banned, while others are not.”

Among other injuries alleged by the plaintiffs, the court noted that the plaintiffs were “likely to prevail” on their allegation that the proclamation violates multiple provisions of the Immigration and Nationality Act, or INA. A three-judge panel of the Ninth Circuit upheld Judge Watson’s order in a ruling on Dec. 22, 2017, noting that “the proclamation functions as an executive override of broad swaths of immigration laws that Congress has used its considered judgment to enact.”[2]

Four Questions Before the Supreme Court

By order dated Jan. 19, 2018, the Supreme Court agreed to hear oral argument on three questions raised in the government’s petition for writ of certiorari and a fourth question addressed by the U.S. District Court for the District of Maryland and in the Fourth Circuit. In a 9-4 decision on Feb. 15, 2018, the Fourth Circuit upheld the ruling by the district court in Maryland and concluded that “the proclamation is unconstitutionally tainted with animus toward Islam.”[3] The questions raised before the court are as follows:

1. Do the courts have jurisdiction to review a challenge to the proclamation?

The government argues that the respondents' statutory challenges are not subject to judicial review because unauthorized immigrants have no claim to a right to enter the United States and because exclusion of unauthorized immigrants is a fundamental act of sovereignty by the political branches. With respect to the respondents' constitutional claims, the government takes the position that the respondents' claims of harm, if any, apply not to the respondents but to people who are seeking admission to the United States and whose constitutional rights are, thus, attenuated.

2. Does the proclamation fall within the president's authority over immigration?

The respondents argue that by barring the admission to the United States of a population of 150 million people, the president is exceeding his statutory authority to suspend or restrict the entry of travelers from other countries when he believes it is in the best interests of the United States. The government counters that Section 212(f) of the INA "confers a 'sweeping proclamation power' to suspend entry of aliens based on findings that would not otherwise mandate an alien's inadmissibility under the INA," and that the president has acted well within that broad authority. To rule otherwise, according to the government, would call into question "the orders of Presidents [Ronald] Reagan and [Jimmy] Carter" who suspended "entry of nationals from Cuba and Iran, respectively." As to the respondents' claim that the proclamation violates INA Section 202(a)(1)(A), which prohibits discrimination in the issuance of immigrant visas to unauthorized immigrants who are otherwise admissible to enter the United States, the government responds that respondents are stretching the meaning of that provision.

3. Does the proclamation violate the establishment clause of the U.S. Constitution — i.e., does it favor one religion over another?

Respondents point to statements by then-candidate Trump and his proxies during the campaign calling for a ban on the entry of Muslims into the United States. They challenge the proclamation as a pretext for unlawful religious discrimination under the establishment clause of the Constitution. The government asks the court to look at the four corners of the proclamation and find that the government had a "facially legitimate and bona fide reason" for the order.

4. Is the temporary injunction issued by the district court in Hawaii overly broad?

The government challenges the global injunction issued by the Hawaii court as being "vastly overbroad" in that it applies to nonparty aliens living abroad and says that a more narrowly tailored injunction would better suit the respondents' claims of harm to the state and the institutional and individual respondents.

Conclusion

In its ruling on Dec. 4, 2017, the Supreme Court allowed the proclamation to take effect by a vote of 7-2. Justices Sonia Sotomayor and Ruth Bader Ginsburg dissented from the order staying the nationwide injunction. A holding by the court that the proclamation is outside the bounds of the president's statutory authority to bar classes of unauthorized immigrants when deemed in the interest of the United States would affirm the plenary power of Congress, rather than the executive branch, on immigration. To find that the proclamation violates the establishment clause, the court would have to find that the president is using national security as a pretext for religious animus. While the upcoming

argument may give us a view into the inclination of the court, we will likely have to wait until late June for definitive answers.

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[1] *State of Hawaii v. Trump*, 265 F. Supp. 3d 1140, 1157 (D. Haw. 2017).

[2] *Hawaii v. Trump*, 878 F.3d 662, 690 (9th Cir. 2017).

[3] *Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 257 (4th Cir. 2018).