



Supreme Court Upholds Trump's Third Travel Ban

Insights

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In one of its most anticipated cases in decades, a deeply divided U.S. Supreme Court ruled 5-4 in favor of upholding President Trump's latest "travel ban" today, delivering a key win to the Trump administration and one of its strict immigration enforcement stances. In its decision, the Court concluded that the president's executive order—which largely targeted individuals from predominately Muslim countries—did not violate the Constitution's Establishment Clause by favoring one religion over another. Despite the rhetoric from the president and those in his administration that some claimed to prove religious bias, the Court ruled that the order was a lawful exercise of the authority granted to the president by Congress (*Trump v. Hawaii*).

The Supreme Court's action now permits immediate enforcement of one of the president's signature immigration policies that began in January 2017 and included repeated trips to the federal judiciary. Employers with workers from the affected countries—Iran, Libya, Syria, Yemen, Somalia, North Korea, and Venezuela—now need to work with immigration counsel to ensure proper protocols are put into place to spare employees from unnecessary risk and to preserve smooth business operations. Although the litigation over the travel ban will now continue in the lower court—as today's decision simply swept away an injunction that had blocked its immediate enforcement—you should operate under the assumption that this ban will continue for an indefinite timeframe.

How Did We Get Here?

The third version of Trump's Presidential Proclamation, sometimes known as Travel Ban 3.0, is President Trump's third executive action limiting travel and immigration from certain countries. His original travel ban came just seven days after his inauguration in January 2017, and was quickly blocked by a federal judge in Seattle.

For those opposing the president's actions, the most troubling aspect was the alleged anti-Muslim bias inferred from statements and tweets by the president and members of his administration both during his campaign and after taking office. The challengers argued that such statements evidenced that the travel ban was designed to exclude Muslims and "plainly runs afoul of the Establishment Clause," which prohibits the government from favoring one religion over another.

On this issue, the administration argued that the Court should look at only the ban's "official objective"—protecting national security—to determine whether it violated the Establishment Clause. So long as the president provides a "facially legitimate and bona fide reason" for his action, the

administration contended, courts should “neither look behind the exercise of that discretion, nor test it by balancing its justification” against the purported constitutional violation.

The president issued a second travel ban on March 6, 2017, which was likewise blocked by federal judges in both Hawaii and Maryland. The Courts of Appeal for the 9th and 4th Circuits, respectively, upheld the injunctions. In June 2017, the Supreme Court issued a partial stay of the injunctions permitting portions of the ban to take effect, but agreed to hear the consolidated cases challenging the second executive order during its 2017-2018 term.

On September 24, 2017, the President issued Travel Ban 3.0, this time as a Presidential Proclamation, the result of a worldwide review conducted jointly by the Departments of Homeland Security, State, Defense, and Justice. Unlike its predecessors, the third travel ban is indefinite and covers individuals from Iran, Libya, Syria, Yemen, Somalia, North Korea, and Venezuela—with travel and immigration restrictions specific to each country (it originally also included Chad, but that country was removed from the travel ban by the White House after finding it had met “baseline” security standards). Given that this new third version superseded the previous action, the Supreme Court saw no need to rule on the second version of the travel ban and tossed the case from its docket.

Like the previous versions, however, Travel Ban 3.0 was challenged in court. The administration argued that this version did not violate the Constitution’s Establishment Clause because it was created after a review of reports from several federal agencies, all of which concluded that it was in the interest of national security to restrict immigration from the seven countries set forth in the ban. Despite this new line of argument, a federal court also blocked Travel Ban 3.0 from taking effect. On January 19, the Supreme Court agreed to wade into the conflict once more and accepted a challenge to this third version. The Court heard oral arguments on April 25, and issued its long-awaited ruling today, the second-to-last day of the 2017-2018 Supreme Court term.

Court Unwilling To Second Guess President On Issues Of National Security

In today’s 5-4 decision authored by Chief Justice Roberts, the Supreme Court largely agreed with the administration’s arguments and overturned the injunction blocking the Proclamation from taking effect. The Court began its analysis of Travel Ban 3.0 by acknowledging that Congress granted the president significant authority to suspend entry of any “alien” or “class of aliens” whom he finds would be “detrimental to the interests of the United States.” Under the Immigration and Nationality Act (INA), the president may do so for as long as deemed necessary and with “any restrictions” he deems appropriate. This, the Court held, entitles the president to a considerable amount of deference with respect to how he crafts immigration and national security policy.

The Court noted that Travel Ban 3.0 was the result of a multi-agency review process that demonstrated deficiencies in the information shared by certain foreign governments and identified other risk factors, which negatively impact the U.S. government’s ability to screen and vet citizens of those countries who apply for entry into the country. This lack of cooperation was sufficient, in the

Court's eyes, to support the determination that admission of people from those countries would be "detrimental to the interests of the United States."

Having found that Travel Ban 3.0 was the result of "a world-wide multi-agency" review conducted by the Department of Homeland Security and others, the Court concluded that President Trump's restrictions were a lawful exercise of his authority. As the Court noted, the INA "exudes deference to the President in every clause" and "vests the President with 'ample power' to impose entry restrictions." Thus Travel Ban 3.0 "falls well within" INA's delegation of authority to the President.

The Court, however, did not agree with the administration's argument that the Court could only review Travel Ban 3.0's "official objective" and not consider the president's anti-Muslim statements. Instead—and in a departure from prior precedent—the Court assumed that it "may look behind the face" of Travel Ban 3.0 and consider the evidence of anti-Muslim animus. Nevertheless, the Court ruled that it will uphold a challenged policy "so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds." The Court therefore held that "because there is persuasive evidence that [Travel Ban 3.0] has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification."

In the absence of facially irrational executive action, the Court was unwilling to second-guess the president's exercise of powers delegated to him by Congress. Therefore, it upheld the executive action, which can once again be enforced immediately. Although the Court acknowledged that the challengers believed Trump's statements struck at the fundamental standards of respect and tolerance, it concluded that "the issue before us is not whether to denounce the statements. 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, we must consider not only the statements of a particular President, but also the authority of the Presidency itself."

What Do Employers Need To Know?

The Supreme Court's opinion is the latest—and most definitive—word to date in the 17-month saga concerning the legality of one of President Trump's main objectives. Given that it can now be enforced effective immediately, employers should caution their workers from the affected countries regarding unnecessary travel outside of the U.S. While the underlying litigation surrounding the travel ban will now continue in the lower courts, that process could drag on for months and the outcome is uncertain. For now, you should assume the ban will continue to be in effect for the foreseeable future.

You should also work with immigration counsel to identify employees who are nationals of banned countries who may be affected by this order. If the employees are abroad and have not previously been impacted by the prior travel bans, they should return immediately. If an employee is in the U.S. and is reaching the visa expiration date, you should take steps to extend the employee's stay in the U.S. and advise the employee to avoid travel abroad. You should also consider sponsoring affected

employees who are on temporary work visas for permanent residence in the U.S.

You should advise foreign national employees in the U.S. to carry originals or clear copies of legal authorization to be in the U.S. at all times (e.g., copies of the identifying page of their passports, visa stamps and I-94 electronic cards, Permanent Resident Cards, Employment Authorization Cards, Travel Documents, Re-entry Permits, etc.). Also, you should instruct employees to cooperate and present evidence of their U.S. immigration documentation and legal status if they are stopped by a U.S. Immigration and Customs Enforcement agent. Such foreign nationals should also consider consulting with an immigration attorney before signing any forms or other paperwork presented by the Department of Homeland Security or the Department of State.

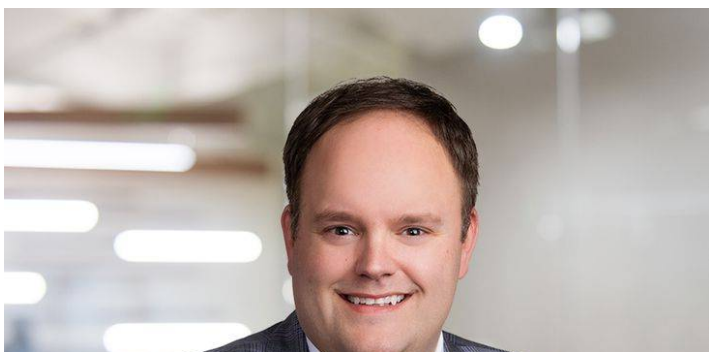
If you have any questions about these developments or how they may affect your business, please contact any member of our [Global Immigration Practice Group](#), or your regular Fisher Phillips attorney.

This Legal Alert provides an overview of a specific Supreme Court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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