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Ninth Circuit upholds injunction against Trump's revised travel ban

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Earlier today, a panel of the US Court of Appeals for the Ninth Circuit unanimously upheld the main part of the trial court injunction against President Trump's revised travel ban executive order, forbidding entry into the United States by nationals of six Muslim-majority nations for a period of 90 days. The text of the opinion is available [here](#).

Unlike the earlier [Fourth Circuit](#) and [trial court](#) rulings against the ban, which invalidated it on the grounds that Trump engaged in unconstitutional religious discrimination against Muslims, this ruling concludes that the order is invalid for the simple reason that Trump lacked statutory authorization from Congress, for his actions:

We conclude that the President, in issuing the Executive Order, exceeded the scope of the authority delegated to him by Congress. In suspending the entry of more than 180 million nationals from six countries, suspending the entry of all refugees, and reducing the cap on the admission of refugees from 110,000 to 50,000 for the 2017 fiscal year, the President did not meet the essential precondition to exercising his delegated authority: The President must make a sufficient finding that the entry of these classes of people would be “detrimental to the interests of the United States.”

Further, the Order runs afoul of other provisions of the INA that prohibit nationality-based discrimination and require the President to follow a specific process when setting the annual cap on the admission of refugees.

The ruling upholds most of the district court injunction against the order, but lifts the part which seems to block the administration from conducting an internal review of vetting procedures for visa applicants and refugees.

Parts of the court's statutory analysis on nationality discrimination follow reasoning first laid out – I believe – by David Bier of the Cato Institute, in assessing Trump's initial travel ban.

Unlike the Fourth Circuit decision, this statutory ruling does not turn on President Trump's discriminatory motivations, and cannot be attacked on the basis that it would allow a similar executive order to be instituted by a different president. In my view, this critique of the religious discrimination rulings makes little sense, because any pretextual discrimination case necessarily leaves open the possibility that the challenged policy might be acceptable if undertaken for nondiscriminatory reasons. Regardless, the statutory ruling is not open to this line of attack.

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What Trump's revised travel ban misses about terrorist attacks in the U.S.

The nations affected by President Trump's executive action on immigration are not actually countries where terrorists who have carried out fatal attacks the United States came from. (Daron Taylor/The Washington Post)

It likewise avoids the debate over whether Trump's campaign statements and Tweets are legitimate sources of evidence (in my view they are, for reasons outlined here and here). The statements and Tweets are significant only as evidence of motive, and are not relevant to an argument for which motives are largely irrelevant.

Like the earlier rulings against the revised travel ban, this one undercuts many commentators' initial predictions that the new order would not be vulnerable to legal challenge in the way that the original was. Numerous federal judges have now ruled that the new order is unconstitutional, lacks statutory authorization, or both.

The administration's only chance to reinstate the travel ban is now to get the Supreme Court to overrule the Fourth and Ninth Circuits on both statutory and constitutional grounds. Sadly, as this litigation goes on, lower court judges have increasingly split along partisan and ideological lines, with Democrat appointees voting against the ban, and most Republican ones for it. The president might do better in the Supreme Court if that pattern holds, as that court has a 5-4 Republican majority. But it is possible that swing voter Anthony Kennedy and perhaps some other GOP justices will break partisan ranks. Trump's recent tweets about the case may increase the likelihood of such an outcome. I also cannot entirely rule out the possibility that a

Democratic justice such as Stephen Breyer might vote to uphold, based on judicial deference to the executive (though I don't consider that a likely scenario).

Unlike many other commentators, I am not completely certain that the Supreme Court will even decide to take the case. That is certainly the most likely outcome. But if a majority of justices agree with the lower courts, they may simply choose to deny the Trump administration's petition for certiorari and let the lower court rulings stand. Because the Fourth and Ninth Circuits reached the same conclusion, there is no split between appellate courts and no need for the Supreme Court to intervene simply to ensure uniformity.

Be that as it may, this litigation has not gone well for Trump so far. Hopefully that pattern will continue.