US appeals court to rule on restoration of anti-Muslim travel ban

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The Trump administration argued Tuesday for the restoration of its temporary ban on visitors from seven Muslim-majority countries and refugees from any country in an hour-long court hearing conducted by telephone.

A three-judge panel of the Ninth Circuit Court of Appeals, which is based in San Francisco, heard the government appeal to overturn the temporary restraining order issued by a federal judge in Seattle, who acted on a lawsuit brought by the states of Washington and Minnesota.

The government's legal representative, August Flentje, special counsel to the assistant attorney general, faced a skeptical reaction from the panel, which peppered him with questions and did not allow him to develop a coherent argument, although it was unclear whether he could have done so even without interruption.

None of the three judges—William Canby, appointed by Jimmy Carter in 1980; Richard Clifton, appointed by George W. Bush in 2001, and Michelle Friedland, appointed by Barack Obama in 2013—seemed sympathetic to the White House claims that the states did not have legal standing to challenge the executive order.

An analogous case was brought by a group of Republican state attorneys-general in 2015, challenging an Obama executive order on immigration enforcement as unduly lenient. That case was heard by a federal district judge in Texas and the Fifth Circuit Court of Appeals. The courts ruled in favor of the plaintiffs, both on standing and on the merits of their suit.

One of the first questions, from Judge Friedland, was whether the Trump administration had any evidence of an imminent threat emanating from any of the seven countries—Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen. No traveler from any of those countries has been involved in a terrorist attack inside the United States since at least 1975.

As with most of the public performances of the Trump administration, factual accuracy and logical coherence were replaced by authoritarian bluster and fear-mongering at the court hearing. Flentje sought to base his argument for the travel ban on the claim that the president's authority on national security matters was virtually absolute.

When asked by Judge Friedland whether the executive order was "unreviewable," he hesitated, then said, "Yes." The court was entitled to consider only whether the executive order was properly drafted and not facially invalid. The judges were obliged to confine their scrutiny to the "four corners" of the paper signed by Trump on January 27, he argued.

This line of argumentation ultimately collapsed on itself, since Flentje retreated from the claim that Trump had the authority to strip legal resident aliens, holders of green cards, of their constitutional rights. After customs agents targeted green card holders in the first weekend of enforcement of the executive order, the White House revised its instructions without changing the text of the order, merely issuing an "interpretation" of the order by White House counsel Don McGahn.

Judge Friedland noted the contradiction between the initial claims that the courts had to concede Trump's unchallengeable authority to make national security determinations, and the White House counsel's intervention to attempt to salvage the executive order. Could Trump's national security authority be delegated to a White House lawyer, she asked?

Speaking for the states of Washington and Minnesota, Washington solicitor general Noah Purcell initially avoided the democratic and constitutional issues at stake, instead diverting the proceeding into a discussion of the exact legal steps to be followed, including whether the Appeals Court panel would send the case back to the district court for further review or issue its own opinion that could immediately be appealed to the Supreme Court.

When he finally turned to the main issues, however, the strength of the case against the executive order became plain. He noted that the Trump administration had "no clear factual claim or evidentiary claims" as to the irreparable harm that would result from the suspension of the executive order, adding, "It was the executive order itself that caused irreparable harm."

He discussed several legal issues relating to proving that the travel ban violates the First Amendment clause forbidding the establishment of religion. Dismissing the argument that since the ban targeted only seven of the 43 Muslim-majority countries it wasn't a Muslim ban, he explained that this was not the legal standard: "You don't have to prove it harms every Muslim—you just need to show the action was motivated in part by animus." Even an action within the legal powers of the president could be illegal and unconstitutional if motivated by religious bigotry.

The discriminatory intent could be demonstrated from Trump's own statements, both during the election campaign and in preparing the order, Purcell argued. Trump called for a Muslim ban during the campaign, and after his election asked one of his advisers, former New York Mayor Rudy Giuliani, to prepare a version of the Muslim ban that would pass legal muster. Trump also discussed his desire to favor Christian refugees over Muslims in an interview with a Christian broadcaster.

It was rare that so much evidence of intent was available even before any discovery had been conducted, he said—hinting at the possibility that Trump administration officials, and even potentially Trump himself, could be called to testify under oath if the case goes forward.

This led to a heated exchange, as Flentje declared, "It's extraordinary for the courts to enjoin a president's national security decision-making based on some newspaper articles." Judge Clifton then asked whether the government attorney was claiming that the reports of Trump's anti-Muslim comments were false. Flentje backed off, conceding that Trump had made the statements in question, but arguing that no judicial notice should be taken.

All three judges pressed Flentje on whether the president could simply issue a ban on Muslims entering the country, and if he did, would anyone, under the government's theory, have legal standing to challenge it. Under repeated prodding, Flentje conceded that such an order would raise significant First Amendment and establishment of religion questions, but he maintained that only individuals directly harmed by the order, and not state governments, had legal standing to challenge such an order in court.

So one-sided were the exchanges that at one point Flentje remarked, in an understatement, "I'm not sure I'm convincing the court." He later offered a compromise ruling, suggesting that the judges could reinstate the travel ban at least for refugees and others who had never previously entered the United States, while allowing it to lapse for green card holders and others with greater ties to the country.

In a media advisory before the hearing, a spokesman said that "a ruling was not expected to come down today, but probably this week." The Trump White House has already announced that it intends to appeal any unfavorable result to the Supreme Court, which currently has only eight members, making a 4-4 tie vote very possible. That result would leave the Ninth Circuit decision intact.

The Trump administration's open hostility to the judicial system's intervention in the travel ban was expressed not only in Trump's speech to Special Forces soldiers in Florida , but also in remarks by retired General John F. Kelly, Trump's appointee as secretary of the Department of Homeland Security, the agency that directly enforced the ban.

Testifying before the House Homeland Security Committee Tuesday, Kelly admitted that no one from the seven countries targeted for the travel ban has committed a terrorist attack inside the United States. But he said that it was impossible to rule it out, since US agencies wouldn't know of such an attack until the "boom," as he put it. This is an argument, of course, for prohibiting all visitors to the United States from all countries—and for rounding up countless Americans as well.

Kelly made a disparaging reference to the federal judges, both the district court judge in Seattle and the two Appeals Court judges who denied the initial move for an emergency stay of the Seattle ruling, saying they could indulge in "academic" detachment from the danger of terrorism because "in their courtrooms, they're protected by people like me."