



Cato Institute Files Lawsuit Seeking Release of Report Used to Justify Trump's Anti-Muslim Travel Ban

The contents of the report may well prove the Trump Administration tried to deceive the courts.

Ilya Somin
July 15, 2022

In 2018, a closely divided 5-4 Supreme Court upheld Donald Trump's travel ban policy targeting residents of several Muslim-majority nations. In doing so, the Court relied in part on the notion that Trump's notorious campaign promise to institute a "Muslim ban" was not the real basis for the policy, or at least not the only one. Rather, the travel ban was also justified by a supposedly objective and thorough government study concluding that people from the nations covered by the ban may pose special security risks.

Unfortunately, the administration never released that study to the courts, essentially claiming that judges should trust the government's assurances, and defer to a study whose contents they were not allowed to see. The majority did just that, despite considerable evidence indicating that the study was little more than a flimsy smokescreen.

The Trump travel bans have since been revoked by Biden. But the study supposedly backing them still hasn't been released. Thus, we still don't definitively know whether and to what extent the Trump administration sought to deceive the courts about its contents and significance.

In a recently filed Freedom of Information Act (FOIA) lawsuit, the Cato Institute - a prominent libertarian think tank - seeks to force the Biden administration Department of Homeland security to release the Trump travel ban report, after DHS previously refused to release it voluntarily. Cato immigration policy specialist David Bier describes the lawsuit and its potential significance:

A new lawsuit by the Cato Institute could answer the question of whether the Supreme Court was wrong to accept assertions from former President Trump that his 2017 travel ban was based on security concerns, not animus against Muslims. Despite rescinding the ban, President Biden has still refused to disclose documents that Trump told the Court were the basis of his decision to ban immigrants from certain majority Muslim countries...

In a 5-4 decision, the Court's majority found that the ban was based not on Trump's open animus against Muslims, but instead on a Department of Homeland Security (DHS) report that supposedly detailed national security concerns. But the majority simply accepted this report as

legitimate without ever seeing it. Indeed, DHS has allowed no one outside the Executive branch to see it.

After President Biden rescinded the ban—which he called "discriminatory"—I filed a Freedom of Information Act (FOIA) request on behalf of the Cato Institute for the DHS report. DHS ignored it, so now Cato is suing. It will be the first time Biden's DHS will have to either justify keeping the report a secret from the public or else release it. Even if DHS refuses to release the report, the court can order it to do so.

Given that DHS's new leadership labeled the ban "cruel" and "harmful," DHS should have been forthcoming with the report that purportedly supported it. But not so far. DHS initially claimed not to be able to find the report. Cato appealed that determination and won, which should have forced DHS officials to look again. They chose not to, so now they will face Cato in court....

Lest anyone forget, it was Trump who instigated the Muslim ban. It was Trump who, in his words, "morphed" it into a ban on select majority-Muslim countries so he could blunt a constitutional challenge.

How did the Supreme Court ignore this back story and uphold the ban as constitutional? First, it adopted a laughably low bar, the so-called "rational basis test" under which courts would have accepted nearly any justification except perhaps for the one Trump stated initially: "Islam hates us." And where did Trump find a suitable replacement for his initial justification? From the DHS report that the department still refuses to disclose....

The ban was purportedly "based on [the President's] findings—following a worldwide, multi-agency review—that entry of the covered aliens would be detrimental to the national interest...."

But the Supreme Court never verified that the DHS report did any of this, and we have at least two very good reasons to doubt the claim's veracity. First, President Trump's proclamation identifying the banned countries lists the nine baseline criteria that DHS's report supposedly applied equally to every country. Under a neutral application of those criteria, however, *dozens* of other countries—including many non-Muslim countries—should have failed.

Second, although the justices never saw the actual report, they did know that it was just 17 pages. Did DHS analyze the vetting systems of more than 200 countries in 17 pages across nine security metrics as the president claimed? It certainly did not. Yet the majority justices said that they it would not question DHS's "thoroughness" because "a simple page count offers little insight into the actual substance of the final report"—the very substance that DHS has sought to hide and Cato's lawsuit now seeks to uncover....

Even if the release of the report proves that the Trump Administration lied about its nature to the courts, that wouldn't necessarily mean that *Trump v. Hawaii* would have come out differently had the justices known the whole truth. The ultradeferral "rational basis" standard under which the majority evaluated the policy might well have led them to rule in favor of the administration anyway. The Court's reasoning was based less on trust in Trump than on an indefensible double standard under which immigration restrictions get far weaker judicial scrutiny than that applied to virtually any other type of government policy.

Still, a rationale based on blatant lies about the contents of a report that doesn't actually do what the government claims it does might potentially have been ruled insufficient even under rational basis. Revelation of mendacity on this scale might even lead at least some conservative justices to impose tougher standards of scrutiny in the future, at least in cases where there is evidence that the government is blatantly lying about its true motives, using national security concerns as a thinly veiled pretext for religious bigotry or some other unconstitutional purpose. In such situations, traditional rationales for deference based on executive branch expertise do not apply, because specialized expertise isn't the real reason for the policy.

And if the administration lawyers who litigated the case knew about the true nature of the report and deliberately misrepresented it in court, they might be subject to sanctions. Under the Federal Rules of Civil Procedure, "fraud" or "misrepresentation" by an "opposing party" can constitute grounds for granting the side that lost a case relief from the court's judgment (though I am not sure whether the losing parties to the travel ban litigation can get any relief at this point, given that the policy has been lifted).

Even if proof of the administration's mendacity would not lead to a different outcome in court, it is at least something the public should know about. I am no FOIA expert, and therefore cannot say whether Cato is likely to win the lawsuit. But DHS should release the travel ban report regardless. If the report includes classified national security information, they can redact that part. But, given its apparently short and perfunctory nature, it's highly unlikely that all or most of the report falls into that category, and neither the Trump nor Biden administration have ever claimed that it does.

NOTE: I am a Cato Institute adjunct scholar (an unpaid external affiliation).

UPDATE: Skeptics may wonder why the Biden DHS is resisting release of the report, if the contents are likely to prove embarrassing to Trump. There is no way to know for sure. But the most obvious possible reason is they do not want to set a precedent for releasing potentially awkward or embarrassing information from Biden's own administration. The Biden people may believe that risk outweighs any short-term political advantage that might be gained here. But if that's their concern, there is an obvious conflict here between the administration's interests and the public interest.

*Ilya Somin is a professor of law at George Mason University. He is the author of *Free to Move: Foot Voting, Migration and Political Freedom*, *Democracy and Political Ignorance: Why Smaller Government Is Smarter*, and *The Grasping Hand: Kelo v. City of New London and the Limits of Eminent Domain*, and coauthor of *A Conspiracy against Obamacare: The Volokh Conspiracy and the Health Care Case*.*