



Thoughts on the Travel Ban Oral Argument

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Early analyses of today's Supreme Court oral argument in the travel ban case suggest that the justices are likely to uphold the ban against both constitutional and statutory challenges (e.g. - here and here). This may indeed turn out to be the case. But the statements of Justice Anthony Kennedy - a key swing voter - suggest that things are far more uncertain than that. Based on their questions - the four most conservative justices (Alito, Roberts, Thomas, and Gorsuch) seem likely to side with the administration. Thomas, of course, continued his practice of not speaking during oral argument, but he signaled his support for the legality of the travel ban in his dissent to the Court's partial upholding of the injunction against Travel Ban 2.0, the predecessor to the current version. The four liberal justices seemed to lean against the ban, particularly Ruth Bader Ginsburg and Sonia Sotomayor. If these alignments hold up, Kennedy's vote could well be decisive.

As always, oral argument is only an imperfect indicator of the Court's intentions. The justices could end up focusing on issues that got little or no attention in the argument, and some could even change their minds between now and when a decision is made. But if the oral argument is any indication, this is likely to be a close case.

A crucial question in the case is whether President Donald Trump's repeated advocacy of a "Muslim ban" during the 2016 campaign and numerous statements equating it with the "territorial" exclusion policy he ultimately adopted in his various travel ban orders render the policy a case of unconstitutional religious discrimination. While questioning the administration's lawyer, Solicitor General Noel Francisco, Justice Kennedy raised a scenario that should give defenders of the travel ban some pause:

Suppose you have a local mayor and, as a candidate, he makes vituperative hate -- hateful statements, he's elected, and on day two, he takes acts that are consistent with those hateful statements. That's -- whatever he said in the campaign is irrelevant?

This is notable because, of course, Trump did make such "hateful statements" throughout the 2016 campaign, and also indicated that his "territorial" policy of focusing on Muslim-majority nations instead of individual Muslims was intended to implement those statements, not break with them. And, like the mayor in Justice Kennedy's hypothetical, Trump issued his first travel ban order within just a few days of taking office. The latest version, Travel Ban 3.0, is clearly an outgrowth of its predecessors and actuated by similar motives. That is why the government is

unlikely to prevail if the Court concludes - as it should - that Trump's campaign statements are indeed relevant.

The administration and its defenders have consistently claimed they must be excluded from consideration, and Francisco reiterated that position at the oral argument. He also contended that Trump's campaign statements don't really indicate the true purpose of the travel ban, because the ban was based on national security considerations developed by agency officials, and because Trump has mitigated his earlier anti-Muslim statements by making various general statements praising Islam and commemorating Muslim holidays.

If Trump's campaign statements are fair game, these other points are unlikely to save the travel ban. Generalized praise for Islam does not vitiate Trump's far more specific statements linking the "territorial" travel ban policy to his "Muslim ban" proposal. In determining whether a seemingly neutral policy is actually motivated by unconstitutional discrimination, Supreme Court precedent requires judges to make "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," including "[t]he historical background of the decision" and "[t]he specific sequence of events leading up to the challenged decision." The "Muslim ban" statements are part of that "specific sequence of events," whereas later, more general statements about Islam are not. Moreover, as Neal Katyal, counsel for the plaintiffs pointed out in the oral argument, Trump, since taking office, has continued to Tweet a variety of Islamophobic material. And he has never apologized for or retracted his earlier bigoted comments. So even if later statements not directly related to the travel ban policy are relevant, they do not vindicate Trump.

The national security rationales for the travel ban concocted by administration staff also don't do much to allay suspicion, because those rationales are extremely weak. Travel Ban 3.0 does not even consistently apply the information-sharing criteria that are supposedly the main reason for the latest version of the policy.

Francisco also had difficulty with a similar hypothetical raised by Justice Elena Kagan, who asked whether "a President gets elected who is a vehement anti-Semite and says all kinds of denigrating comments about Jews and provokes a lot of resentment and hatred" could issue a travel ban order barring entrants from Israel, if he solicited the same sort of agency recommendations as Trump got for Travel Ban 3.0, and produced a national security rationale for the Israel travel ban (perhaps to pressure Israel to make concessions to the US on some important national security issue). Francisco actually seemed to concede that, in such a "difficult hypothetical," challengers would have a legitimate claim under the Free Exercise Clause of the First Amendment. Obviously, if the campaign statements of Kagan's hypothetical anti-Semitic president can legitimately be considered by courts, the same goes for Trump's anti-Muslim statements.

Later in the oral argument, Kennedy made some statements that seemed to lean towards the government on the statutory issue, of whether the travel ban violates Congress' prohibition on nationality discrimination in issuing immigrant visas. He suggested that Travel Ban 3.0 is not truly perpetual, because it is supposed to be reevaluated every 180 days. It is not clear how significant Kennedy's statement is, given that even a temporary travel ban might still violate the

nationality discrimination provision, if it in fact discriminates on the basis of nationality, as this one explicitly does, by barring nearly all entry by citizens of six Muslim-majority nations (recently reduced to five after Chad was dropped). Moreover, the 180 day reevaluation does not mean that the travel ban will actually end after the expiration of that period. As Katyal pointed out, all that happens after 180 days is that the government will prepare a report on the policy. The travel ban's restrictions on entry continue until the president decides otherwise. Most importantly, this issue has little bearing on the religious discrimination issue. A time limit cannot save the travel ban from invalidation if it otherwise violates the First Amendment.

Most of the other questions raised by the justices canvassed arguments that have already been extensively discussed in the briefs and the ongoing public debate over the case. For example, Chief Justice John Roberts asked whether Trump's anti-Muslim statements can also be used to invalidate such actions as launching air strikes against Muslim terrorists. I addressed such arguments here. Alito raised the point that the travel ban does not even come close to excluding all the Muslims in the world, but only covers a few countries. As Neal Katyal noted in response, that ignores the reality that the vast majority of those excluded are Muslim, and they seem to have been targeted for precisely that reason, not because of any genuine national security rationale. Several justices also discussed the potential significance of claims that it would have been legally permissible for a different president to adopt the same policy, if only he had not made the same types of anti-Muslim statements as Trump (I discussed this issue in detail here).

Stephen Breyer questioned both sides' lawyers on whether the travel ban's provisions for waivers in hardship cases are meaningful, or mere "window dressing." He did not seem very satisfied with Francisco's answers. As Katyal noted, the administration has denied waivers even in such extreme cases as that of a "10-year-old with cerebral palsy who wants to come to the United States to save her life and she can't move or talk." State Department data suggests that travel ban waivers are extraordinarily rare. It is not clear exactly significance this issue has to Breyer's thinking about the case. But perhaps the availability of wide-ranging waivers might have led him to conclude that the policy does not qualify as categorical exclusion based on nationality. If so, he did not seem to find Francisco's answers very reassuring.

At this point, I honestly think the case could easily go either way. Justice Kennedy is likely to be a key swing voter, and I find it extremely difficult to predict what he will do in close constitutional cases like this one - so much so that I have sworn off doing so after he did the exact opposite of what I expected in the *Fisher II* affirmative action case. All that can be safely said is that much may hinge on his decision.

UPDATE: Adam Liptak and Michael Shear of the *New York Times* interpret Kennedy as leaning more toward the administration than I do, while Josh Gerstein and Ted Hesson of Politico suggest he is more on the fence. Ilya Shapiro of the Cato Institute thinks Chief Justice Roberts might find some way to get rid of the case on "technical" grounds that obviate the need to address the merits. I am skeptical that this is likely. But we shall see.

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