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Legal War Over Trump's Halted Travel Ban Resumes Without Fanfare

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Donald Trump doesn't talk much about his travel ban these days.

In a speech marking his 100th day in office, the president made just passing reference to his administration's "historic steps" to restrict visas from those with nefarious intent, and promised to "keep radical Islamic terrorists the hell out of our country."

Vice President Mike Pence has skirted the topic too, avoiding mention of it during a trip to Indonesia -- home of the world's biggest Muslim population -- according to a senior administration official.

The public retreat may be largely strategic. Away from the limelight, a raging court fight has spurred a constitutional confrontation that could define powers of the presidency for years to come.

On Monday, a federal appeals court in Richmond, Virginia, will hear arguments over Trump's revised March 6 executive order aimed at temporarily halting travel to the U.S. from six mostly-Muslim countries while the government evaluates screening procedures. Key parts of the ban were blocked by federal courts in March, as was Trump's first order, a broader decree that led to chaos in January at airports across the country.

The hearing is the biggest legal test so far for the revised ban. As a measure of the case's consequence, the full appeals court, rather than the typical three-judge panel, will decide whether a district judge in Maryland properly blocked Trump's order.

Split Panel

Much like the fight over Trump's first (and now-withdrawn) order, the hearing will likely center on whether Trump's campaign promise to enact a "Muslim ban" betrays the stated purpose to keep the country safe.

That's "really the \$64,000 question," said Ilya Shapiro, senior fellow in constitutional studies at the Cato Institute, a Washington-based libertarian think tank. "The whole thing is clouded by how this was rolled out."

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Courts have split on whether to consider Trump's words on the campaign trail. A Hawaii judge who also blocked the order said a "court will not crawl into a corner, pull the shutters closed and pretend it has not seen what it has." But a Virginia judge said he's not going to look to Trump's comments as a candidate and "psychoanalyze the president" for his motives in drafting the ban.

Trump's recent silence hasn't quieted skeptics, though that may have been the goal.

"I think it's almost certainly the case that someone somewhere along the way made the point to the president that he was his own worst enemy and suggested that he refrain, to the maximum extent possible, from taking to Twitter whenever he had something to say about immigration," said University of Texas law professor Stephen Vladeck. "It's too little too late. Because the reality is that silence over the past six weeks doesn't say anything about original motivation."

The case may soon come before the Supreme Court, especially if the Richmond appeals court disagrees with its San Francisco counterpart, which will hear arguments May 15 over whether the Hawaii judge properly blocked the ban. The U.S. warns that the district judges' rulings threaten the president's power to make judgments over national security.

Trump's Motivation

If Trump prevails in both cases, the U.S. can temporarily halt issuance of visas to people from Iran, Libya, Somalia, Sudan, Syria and Yemen. If he loses in either court, the travel order will remain frozen for now, as the parties fight over Trump's motivation or until the Supreme Court weighs in.

In his ruling, U.S. District Judge Theodore Chuang in Greenbelt, Maryland, said Trump's plan was more likely motivated by his campaign promise -- making it an unconstitutional act of religious bias -- than by the national security justifications offered after he took office.

Government lawyers say Chuang should have ignored comments by Trump and his advisers and focused instead on "the policy's text and operation."

"Virtually all of the president's statements on which the district court relied were made before he assumed office -- before he took the prescribed oath to 'preserve, protect and defend the Constitution'," the lawyers wrote in court papers.

Those behind the Maryland case, including the International Refugee Assistance Project, disagree.

‘Religious Test’

“President Trump never disavowed his intention to prevent Muslim immigration,” the groups said. “Instead, he announced that he would achieve that goal by banning individuals from Muslim countries rather than instituting a direct religious test.”

Texas is among about a dozen states that back the administration while California, Virginia and others attack the ban.

Absent comments by Trump and his surrogates, opponents would be on “a much thinner foundation” as courts typically resist reviewing the motives behind a government decision, said David Martin, a University of Virginia law professor.

“This just doesn’t look like your normal national security or immigration decision,” Martin said.

The panel will have 13 judges. Seven were picked for the bench by Democratic presidents, three were named by Republicans, and three had the backing of Democratic and Republican presidents in their various appointments.

Administration aides are confident in the outcome. Steve Bannon, the ex-Breitbart executive who now serves as one of the president’s top advisers, has placed check marks next to three items on a large whiteboard in his office filled with Trump campaign promises: “Suspend immigration from terror-prone regions,” “Implement new extreme vetting techniques,” and “Suspend the Syrian Refugee Program.”