



## After many days in court, travel ban nearing final resolution

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President Trump's efforts to restrict entry to the United States for citizens from eight countries came a few steps closer to a final resolution this week. Two federal appeals courts heard arguments on whether the latest version of the travel ban, which would effect 150 million mostly-Muslim people, should be allowed to go ahead.

The week began with the Supreme Court allowing Mr. Trump's latest proclamation – the third iteration of the travel ban – to go into effect pending the decisions from the two appeals courts. The various versions of the order have produced a year of almost constant litigation, blending age-old questions of religious discrimination and judicial oversight of the White House with newer complexities of how to handle a case the president can't seem to stop tweeting about.

Friday, after a full panel of judges on the Fourth Circuit Court of Appeals heard arguments in Virginia – and two days after a panel of three judges on the Ninth Circuit Court of Appeals heard arguments in Seattle – it seems that the legal issues have circled back to several familiar places.

In an appeal to the first version of the travel ban in early February, August Flentje, a lawyer for the Justice Department, shocked some observers when he said that the president's decisions on national security are unreviewable by the courts. Ten months later, courts are still wrestling with that question.

In Seattle on Wednesday, Deputy Assistant Attorney General Hashim Mooppan said that, hypothetically, he didn't think that courts could step in if a president and his cabinet decided to ban all immigrants from entering the country. Mitchell Reich, a lawyer arguing against the ban, called the argument breathtaking.

And in Richmond, Va., today, Fourth Circuit Judge Paul Niemeyer made a similar point.

"I don't see how we as a court should be asking the questions we're asking today," said Judge Niemeyer, one of three judges who ruled in favor of the travel ban last time. "We play an important role, but we play an important role domestically. We don't exercise the sovereign power of United States vis-a-vis other countries."

Indeed, Congress has delegated significant powers to the president in the foreign policy and national security realms, and the judiciary has, until recently, shown broad deference to the executive branch. For even longer, courts have granted the president a “presumption of regularity” that, barring evidence to the contrary, they are properly discharging their duties.

This traditional deference could be what’s motivating recent decisions from the Supreme Court on the travel ban. The justices allowed the Travel Ban 2.0 to go into effect in part over the summer, and that version had been on the court’s docket for this term until the Trump administration replaced it with the latest version.

The second travel ban order called for temporarily suspending entry to the US for citizens from Iran, Syria, Yemen, Somalia, Libya, and Sudan while the administration reviewed the country’s immigration processes. While it was not as sloppily written as the first order, critics still decried the second order as a “Muslim ban,” and courts agreed. In May the Fourth Circuit said in a 10-to-3 ruling that the second order “drips with religious intolerance, animus and discrimination.” The Ninth Circuit ruled that the order violated a section of an immigration statute that prohibits nationality-based distinctions when issuing visas.

Travel Ban 3.0, meanwhile, resulted from the recommendations of a “worldwide, multi-agency review” conducted by the Department of Homeland Security over several months. The new version excluded Sudan but added Chad, North Korea and some government officials from Venezuela. This version is also permanent, with the administration saying countries can be removed from the order if they improve their information sharing with the US on visa applicants.

The Supreme Court voted 7-to-2 to allow that order to go into full effect – Justices Ruth Bader Ginsburg and Sonia Sotomayor dissented – but said they will hear appeals to the lower court decisions and expect appeals courts to act quickly with “appropriate dispatch.”

“I imagine what’s motivating the [high] court now is that the president generally gets the benefit of the doubt when asserting national-security reasons for a given action,” wrote Ilya Shapiro, a senior fellow at the libertarian Cato Institute, in The Hill.

Lower courts have consistently ruled against the administration on the travel ban, however, and some appeals court judges pressed Mr. Mooppan this week, in particular on Trump’s tweets.

Mooppan, who also represented the government in Virginia, told the Fourth Circuit judges that while the tweets represent official statements, they are not “legally relevant.”

Judge Stephanie Thacker responded that, as official statements, the tweets “could be subject to charitable interpretation.” She then referenced an August post referencing an apocryphal story about a US general who erroneously was said to have executed Muslim captives in the Philippines using bullets coated in pigs’ blood. “How am I to take that charitably?” she asked.

Judge James Wynn Jr. was more pointed. “Do we just ignore reality and look at the legality to determine how to handle this case?” he asked.

Cecillia Wang, deputy legal director of the American Civil Liberties Union, also made the argument that the third travel ban has an “internal illogic.”

Trump “included Somalia even when it passed the baseline” for information-sharing requirements, she said. “He didn’t make a nationality ban against Venezuela, he only applied it

to certain government officials, even though they failed the baseline, and he's letting in a lot of people from countries [via exceptions and case-by-case waivers] even though whole justification is you can't trust anyone coming from these countries."

However, two justices on Friday appeared to suggest that the Homeland Security review made a difference in the scope of the court's ability to weigh in on the ban.

"The government has taken great pains to investigate," said Judge Barbara Milano Keenan, adding, "It arguably can be illogical, it can be flawed ... [but] the president can do it, can't he, as long as he makes the required findings?"

If the case does make it to the Supreme Court – and the speed emphasized in the justices' order this week suggests it could make this term's docket – the Trump administration will be confident.

The Supreme Court has yet to touch the merits of the travel ban, but Mr. Shapiro notes that when the Supreme Court has granted a stay in a case in recent years, as it has done with the travel ban, it often indicates that it disagrees with the lower courts.

"I still disagree with the travel ban as a matter of policy," he wrote, "but it's becoming rapidly clear that it's fine as a matter of law."