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5 questions on the future of Trump's travel ban

Supreme Court action leaves legality of president's executive order up in the air.

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June 26, 2017

President Donald Trump's travel ban gained legal traction at the Supreme Court Monday after months of setbacks from lower courts, but the justices may have ushered in a long summer of confusion about the impact of the controversial policy as lawyers on both sides prepare for arguments in the fall.

Trump quickly claimed victory after the Supreme Court pared back court injunctions that had blocked him from implementing his executive order to halt issuance of visas to citizens of six Muslim-majority countries and suspend admission of refugees from across the globe.

However, critics of Trump's directive said they believe the majority of travelers from those countries are likely exempt from the newly reinstated rules because the Supreme Court limited the application to people without ties to the United States — at least until the justices take up the case again in October.

Here are five outstanding questions after the Supreme Court's first ruling on the Trump travel ban:

Who really won?

Despite Trump's quick claim of a "clear victory for national security," the justices may have handed the president more of a rhetorical victory than a practical one — at least for the time being.

The justices said Trump's travel ban directive can take effect while the litigation goes forward, but the Supreme Court gave an exemption to "foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States."

This means visa applicants who have some link to the United States, such as family members they're seeking to visit, can continue to receive visas, as can those who are admitted to U.S. universities, set to work at U.S. companies or even invited to speak by U.S. organizations.

"There's enough in that opinion for either side to claim victory, but on balance I'd say it's mostly a win for the plaintiffs" challenging the ban, said Stephen Legomsky, a former chief counsel at U.S. Citizenship and Immigration Services and Washington University law professor.

While Trump may now proceed with parts of the 90-day visa ban on travelers from six countries and 120-day refugee ban, immigration advocates say a majority of those seeking to visit or live in the United States would likely be exempt because they have tangible ties to people or organizations here.

Trump's travel ban had already been substantially narrowed from an initial version released in January. Green-card holders and existing visa holders — such as foreign students — were carved out by the president in March in an effort (which he has since said he regrets) to bolster the legal defense of the rules. On Monday, the Supreme Court limited the rules' application even more.

In theory, refugees could be most affected, since about only 60 percent of those admitted to the U.S. have declared family ties here. But the Supreme Court ruling appears to count those already assigned by the government to a refugee organization, so many refugee cases in the pipeline likely will be permitted to continue.

"The hope is this really only impacts a very small number of people," said Becca Heller of the International Refugee Assistance Project, a plaintiff behind one of the suits.

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What happens next?

The Trump administration says it's studying the ruling and will develop guidance on how U.S. officials should put it into effect. The State Department said it plans to implement the order in "an orderly fashion" and noted that earlier this month Trump signed a directive telling agencies to begin enforcement 72 hours after stays ordered by lower courts were lifted.

But the language of that memo may mean Trump needs to issue a new directive allowing the State Department and other agencies to start implementing the travel ban.

"It's confusing, and it's going to get more confusing as a result of the way the order has gotten kind of chopped up over time," said Omar Jadwat, an ACLU attorney who is part of legal team pressing one of the challenges.

There will be no summer Supreme Court arguments, as some had urged. Some observers believe the fact that the court stepped in Monday to allow Trump to move forward with part of the ban suggests it will give its permanent legal blessing this fall.

"The side that gets a stay from the Supreme Court generally ends up winning on the merits," noted Ilya Shapiro of the libertarian Cato Institute.

However, the court could avoid ruling on the merits of the legal fight. If the 120-day refugee ban period is ending around the time the justices hear arguments, they may decide the dispute is moot.

"I imagine [Chief Justice] John Roberts doesn't want to rule on this one way or another and just wants it to go away," Shapiro said.

How is the ban carried out between now and October?

Decisions about who has a sufficient link to the United States to travel here are likely to be made by officers at U.S. embassies and consulates overseas, as well as State Department officials who oversee the refugee program.

One tricky aspect is that the "credible claim of a bona-fide relationship" standard the justices set forth Monday isn't seen in immigration law, experts said.

"This is a mildly unworkable and somewhat confusing standard," said Heller of the International Refugee Assistance Project. "We are diving into a ton of research on this."

Adding to the confusion: State Department statistics don't appear to differentiate between short-term visitors coming to the U.S. solely for tourism or for medical treatment and those coming to see family.

"There is no such category," said Eli Kantor, an immigration attorney in Beverly Hills, California..

The Supreme Court's unsigned order makes clear U.S. groups can't recruit foreigners explicitly to get them around the travel ban. But refugee advocates said foreign nationals still may try to establish relationships with American organizations to improve their chances at visas.

People protest outside as the 9th US Circuit Court of Appeals prepares to hear arguments on President Donald Trump's revised travel ban in Seattle, Washington on May 15, 2017. | Getty

The next legal step may be action from the judges in Hawaii and Maryland whose injunctions the Supreme Court reined in Monday. They will likely reword their injunctions. Immigration activists say they won't hesitate to go to court if the federal government appears too stingy in granting visa requests.

Justice Clarence Thomas, in a separate opinion joined by Justices Samuel Alito and Neil Gorsuch, predicted "a flood of litigation" over what U.S. ties merit visas and indicated a lack of trust in the Hawaii and Maryland judges to referee those disputes.

"I fear that the Court's remedy will prove unworkable," Thomas wrote. "Litigation of the factual and legal issues that are likely to arise will presumably be directed to the two District Courts whose initial orders in these cases this Court has now — unanimously — found sufficiently questionable to be stayed as to the vast majority of the people potentially affected."

Was it unanimous (as Trump said)?

One talking point from the White House Monday was that the Supreme Court was unanimous in its decision to let the ban move forward. Trump's own statement said that twice, concluding: "I am also particularly gratified that the Supreme Court's decision was 9-0."

Court experts say that's not technically true. The controlling 13-page order from the court was labeled as a "per curiam" decision, meaning it had no listed author and reflects the views of at least five of the court's justices. Alito, Thomas and Gorsuch concurred in part and dissented in part. No other justice recorded his or her dissent.

Thomas did say in his opinion that the thrust of the court's action was unanimous, but the information the court released Monday doesn't confirm definitively that all the justices joined the per curiam ruling or aspects of its rationale.

What did Gorsuch do?

Some travel ban opponents held out the hope that Gorsuch, the court's newest justice, might be open to criticism of Trump's travel ban. They noted that his history of concern for religious freedom could make him receptive to arguments that Trump's directive violates the Constitution by discriminating against Muslims.

Those hopes were largely dashed Monday when Gorsuch signed Thomas' opinion, also joined by Alito, that would have reinstated the travel ban in full. The trio also concluded that Trump had a strong likelihood of prevailing in the travel ban legal fight.

"It doesn't surprise me at all that Alito and Thomas would do that. I would expect that given their philosophy, but the interesting thing to me is that Justice Gorsuch would sign on to their opinion in this case. He hasn't had that much occasion to project his views one way or another with respect to immigration," Legomsky said. "Lots of people were wondering about that, including me."

One of the lawyers challenging the Trump order acknowledged some disappointment but insisted that the legal team opposing the ban will keep trying to win Gorsuch over.

"We're all still reading the tea leaves on Justice Gorsuch," said Karen Tumlin of the National Immigration Law Center. "For me, obviously, it's notable that he joined this, but I do think it's far too early and I'm going to hold out judgment for how he's ultimately going to rule."