



Evidence Indicates there is no "Extensive" Analysis Backing Trump's Travel Ban

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During last month's Supreme Court oral argument on the the legal challenges to President Donald Trump's travel ban policy, Solicitor General Noel Francisco assured the justices that the president's numerous statements calling for a "Muslim ban" and equating that with his later "territorial" policy of targeting residents Muslim-majority nations, had no connection to the travel ban. Instead, Francisco claimed that the policy was actually based on an "extensive worldwide process" analyzing of the security risks posed by entrants from all of the world's 200 nations, which in turn resulted in a "neutral baseline" of security criteria that were even applied to "every nation in the world." Meanwhile, the administration refuses to release this supposed analysis to the courts (despite the availability of in camera proceedings under which classified information could be released to the judges but withheld form the public), and Francisco claims that judges must accord the president "a very strong presumption that what is set out there is the truth."

But, as David Bier of the Cato Institute explains in a recent post, the evidence suggests that no such "extensive" analysis or "neutral baseline" actually exists. All that actually exists is a perfunctory 17 page document with little or no analysis and evidence:

In justifying President Trump's travel ban to the Supreme Court last month, his attorneys repeatedly referenced a confidential report. They told the Court that this "extensive" analysis of "every country in the world" resulted from a "worldwide multi-agency review" and proves that the president did not act with religious animus....

In response to a [Freedom of Information Act] lawsuit by the Brennan Center for Justice in New York, the government disclosed that its final secret report filed in September was just 16 pages with a one-page attachment. Yet the president claims it reviewed "more than 200 countries," meaning it covered each country in less than a tenth of a page....

We now know that this 60-word average is actually too generous for most countries because the government has said that the report included the information on the eight targeted countries and

the explanation for the ban contained in the president's 12-page travel ban order. If it dedicated the other five pages solely to the non-travel ban countries, this would leave just 16 words for each...

[T]he length of the report by itself gives the justices a very good reason to conclude that the government's report did not actually assess every country in the world in 16 words or less....

Maybe the president could rebut this impression, but any presumption that he had in his favor at the outset should be forfeited based on what we know now. The best evidence indicates that his "extensive" review simply never happened.

Perhaps Trump has some other super-secret, totally terrific study that justifies the travel ban more fully. But, at this point, there is no evidence that any such thing exists. If it did, the administration would have a strong incentive to reveal it, even if only in camera, or in some redacted form, to protect classified information. It also did not indicate the existence of any such more extensive study in its response to the Brennan Center FOIA lawsuit. If such a thing did exist, the government presumably would have had to reveal it in the response, even if it also claimed "presidential communication privilege" as a justification for withholding it (as it did in the case of the September report).

As Bier points out, the short and perfunctory nature of the final report that supposedly justifies the travel ban reinforces other evidence indicating that the security rationales offered by the administration are not the true reason for the policy. Far from consistently applying "neutral criteria" to all the nations in the world, as Francisco claims, the administration in fact applied its standards in a highly inconsistent manner. The security justification for the travel ban is also weakened by the fact that, in the forty year period for which we have data, no one has ever been killed in a terrorist attack on US soil by an entrant from any of the nations covered by travel ban. Had Travel Ban 3.0 been in place since 9/11, it would not have prevented the entry of a single terrorist (even one who did not commit any attacks on US soil). The risks posed by entrants from the nations covered by the travel ban are actually lower than those posed by native-born Americans.

When Noel Francisco told the Supreme Court that the the travel ban was based on a "extensive" worldwide analysis of security risks that came up with "neutral criteria" on which the travel ban was based, it is likely that he was either misinformed or attempting to deceive the justices. Either way the Court should not give any deference to such assurances from administration lawyers.

The paucity of evidence backing the travel ban strengthens the constitutional case against it. In cases where there is evidence that a seemingly neutral policy was actually motivated by unconstitutional discrimination on the basis of race, ethnicity, or (in this case) religion, the government must prove that it had a legitimate basis for the policy that would have led it to adopt it anyway. The administration claims that the "extensive" worldwide study and the "neutral" criteria developed as a result of it qualify as such a rationale.

If the supposedly extensive analysis doesn't actually exist, and the "neutral" criteria are not being consistently applied, that makes it even more likely that Trump's true motive in adopting the

travel ban was to make good on his "Muslim ban" campaign promise. It also suggests he was telling the truth when he repeatedly said that the "territorial" policy embodied in the travel ban is just an extension of the Muslim ban. The nations included in the ban were chosen because they are overwhelmingly Muslim, not because entrants from those countries pose any special security risk. For reasons I summarized here, the inclusion of North Korea and a few Venezuelans in the ban does not alter this conclusion, since their addition to the list bars almost no entrants who might otherwise have come in. The fact that the policy does not cover all the Muslims in the world also should not be decisive.

The administration's defenders argue that the government deserves special deference in immigration and national security cases. In an amicus brief I coauthored on behalf of several fellow constitutional law scholars, we argue that such special deference is unwarranted because the First Amendment's restrictions on religious discrimination constrain federal power over immigration no less than all other exercises of federal authority. A long history of cruel, abusive, and often bigoted policies also shows that it is dangerous to give special deference in immigration and national security cases. But even if some degree of special deference is generally appropriate, it should not apply in a case where there is strong evidence that the government is not acting in good faith. The main justification for deference is the executive's special expertise on national security matters. But that expertise is irrelevant in a case where national security is not the true motive for the policy in question.

The travel ban litigation is not the first time an administration has tried to mislead the Supreme Court about the true motives for a discriminatory policy defended on national security grounds. In the now-notorious 1944 *Korematsu* case, the Justice Department claimed that Franklin D. Roosevelt's policy of forcibly interning over 100,000 Japanese-Americans was motivated by security considerations, rather than racism, and in the process withheld evidence indicating that the military did not consider the Japanese-Americans to be a genuine threat. The Justice Department belatedly admitted this deception in 2011. Ironically, the then-acting Solicitor General who issued the 2011 apology, was Neal Katyal, who currently represents the state of Hawaii in the case against the travel ban.

Perhaps a future administration will someday apologize for the government's misconduct in the travel ban case. In the meantime, we must hope that the Supreme Court will not let the government get away with it this time around.

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