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Travel ban lawsuits began as whirlwind, but will end as whimper

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As appeals of Travel Ban 3.0 proceed apace — on Wednesday, the Ninth Circuit heard argument in Seattle in the case out of Hawaii, and today it's the Fourth Circuit's turn in Richmond in the case out of Maryland — it's striking how the stage has shifted.

What began with chaos at airports and the birth of a massive legal #resistance will likely end with the Supreme Court allowing an executive order much more tailored (and lawyered) than the one President Trump signed his first week in office to continue in effect.

The litigation over the travel ban has been surreal, going up and down to the Supreme Court on preliminary-injunction hearings and appeals several times already. Travel ban 2.0 had been on the court's docket this term, but then when 2.0 expired in September and was replaced with a more-tailored 3.0 — presenting results of a worldwide security study, adding three countries, removing Sudan — everything went back to square one. There were new suits in district courts around the country, and judges in Hawaii and Maryland enjoined some provisions. The Ninth and Fourth Circuits, respectively, refused to stay those injunctions pending appeal, so the government sought Supreme Court's intervention yet again.

The court essentially said "cut it out guys, we are staying those injunctions," meaning that the full Travel Ban 3.0 is in effect pending appeal and the courts have to evaluate these things in the normal course.

To be clear, the Supreme Court didn't rule on the merits and there's no opinion, just a procedural order, with two justices (Sonia Sotomayor and Ruth Bader Ginsburg) dissenting. But if you read between the lines — and also consider what the court did with Travel Ban 2.0 in June (also allowing it to go into effect pending appeal, with modest tweaks) — the justices are saying that the lower courts are being too hasty and effectively becoming part of the judicial #resistance. Indeed, in 22 of 23times when the Roberts Court has granted stays before taking up a case, it has reversed the lower courts. Justice Anthony Kennedy, often the "swing vote" in close cases, has never dissented from those stays.

I imagine that what's motivating the court now is that the president generally gets the benefit of the doubt when asserting national-security reasons for a given action. In the immigration context specifically, the 1972 case of Kleindienst v. Mandel established the precedent that courts don't look beyond the four corners of the written order that's given by the executive branch. They don't reevaluate the balances of security versus other considerations.

That's why this would've been a much lower-profile case had the administration not rolled out Travel Ban 1.0 in such a haphazard manner. That last week of January, some agencies weren't even aware of what was going on; there wasn't even any training of the line border officers at the airports! If all that had gone through the appropriate interagency process and been fully "lawyered up" — essentially if we had started with Travel Ban 2.0 — the political opposition may have been the same, but the course of litigation would have gone differently.

Of course, the plaintiffs in all these lawsuits have argued that no amount of process or lawyering would've made a difference because this was all motivated by anti-Muslim animus, as demonstrated by candidate Trump's statements and President Trump's tweets. But that's the weakest part of their case, because the executive orders as written are very different from what an actual Muslim ban would be. (Indeed, the original list of countries was taken from an order President Obama had issued regarding higher-risk "countries of concern," which triggered various restrictions and tighter screening.) The ACLU's lawyer even admitted during the last round of appeals that the same exact policy would be constitutionally fine had it been implemented by a President Hillary Clinton or even a President Mike Pence.

The stronger legal arguments revolves around the alleged tension between two parts of the immigration statutes, one that allows the president to issue travel restrictions for national-security reasons and the other that prevents the executive branch from making nationality-based distinctions when issuing visas. This is what the Ninth Circuit had previously ruled on, even as the Fourth Circuit focused on the "taint" that Donald Trump had put on the whole exercise.

So we'll see what happens with this latest round of appeals, decisions on which the Supreme Court in its stay order suggested that the lower courts should render "with appropriate dispatch." The Ninth Circuit seemed to be taking the hint and, during this week's hearing, was much harder on the challengers than it had been in the previous go-around.

I still disagree with the travel ban as a matter of policy — it's both over- and under-inclusive of countries and visa categories, and isn't likely to have much effect on security one way or another — but it's becoming rapidly clear that it's fine as a matter of law.

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