



10 key takeaways from the Supreme Court arguments on Trump's travel ban

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The Supreme Court heard arguments Wednesday from lawyers on both sides of Trump v. Hawaii, the case that will determine whether the president's third and latest controversial travel ban can stand.

Since taking office last January, President Donald Trump has tried to push through three versions of an executive order that would limit immigration from certain countries, many of them considered Muslim-majority nations.

Lower courts have struck down the first two versions of that order. But the third version, which seeks to indefinitely ban travelers from Iran, Yemen, Libya, Somalia, Syria, North Korea and government officials of Venezuela, was allowed to remain in effect until the Supreme Court heard arguments from the government and those challenging it, including Hawaii and some individual travelers affected by the ban.

Analysis: The constitutional showdown over President Donald Trump's travel ban

We asked reporters and legal experts about what they learned from Wednesday's arguments, and what to watch before the end of the court's term in June.

Does the president have authority to control entry into the U.S.? That's at the heart of the case, experts say. Congress has given power to the president to determine what constitutes a national security threat, said Ted Alden, a senior fellow at the Council on Foreign Relations. "The courts have been deferential to that," Alden said. The issue is whether Trump's executive order has effectively laid out the threat. If the Trump administration "had laid out a clear and defensible rationale for the restrictions" — as President George W. Bush did after 9/11, when he put in place "broad and significant" restrictions on travelers to the U.S. from Muslim-majority countries — the travel ban "would have almost certainly been without challenge," Alden said.

The justices might not have the appetite to interfere with the authority of the executive branch, Alden said. In “the few 9/11 cases that worked their way through having to do with whether immigrants were improperly treated by [an] administration, the courts sided with the administration in all of those cases,” Alden said. The court has historically given great latitude to how the executive branch determines what constitutes a national security threat, he added.

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How much does this have to do with Trump as president, versus another president? It’s not clear, says Ilya Shapiro, a senior fellow in constitutional studies at the Cato Institute. “The justices were struggling with how much to treat this as a regular case versus what [impact] the unusual nature of the Trump presidency ... has on the legal analysis,” Shapiro said. “That was the running theme.”

A spotlight on Trump’s rhetoric

Critics of the executive order have labeled it a “Muslim ban,” in part due to Trump’s rhetoric as **a presidential candidate**, as well his tweets as president. His comments and tweets, critics say, offer proof that the ban was intended to discriminate against Muslims — a violation of the Establishment Clause of the First Amendment, which prevents the government from preferring one religion over another.

But as Amy Howe **noted** on SCOTUSBlog, Justice Samuel Alito seemed skeptical that the president’s ban actually singled out Muslim-majority countries. “There are dozens of Muslim countries, Alito pointed out, but the order only includes five of them, which collectively comprise a very small percentage of the world’s Muslim population,” Howe wrote.

It’s not yet clear what weight the court will Trump’s statements and tweets.

Solicitor General Noel Francisco, who defended the travel ban for the Trump administration in court Wednesday, argued that Trump’s remarks on the campaign trail were not relevant to the case because those statements were made when he was a private citizen, not when he was president. Statements made as a candidate should be treated differently than those made as a president, Francisco argued. But Hawaii’s lawyer, Neal Katyal, argued that campaign statements are not irrelevant. Katyal pointed to November, when Trump, as president, retweeted **three virulent anti-Muslim videos** as well as separate tweets in which he said he wants to have **an even tougher travel ban** than his first two.

It’s not yet clear what weight the court will give these statements, said Marcia Coyle of the National Law Journal. “Some judges have felt you shouldn’t look at them, that campaign statements are campaign statements. But there are other judges who feel you have to look at them to determine whether there was animus at work here,” Coyle told the PBS NewsHour’s Judy Woodruff.

Is the waiver process actually working?

Trump's travel ban includes language that grants waivers to some foreign nationals, permitting them entry into the U.S. "on a case-by-case basis."

Justices Sonia Sotomayor and Stephen Breyer sought assurance from Francisco that the waiver process was working, that people were actually receiving waivers, and that it wasn't all just "window dressing."

"The solicitor general stated that some 431 people had received a waiver. That is a drop in the bucket for the thousands of people who are covered by this ban," Penn State law professor Shoba Sivaprasad Wadhia told the PBS NewsHour. "And I think it's raising serious concerns and questions about whether it's actually working."

Shapiro, on the other hand, said he was surprised the waiver issue would hold up the court. "I didn't think that it would be an issue, given that with [the third version of the ban], they did craft all those detailed exceptions, and exemptions and waivers and things like that."

The timing of this hearing matters. What happened Wednesday was very different than if the first or second version of the travel ban had gone to the Supreme Court, Shapiro said. The latest version of the travel ban made its way to the Supreme Court at a "lightning quick" speed, Shapiro said, and likely moved much more quickly than it would have last fall, or when there was chaos in airports across the world after the first ban was put in place last January and February.

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The immediate sense from Wednesday's hearing was the government is likely to win, Coyle said — partially because of the fact that the court allowed the ban to take effect pending its review. Still, it'll likely be a close decision, Coyle said. "There are a lot of issues here. And I think it's just wise to wait and see how they sort them out," she added.

All eyes are on Justice Anthony Kennedy and Chief Justice John Roberts, since they are the most likely swing votes in this case, said Sarah Pierce, a policy analyst at the Migration Policy Institute. "While both are hard to read, Chief Justice Roberts expressed many doubts about Hawaii's arguments," including the precedent for future national security decisions by a president if the ban is struck down. Meanwhile, Kennedy asked questions and expressed views that could be seen as favoring either side, making it harder to tell where he stands, Pierce said.

Gorsuch, meanwhile, is not an automatic vote for the administration, Pierce added.

"Gorsuch recently raised eyebrows by siding against the administration in a case regarding the vagueness of a statute used to deport legal immigrants; and he has a history of striking down vague statutes," Pierce said. Gorsuch's questions in this case mostly focused on procedural concerns, she noted, and on that issue "he did not tip his hand in one way or the other."