The New York Times

America Needs Closure on the Travel Ban

Josh Blackman

June 11, 2017

President Trump's revised travel ban has surged from his signature to the Supreme Court's docket in less than three months. Under normal procedures, a case granted for review this late in the term would be argued by Thanksgiving with a possible resolution as late as June 2018. This case, indeed this president, is anything but normal. The legality of the travel ban, which implicates the commander in chief's core statutory and constitutional authority over national security, demands an immediate resolution by the Supreme Court — one way or the other.

When necessary, the justices have quickly answered separation-of-powers disputes in less than a month's time. Here, such a speedy resolution is essential not only to address the legality of this executive order but, more broadly, to signal to the lower courts how to treat President Trump's unprecedented behavior in this case and beyond. With all the briefs scheduled to be filed on Monday, the court should follow its practice from previous urgent cases: Schedule argument for 10 days hence, with a resolution as soon as practicable. Letting this issue linger over the summer, or longer, would deny the parties, the courts and our republic what is truly needed: finality.

For a road map of how to proceed with all deliberate speed, look no further than the famous Steel Seizure Case, decided during the height of the Korean War. On April 8, 1952, President Harry S. Truman ordered his secretary of commerce to take control of American steel mills to avert a labor strike. He resolved that nationalizing the mills was essential to securing supply lines overseas. Although Truman was fond of saying "the buck stops here," ultimately the decision would rest with the Supreme Court. After a month filtering through the lower courts, on June 2, the justices invalidated the seizures. From start to finish, they resolved a constitutional conflict in less than a month.

There would be two more judicial blitzes during the tumultuous 1970s. The landmark First Amendment decision known as the Pentagon Papers Case rocketed through the federal judiciary in less than three weeks. On June 12, 13 and 14 of 1971, The New York Times published a classified study about the Vietnam War. The next day, a federal judge in Manhattan granted a remarkable injunction, ordering The Times to cease distribution of the Pentagon Papers. On June 23, the Court of Appeals affirmed the lower court's judgment. Less than 24 hours later, The Times filed its appeal with the Supreme Court. On June 26, at 11 a.m., less than two hours after the printed briefs had arrived, the justices heard oral arguments. Four days later, following what Justice John M. Harlan referred to in dissent as a "frenzied train of events," the court ruled for The Times.

Three years later, the court would once again push the boundaries of its own limits during a very trying time. On May 1, 1974, President Richard Nixon began his last stand, fighting in court a

subpoena that ordered him to release Oval Office tapes. After the lower courts ruled against him, Nixon appealed to the Supreme Court, and review was granted nine days later. Delaying their summer vacation, the justices scheduled arguments for July 8. Two weeks later, the court unanimously ruled that Nixon had to release the tapes. And two weeks after that foundational decision, the 37th president resigned.

The transition from the Carter to the Reagan administration would bring one of the most momentous constitutional cases of the past half-century. As part of the negotiations to free the hostages from the United States embassy in Tehran, Reagan issued an executive order in February 1981 that would suspend all pending litigation against the Iranian government. The Dames & Moore company, which was owed more than $3 million by the Iranian Atomic Energy Organization, challenged the constitutionality of the executive order on April 28, 1981. After the case zipped through the lower courts, the Supreme Court granted review on June 11, 1981, explaining that "the issues presented here are of great significance and demand prompt resolution." All parties were ordered to file their briefs eight days later and oral arguments were heard on June 24. After another eight days, Justice William H. Rehnquist issued a unanimous decision, upholding Reagan's actions. Again, the entire case was resolved by the court in one month.

Perhaps no case is more emblematic of the court's ability to act swiftly than Bush v. Gore. On Dec. 8, 2000, the Supreme Court of Florida ordered a recount of certain ballots from Miami-Dade County. Later that evening, Gov. George W. Bush filed an emergency appeal to the Supreme Court. The following day, the justices put the recount on hold, and scheduled the case for oral argument on Dec. 11. Twenty-four hours later, five justices wrote separate opinions totaling more than 50 pages. The majority ruled for Governor Bush at just the right time: That fateful Tuesday was the statutory deadline for Florida's Electoral College to safely cast its votes. Bush v. Gore's correctness is still subject to vigorous debate, but, right or wrong, this opinion brought a conclusion to the 2000 election. "While I strongly disagree with the court's decision," Vice President Al Gore said at the time, "I accept the finality of this outcome."

The legal status of President Trump's executive order, and indeed that of his entire administration, needs finality, sooner rather than later. Even if five justices plan to strike down the executive order, they should do so now, and not in the fall, or worse, one year from now. The lower courts desperately need guidance. Should judges look to Mr. Trump's Twitter feed to determine his true intent? Should the judiciary privilege statements from the commander in chief that conflict with those of the Justice Department? Are all of Mr. Trump's actions that affect Muslims, at home and abroad, perpetually tainted by his campaign statements? If the Supreme Court signals that the answer to those questions is yes, then the lower courts may declare open season on this administration in contexts far beyond the travel ban. If a more circumspect Supreme Court signals that the answer is no, then, perhaps, the lower courts will fall into line.

Far beyond this interim order, all of President Trump's foreign and domestic policies will be infected by these same critical disputes. The Supreme Court may be able to evade review here, but these issues are certain to repeat themselves. The nine justices cannot punt these complicated matters, hoping someone else deals with them. All of the issues are fully developed, and ready for resolution now. The buck stops here.

Josh Blackman is a constitutional law professor at the South Texas College of Law in Houston, an adjunct scholar at the Cato Institute and the author of "Unraveled: Obamacare, Religious Liberty, and Executive Power."