Overview
The US Supreme Court upheld the Trump Administration’s third travel ban and, more significantly, affirmed the president’s broad authority to restrict immigration by Executive Order (EO). In *Trump v. Hawaii*, issued June 26, 2018, the Court found that the EO was within the president’s authority under an Immigration and Nationality Act (INA) provision which allows the president to restrict foreign nationals from entry to the US whenever the president finds that such entry “would be detrimental to the interests of the United States.”

Decision Opens Door to More Travel Restrictions
As background, the September 24, 2017 version of the Travel Ban reviewed by the Court has been in full force since December 2017 when the Court stayed preliminary injunctions issued by the Fourth and Ninth Circuit Courts of Appeal. Thus, no new travel restrictions arise purely as the result of this decision; any expansion of restrictions will require presidential action. However, the Court’s decision paves the way for future restrictions. The Court found that the provision in question “exudes deference to the president in every clause.” Thus, under this interpretation, there is very little limitation on the president’s discretion to suspend entry of foreign nationals to the US, provided there is a national interest rationale supporting such future actions.

Current Travel Ban Applies to Seven Countries
The restrictions under the EO currently apply to seven countries: Iran, Libya, Somalia, Syria, Yemen, North Korea, and Venezuela. Chad was removed from the initial list of eight countries in April 2018. The impact of this more tailored travel ban continues to be felt by local communities, families, and global businesses. More specifics on the travel restrictions are set out in our December 7, 2017 blog post, “Travel Ban Injunction Lifted by Supreme Court”

Broad Presidential National Interest Authority to Suspend Entry by Foreign Nationals
The Court determined that the provision in question, 8 U.S.C. 1182(f), “entrusts to the president the decisions whether and when to suspend entry, which foreign nationals should be suspended from entry, and on what conditions the entry is suspended.” The Court views the delegation of authority to the president as “comprehensive.” “The sole prerequisite…is that the president ‘find’ that entry…‘would be detrimental to the interests of the United States.’”

Justification for Disregard of Travel Ban History
The third version of the EO travel ban was based upon a global review of information sharing and security practices, as mandated by an earlier Executive Order. The limitations are directed at countries that failed to meet the standards for practices in the area of information sharing and security. The Court gave significant weight to the global review process and the involvement of the Department of Homeland Security (DHS), Department of State (DOS) and intelligence agencies, as well as the resulting tightened limitations.
This assessment process was, in the view of the Court, more than sufficient to meet the “sole prerequisite” of making a “finding” that the entry be detrimental to the national interest. This “finding” on the part of the president is only required to meet the very minimal “rational basis” standard. This standard is not a very high test to satisfy as it requires a simple argument that the “policy is plausibly related to the government’s stated objective.”

**New Travel Restrictions**

**Likely**

Given this administrations’ immigration policy stance, it is likely the president will seek to exercise his reaffirmed power. In addressing the Plaintiff’s arguments based on the INA’s prohibitions against discrimination based on nationality, the Court viewed 8 U.S.C. 1182(f) as establishing the universe of potential visa applicants – without consideration of nationality discrimination. Only the remaining group after application of 8 U.S.C. 1182(f) is protected from discrimination based on nationality in the context of immigrant visas.

The Court did note that 1182(f) does not give the president carte blanche to make immigration laws. “We may assume that 1182(f) does not allow the president to expressly override particular provisions of the INA.” However, they did not find that the revised travel ban overreached in this regard. The Court made it clear that it was not expressing a view on the soundness of the policy embodied in the travel ban. Rather, its decision is based purely on their interpretation of the president’s authority and its finding that the government established a sufficient national security justification under the applicable rational basis standard to support the EO. It is worth noting that the Supreme Court’s decision concerned noncitizens seeking entry to the United States. Such individuals do not benefit from our constitutional rights. However, noncitizens in the United States, with or without proper status, continue to have constitutional rights such as due process and equal protection.

In addition, in the dissent the Court strongly reminded the government that the waiver process set forth in its proclamation for individuals who do not pose a national security risk must be carried out, otherwise the government risks running afoul of its own terms and would “signal that the travel ban is motivated by anti-religious animus.”

**What Does the Future Hold?**

Through the *Trump v. Hawaii* decision, the Court has interpreted the relevant INA provisions as vesting the president with broad discretion to restrict foreign nationals from entry to the US where such restrictions at least facially fall under the national security policy umbrella. The message clearly instructs lower courts to proceed with greater deference to the president in actions under the authority used in this case, without looking behind the narrow parameters of similar future actions if they can be characterized as facially neutral.

In addition to the prospect of additional travel bans, the future also will bring renewed attention to the administration’s handling of the waiver application process associated with the travel ban. The availability of waivers was a factor in the characterization of the ban as facially neutral. The backlog of these waiver applications and the decision patterns are now being closely monitored by immigration advocates. The waiver process presents an area for possible future challenges if it is not perceived as robust and neutral. With the Court’s resolution on the legality of the travel ban, the waiver process is the only option at this time for individuals subject to its restrictions to obtain immigration benefits for which they are otherwise eligible.

This case illustrates many of the issues dividing our country, with the dissents voicing drastically different views and analysis of both the law and the relevant facts surrounding the travel ban. The courts operated as a check on the initial travel ban; this is evident in the nature and reduced scope of the current travel ban. This decision has deep implications for this important balance between the executive and judicial branches. While this chapter is over, this is not the end of this story as the administration continues its efforts to reshape our immigration landscape.

If you have questions about this advisory or questions about related immigration changes, please contact Elizabeth LaRocca at +1 202 429 1351 and Dana Delott at +1 202 429 6498 in our Washington office.

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