

The Trump Administration Is Making a Mockery of the Supreme Court

It promised to create a ‘robust’ waiver process for visa applicants from countries affected by the travel ban. The process is a sham.

By Betsy Fisher and Samantha Power

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Two years ago this week, President Trump signed an executive order banning travelers from a number of Muslim-majority countries from entering the United States. The fallout has been dire.

A teenage Syrian girl who survived a bombing and is in urgent need of reconstructive surgery was barred from traveling from Germany to the United States to seek medical treatment. A 7-year-old Somali boy, whose father died, was prevented from reuniting with his mother in the United States. One American citizen was forced to move to Syria in order to live with her husband, who was barred from coming to the United States. In fact, hundreds of people from Yemen alone who had already undergone vetting and received visa approval notices from the State Department have since had those approvals rescinded or been barred from traveling to the United States.

Our organization, the International Refugee Assistance Project, was among the groups that filed the first challenge to the executive order, and we won a series of injunctions temporarily blocking the ban from being enforced. But in June the Supreme Court upheld a modified version of the ban in a 5-to-4 decision. The majority sided with the Department of Justice, which had claimed that a “robust” waiver process would allow citizens from the blacklisted countries to enter the United States if they met certain reasonable criteria. The Trump administration had cited this as evidence that the travel ban was rooted in national security concerns and not in the discriminatory intent to ban people on the basis of their religion.

This assurance was a key rationale for the court’s decision. Chief Justice John Roberts’s majority opinion argued that a waiver process would provide humanitarian exceptions to the ban and thus supported “the government’s claim of a legitimate national security interest.” However, in their separate dissents, Justice Stephen Breyer raised serious concerns about the waiver process, and Justice Sonia Sotomayor argued that it was a “sham.”

It turns out they were right. The waiver process is opaque, arbitrary and unreasonably harsh, and it has not mitigated the ban’s effects on thousands of families in dire circumstances. It makes a mockery of the rule of law.

The waiver provision in the ban stipulates that those barred by their nationality from entering the United States may be granted waivers if they satisfy a three-part test: Applicants must show that being denied entry would cause “undue hardship,” that their entry would be “in the national interest” and that their entry would “not pose a threat to the national security or public safety of the United States.” But there are no published instructions as to how or where to apply for a waiver. Nor is there a form to fill out. This is in direct violation of the text of the ban, which explicitly directs the secretaries of state and of homeland security to clarify the process.

We have no way of knowing how many people have tried to obtain a waiver. What we do know is that the State Department has interpreted the ban’s provisions in an excessively harsh manner: Between Dec. 8, 2017 and April 30, 2018, according to the only data the administration has made available, roughly 98 percent of people who applied for a visa did not receive a waiver.

Thanks to the Freedom of Information Act, we know that the State Department will not even consider an applicant’s home country conditions when evaluating whether the travel ban imposes undue hardship. What this means in practice is that a Yemeni woman whose husband is in the United States cannot cite atrocities against her family or hometown as evidence of undue hardship. Some consulates even outright refuse to accept the supporting materials that applicants submit to try to prove their eligibility for a waiver.

The system is not just ungenerous; it is also arbitrary. Waivers appear to be given reliably only when much publicity is brought to bear. Performers in an acclaimed play enlisted international celebrities like Sting and Benedict Cumberbatch to support their waiver applications, which were eventually approved. Thanks to heavy press coverage, a Yemeni mother longing to say her final goodbyes to her dying toddler was granted a waiver.

But the vast majority of eligible applicants cannot muster this level of public attention. More to the point, neither tragic circumstances nor celebrity testimonials should be required to shame the government into following its own laws and criteria.

The Muslim ban cannot be cured of its discriminatory intent and devastating effects, and neither the Trump administration nor the Republican-led Senate has shown a willingness to overturn it. Until the bigoted policy is rescinded, Congress must hold the administration accountable to its own directive to establish a transparent, functioning waiver system that would ease the suffering of thousands of families.

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