



# CBCnews

## **Trump's appeal of travel ban suspension pits executive against judiciary**

*Tuesday hearing in federal court was biggest legal test yet for Trump's travel ban*

Matt Kwong

February 7, 2017

A federal appellate court heard arguments Tuesday for and against lifting a block on U.S. President Donald Trump's executive order, which has over the last two weeks given rise to mass confusion, legal maneuvers and plenty of human drama.

An emergency three-judge panel with the San Francisco-based Ninth U.S. Circuit Court of Appeals convened the hour-long telephone hearing at 6 p.m. ET.

Here's what the two sides were arguing, and what happens next:

Oral arguments kick off

The case pits the Department of Justice lawyers against lawyers representing Washington state and Minnesota. The states were the plaintiffs in this case, and argued in favour of continuing to suspend Trump's ban.

Justice department lawyer August Flentje contended that Trump's executive order, which closes U.S. borders for 90 days to citizens from seven predominantly Muslim nations (Iraq, Syria, Iran, Libya, Somalia, Sudan and Yemen) should be reinstated as a matter of national security.

Both sides filed their legal briefs ahead of the hearing and had up to 30 minutes to make their case via phone. A quick ruling is expected.

What this hearing is about

These oral arguments were not meant to be about the overarching merits of the travel ban itself.

Rather, this hearing focused on the narrow question of whether to uphold a temporary restraining order imposed on Friday by Seattle U.S. District Judge James Robart. The federal judge's injunction, which applied nationwide, effectively put Trump's immigration executive order on ice.

Temporary restraining orders are granted as a form of interim relief. The Ninth Circuit will be ruling on the sole question of whether the restraining order was justified until the case is heard on its larger merits. Robart wrote in his decision that the plaintiff states were likely "to suffer irreparable harm" if the enforcement of Trump's order was not halted.

A showdown between branches of government

While the original court challenge of the travel ban was a battle of states vs. the federal government, the case before the Ninth Circuit is being framed as a showdown between two separate but equal branches of the government: the judiciary and the executive branch (president).

The Department of Justice argued that the president's executive power to manage immigration in the U.S. is being unlawfully undermined by the judiciary.

Trump's Twitter feed was revealing about the way he views the judicial branch. In one missive, he referred to Robart as a "so-called judge." In another, he wrote: "Just cannot believe a judge would put our country in such peril. If something happens blame him and court system."

Restraining orders are not typically appealable, notes Yvonne Tew, a professor of constitutional law at Georgetown University. "But the government is bringing this before the Ninth Circuit, arguing that because of the nature of the case, they should allow it to be appealed before the appeals court."

What Trump's lawyers argued in their brief

In its 15-page legal brief filed on Monday, the justice department put the crux of its argument in its top line: "The executive order is a lawful exercise of the president's authority over the entry of aliens into the United States and the admission of refugees."

The line cites the Immigration Act of 1952 to argue the order is lawful. The Act includes a provision giving the president the authority to "suspend the entry of all aliens or any class of aliens as immigrants or non-immigrants" if their arrival in the U.S. is deemed "detrimental" to U.S. interests.

Justice department lawyers also said the courts have taken an "extraordinary step of second-guessing" the president's judgment on a matter of national security.

While the states asserted that constitutional rights would be violated by the ban, the Justice Department said that the Supreme Court has already ruled that "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application."

In other words, the department said, foreign nationals aren't protected by U.S. constitutional rights to due process and equal protection.

Arguments by lawyers opposing the ban

The suit brought by the attorneys general of Washington state and Minnesota warned that lifting the suspension of Trump's immigration executive order would "unleash chaos again" by breaking up families, causing disarray in immigration procedures and hurting economies.

"The order also caused immediate harm to Washington's public universities, which are state agencies," the [32-page brief](#) said. "Hundreds of their faculty, staff, and students are from the affected countries."

Minnesota soon joined the Washington complaint, alleging similar harms.

Although the president does have wide discretion on immigration, as outlined in the 1952 Immigration Act, the plaintiffs counter that the 1965 Immigration and Nationality Act signed by president Lyndon B. Johnson actually supersedes the older law.

That's because under the 1965 Immigration Act, Congress decided to give each country an equal shot at immigration quotas, thereby "putting in a ban on discriminating based on national origin," says David Bier, an immigration policy analyst with the Cato Institute.

The 1965 amendment states: "No person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence."

Citing the 1965 legislation, Washington State solicitor General Noah Purcell told the judges Tuesday "that is a claim that we feel very likely to succeed on" and would allow the court to "avoid" some constitutional issues.

Included with the states' filings asking the court to keep blocking Trump's travel ban were amicus (friend of the court) supporting documents. These briefs included statements from: 16 attorneys general; 97 tech companies including Apple, Google and Microsoft; as well as a brief from 10 national-security signatories, including former secretaries of state John Kerry and Madeleine Albright.

How this could get to the Supreme Court

No matter what happens, the losing side is likely to appeal, and the case over suspending the travel ban looks destined for the Supreme Court, America's highest court of appeal.

If one federal appeals court in one region rules against the travel ban, but another federal appeals court rules in favour of it, that set ups the kind of conflict that ends up before the higher court.

The Supreme Court normally has nine justices, which would decide whether to even hear the case. As the court is currently operating short-handed, with just eight of nine justices on the bench (following the vacancy left by the death of Justice Antonin Scalia last year), a majority 5-3 decision would be needed. Otherwise, the appeals court ruling in San Francisco will prevail.

Ilya Shapiro, editor of *Cato's Supreme Court Review*, says that Trump's nominee for the ninth seat on Supreme Court seat, Neil Gorsuch, would more likely have ruled against Trump's immigration order.

Gorsuch is known to be "skeptical of executive power," Shapiro says.