



What Trump does with expiring travel ban will shape Supreme Court fight

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September 23, 2017

What President Trump chooses to do as his travel ban expires Sunday will determine the contours of the battle scheduled to arrive at the Supreme Court next month.

Ninety days will have elapsed since the Supreme Court in June allowed the entry ban to proceed in a limited fashion. Other expiration dates and deadlines pertaining to refugees affected by the order loom at the end of October.

Speculation abounds about how Trump may respond to the looming entry ban deadline, with the Wall Street Journal saying Friday that the Trump administration is plotting "targeted restrictions affecting a slightly larger number of countries" than the second order. Trump's second order implementing the travel ban took aim at foreign nationals arriving from six Muslim-majority countries: Iran, Libya, Somalia, Sudan, Syria, and Yemen. The White House did not confirm the Journal's report, but told the *Washington Examiner* in an email, "The Trump administration will ensure we only admit those who can be properly vetted and will not pose a threat to national security or public safety."

Legal experts think advocates on both sides of the issue may want to press on even if the high court would rather punt on making any decision.

Josh Blackman, a South Texas College of Law professor, said he thinks it's unlikely the Trump administration or its opponents will want to scrap the dispute.

"I doubt the government will want to get rid of the case. The only court that has been favorable to the Trump administration has been the Supreme Court," Blackman said in an email. "Even if the government tries to argue the case is moot, I suspect the plaintiffs will argue that under the 'voluntary cessation' doctrine, the government may re-offend, so the justices should resolve it." The voluntary cessation doctrine holds that a controversy cannot automatically become moot by the termination of the allegedly unlawful conduct.

Blackman said he expects the Supreme Court to rule on the merits of the case, putting him at odds with other court watchers.

Donald Verrilli, former Obama administration solicitor general, said at Georgetown University's preview of the coming Supreme Court term this week that he thinks there's a "high probability" the court is unlikely to hear the existing case on the merits because of the "very powerful incentive" created by the "competing pressure" from both sides' arguments.

Martin S. Lederman, Georgetown University Law professor, said he thinks the high court's most likely reaction to the travel ban controversy is no action at all.

"This may turn out to be a big dud in terms of what happens in the court," Lederman said at the Georgetown preview. "I think that by far the most likely resolution here is no resolution at all. It's either that the court will view the cases as moot, or remands the case for further consideration of very different facts and circumstances on the ground come October."

If the Supreme Court decides not to rule on the merits, all eyes will be watching to see if the Supreme Court provides any direction to lower courts. New cases could be brought, depending on the various actions the Trump administration may take.

Helgi C. Walker, a partner in global law firm Gibson, Dunn, and Crutcher's D.C. office, said this week she "wouldn't count also Justices [Clarence] Thomas, [Samuel] Alito and [Neil] Gorsuch out of this" because they dissented from the high court's June order about the travel ban on the grounds that the government made a strong showing of likelihood of success.

"My old boss, Justice Thomas, sometimes says cases aren't moot even if the government tells him that they are because he sometimes feels we should just go ahead and decide these questions," Walker said this week at Georgetown. "Even if the court does avoid the merits issue, I can imagine some really interesting writings from that core block of three defending the president's Article II powers."

Such writings from the high court's ideological right would provide lower courts with direction about how to rule on the existing case or on future litigation involving the ban and potential follow-up executive orders.

Kannon Shanmugam, who heads Williams & Connolly's Supreme Court and Appellate litigation practice, said this week he thinks the Supreme Court's left-leaning justices also would try to shape subsequent legal fights on the travel ban by writing about how the lower court's should look to resolve such disputes.

"I have to think that if the president promulgates a new policy, there's going to be a pretty strong imperative for supplemental briefing on the impact of that new policy on the pending litigation and assuming that the court does not reach the merits in that instance where the policy [that] was under review has effectively expired and therefore been rendered obsolete, I think there are very interesting questions about ... whether the court would remand or whether the court would effectively require new litigation," Shanmugam said.

Unlike many Supreme Court cases in which tension between the left- and right-leaning wings effectively makes Justice Anthony Kennedy the deciding vote, legal experts expect that Chief Justice John Roberts' vote could be most crucial.

Irv Gornstein, Georgetown Law's Supreme Court Institute executive director, said he thinks Roberts will try to compromise with the warring factions by nuking the lower courts' opinions on the travel ban as governing precedent for future disputes.

"Once you see Justice Thomas or Gorsuch dropping off [the potential compromise], then there will be a temptation for some on the Left to also drop off and write, but I do think the chief, the goal would be to get nine votes for a straight vacate [of the lower courts' rulings]," Gornstein said at Georgetown this week.

Ilya Shapiro, a senior fellow at the Cato Institute who has filed briefs with the high court against the ban, similarly thinks Roberts has no appetite for resolving the travel ban case.

"I can't imagine John Roberts wants to rule any which way on the merits either re-evaluating the national security prerogative of the president or being seen as supporting a Trumpian agenda," Shapiro said at the libertarian think tank's preview this week of the high court's coming term.

Evidence that the high court could be looking to avoid any decision may be found in its scheduling of oral arguments when it starts next month.

"The court's decision not to schedule the entry ban case for the first week of October might be further evidence of what several commentators identified in the Supreme Court's June 26 decision and order — an inclination to never decide the case on its merits," wrote Leah Litman, a University of California, Irvine law professor and former Kennedy law clerk, in August. "While the court's scheduling of the entry ban case may not provide it with the time to decide the case, it does put the court in a position to order additional briefing on whether the case is moot before the court even hears argument. That may be an attractive approach to the extent the court doesn't even want to discuss the merits of the case at oral argument, in addition to not wanting to write about the merits of the case in an opinion."

Litman told the *Washington Examiner* via email she thinks the entry ban will become moot on Sunday, but a challenge covering the refugee ban will remain in effect. The 120-day suspension of the refugee program included in Trump's order is set to expire Oct. 24, two weeks after the date scheduled for oral arguments on the travel ban.

If the Supreme Court renders the ongoing travel ban dispute moot, some conservatives in the legal community will chalk that up as a victory for Trump, including Carrie Severino, Judicial Crisis Network's chief counsel and policy director.

"I don't think there's a lot of downside for [Trump administration] for it to be moot," Severino said Friday. "Practically speaking, when we had the order in June that allowed the order to go into effect, I think the Trump administration won that day because ... what they were really asking for is, 'Let us carry on this analysis of the safety of these different countries, let us carry out the order.' They will have gotten the opportunity to do that."

Severino noted that it is possible opponents of Trump's travel ban could claim that they "suffered some kind of ongoing damage" from the mooted travel ban, perhaps by being unable to attend an event because of the order.

While Severino did not specify who may bring such a challenge, potential candidates can be found in the briefs Trump's opponents have filed with the Supreme Court. Hawaii's Sept. 11 merits brief to the high court noted that the "University [of Hawaii] is slated to host a speaker from Syria this September."

Two speakers, Abdalaziz Alhamza and Walaa Altahhan, who are journalists with "Raqqa is Being Slaughtered Silently," are scheduled to speak at the university on Thursday to talk about "Resistance against Assad, ISIL, and Imperialism in Syria."

The scheduled talk arrives a few days after the travel ban's entry ban expires. Whether any formal action Trump takes would change the legality of their presence in Hawaii remains to be

seen, but at least one other avenue exists for Trump to undermine his administration's fight in court: Twitter.

How or whether Trump might choose to tweet about the ban could drastically determine the outcome of the dispute. Neal Katyal, a former Obama administration solicitor general who filed Hawaii's merits brief, recognizes that and may have been trying to bait Trump into tweeting about the pending litigation to help Hawaii's cause earlier this week.

"I do refer to the president as my co-counsel often times because I do think that give the guy a Twitter account, and he'll often tell the truth, and the truth is one that is constitutionally damning," Katyal said with cameras rolling at the Cato Institute's Supreme Court preview.