



## Shouldn't the DOJ Know About Terrorists From Countries Covered by Trump's Travel Ban?

*The government's failure to cite relevant examples helped ensure its defeat.*

Jacob Sullum

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At a hearing before the U.S. Court of Appeals for the 9th Circuit on Tuesday, Justice Department lawyer August Flentje was repeatedly asked for evidence that President Trump's travel ban addresses "a real risk" of terrorism. Flentje came up short, as reflected in the 9th Circuit's explanation of its refusal to override a temporary restraining order against the ban. The appeals court says "the Government has pointed to no evidence that any alien from any of the countries named in the Order [Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen] has perpetrated a terrorist attack in the United States."

That much is true, but it's not because there is no such evidence. Last September, for example, a Somali-American named Dahir Adan was shot and killed after attacking shoppers with a knife at a mall in St. Cloud, Minnesota. Ten people were injured. Two months later, a Somali refugee named Abdul Razak Ali Artan was shot and killed after ramming people with his car and stabbing them with a knife at Ohio State University in Columbus. Thirteen people were injured. In addition to those cases, Cato Institute immigration analyst Alex Nowrasteh has identified half a dozen people from Iran, Iraq, and Somalia who have been convicted in the United States of charges related to domestic terrorism since 9/11.

Flentje should have known about these cases, and so should Michelle Bennett, the DOJ lawyer who represented the Trump administration at the U.S. District Court hearing last Friday that preceded the TRO. James Robart, the federal judge who issued the TRO later that day, asked Bennett, "How many arrests have there been of foreign nationals from those seven countries since 9/11?" She did not know. "I'm from the civil division, if that helps get me off the hook any," she said with a smile. Robart replied (incorrectly) that "the answer to that is none, as best I can tell."

William Canby, one of the 9th Circuit judges, noted that exchange during Tuesday's hearing, giving Flentje a chance to set the record straight. He did not take it. "Yes, your honor," he

replied, seeming to confirm Robart's inaccurate statement. "These proceedings have been moving quite fast, and we're doing the best we can."

That is pretty shocking if true. It was inevitable that judges would ask this sort of question, and the answer is a matter of public record. Once Bennett was stumped, Flentje should have known the question would come up again in the appeals court. Yet both Bennett and Flentje left the impression that no one from the seven banned countries has been implicated in domestic terrorism, which is clearly not correct.

While Robart and Canby overstated the case, it is accurate to say that people from the countries covered by Trump's travel ban have been responsible for only a small share of terrorist activity and zero deadly attacks in the United States since 1975. To my mind, those facts cast doubt on the logic of Trump's criteria, which supposedly are aimed at protecting Americans from terrorists. But the legal significance of those doubts is a matter of dispute. While Bennett argued that Robart should not examine the empirical basis for Trump's order, Robart insisted that "I have to find fact as opposed to fiction."

The 9th Circuit also rejected Trump's contention that the risk assessment underlying his order is beyond judicial review. But it is not clear how logical the order must be to pass constitutional muster. The fit between Trump's ostensible goal and the means he chose is relevant in evaluating the argument that his order improperly discriminates against Muslims, which can be construed as an equal protection claim, an Establishment Clause claim, or a religious freedom claim. It also might be relevant in deciding what due process means for people affected by the order, assuming it means anything at all.

At this stage of the case, the nature and magnitude of the danger addressed by the travel ban were relevant in assessing the government's claim that leaving the TRO in place would cause "irreparable harm." And that is where Bennett and Flentje clearly fell down on the job. "Despite the district court's and our own repeated invitations to explain the urgent need for the Executive Order to be placed immediately into effect," the 9th Circuit observes, "the Government submitted no evidence to rebut the States' argument that the district court's order merely returned the nation temporarily to the position it has occupied for many previous years."