

# US Appeals Court bars enforcement of Trump travel ban

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A three-judge Appeals Court panel issued a unanimous ruling Thursday afternoon rejecting the Trump administration's claim of "unreviewable" presidential power and sustaining a judicial order that bars enforcement of Trump's temporary ban on travel from seven Muslim-majority countries, as well as his temporary ban on the entry of refugees from any country.

The 3-0 ruling was signed by 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. They denied a Trump administration request for an immediate stay of the temporary restraining order issued February 3 by Federal District Judge James Robart in Seattle, Washington.

The panel declared: "[T]he Government has not shown a likelihood of success on the merits of its appeal, nor has it shown that failure to enter a stay would cause irreparable injury, and we therefore deny its emergency motion for a stay."

The 29-page decision subjects the Trump administration's legal position and factual claims to withering criticism. The judges declare that the government presented no evidence that halting the travel ban would endanger national security or American lives. By contrast, the ruling held that the states of Washington and Minnesota, which brought suit against the ban, demonstrated widespread and irreparable damage on their citizens and institutions if the travel ban were reinstated.

The appeals court decision by no means ends the conflict over the travel ban. From a legal standpoint, it was not a final determination on the merits of the case, but merely continued the suspension of the travel ban while the lawsuit is more fully adjudicated.

President Trump responded to the ruling within minutes, tweeting, "SEE YOU IN COURT, THE SECURITY OF OUR NATION IS AT STAKE!" The Department of Justice, under newly sworn-in Attorney General Jeff Sessions, an adamant opponent of immigrants, whether documented or undocumented, said in a statement that it was "reviewing the decision and considering its options."

One possible step would be a Trump administration appeal of Thursday's decision to the US Supreme Court. However, the court has lacked a ninth justice for a year, since the death of Justice Antonin Scalia, and has had frequent 4-4 splits during

that time. An evenly divided court would leave the denial of a stay by the Ninth Circuit intact.

Some right-wing legal commentators urged Trump to withdraw the executive order, which suffers from numerous technical defects pointed out in the court decision, and reissue it after consultation with congressional leaders and the newly installed members of the Trump cabinet, including Sessions. This step could delay Supreme Court review until after the confirmation of Trump's nominee to fill the high court vacancy, Neil Gorsuch, in the expectation that he would provide a fifth and deciding vote for the government.

A third possibility, for which Trump seemed to lay the basis in a series of increasingly vituperative statements during the week, would be to directly defy the court ruling, escalating the conflict within the US political system to the level of a constitutional crisis. Certainly, Trump's declaration that "If something happens blame him [Judge Robart] and the court system," should be taken as a warning. The White House is prepared to use any terrorist attack that occurs as a pretext to breach constitutional norms and establish an authoritarian regime backed by the military and police.

The US ruling elite is deeply divided over what course of action to take. Speaking for those sections of the military-intelligence apparatus hostile to Trump, former Director of National Intelligence James Clapper appeared on CNN only hours before the court ruling, declaring that he knew of no terrorist threat that could justify the travel ban, and warning that the ban had damaged relationships with US allies in the Middle East and would serve as a recruiting tool for Muslim extremist groups.

Even Trump's own nominee to the Supreme Court, Gorsuch, voiced opposition to Trump's tweets lambasting the "so-called judge" and suggesting the appeals court hearing Tuesday was "disgraceful." Gorsuch is himself an appeals court judge, on the Tenth Circuit, and he told a Democratic senator that such attacks on judges were "disheartening" and "demoralizing."

The intensity of the political conflict, within three weeks of Trump's inauguration, is reflected in the language of the Appeals Court decision, which systematically eviscerated the arguments made by the Trump administration in legal briefs and in the course of an hour-long oral argument Tuesday.

The three-judge panel found that the district court had the authority to rule on the Executive Order, rejecting the government's claim that the president has "unreviewable authority to suspend the admission of any class of aliens." The government was not merely claiming that the political branches should be shown deference by the judiciary on national security issues, they wrote: "Instead, the Government has taken the position that the President's decisions about immigration policy, particularly when motivated by national security concerns, are *unreviewable*, even if those actions potentially contravene constitutional rights and protections."

They added, in language that underscores the implications of Trump's actions and his administration's legal argument: "There is no precedent to support this claimed unreviewability, which runs contrary to the fundamental structure of our constitutional democracy."

The ruling cited a series of Supreme Court decisions striking down actions taken by the federal government and justified in the name of "national security." These include the 2008 *Boumediene* decision, in which the court found, over the objections of the Bush administration, that prisoners held in Guantanamo Bay had the right to seek a writ of *habeas corpus* and gain judicial review of their continued detention. The panel noted that at this stage in the legal proceeding, the burden was on the federal government to show that it was likely to succeed on the merits of its case and that it would suffer irreparable injury if the travel ban continued to be blocked. The government failed on both grounds, the three judges decided.

The ruling laid the most stress on the argument by the states of Washington and Minnesota that the travel ban was a gross violation of the constitutional requirement of due process, which applies not only to American citizens, but also to legal permanent residents, and to those without legal papers who are on American soil.

Even refugees seeking entry into the United States have rights under "procedures provided by federal statute," which could not be overridden by the president. The panel rejected the claim of the Trump administration "that most or all of the individuals affected by the Executive Order have no rights under the Due Process Clause."

The judges treated with some contempt the efforts by the Trump administration to rectify the obviously unconstitutional denial of rights to legal permanent residents. The inclusion of these green-card holders under the executive order was demanded by Trump's fascistic chief adviser, Stephen K. Bannon, who overrode objections from Department of Homeland Security officials. After a series of unfavorable court rulings, the White House sought to "reinterpret" the order on the fly, with a statement by Chief of Staff Reince Priebus and further directives to the DHS. Finally, White House counsel Donald F. McGahn issued "Authoritative Guidance" that the order did not apply to green-card holders.

The judges wrote: "At this point, however, we cannot rely

upon the Government's contention that the Executive Order no longer applies to lawful permanent residents. The Government has offered no authority establishing that the White House counsel is empowered to issue an amended order superseding the Executive Order signed by the President and now challenged by the States, and that proposition seems unlikely.

"Nor has the Government established that the White House counsel's interpretation of the Executive Order is binding on all executive branch officials responsible for enforcing the Executive Order. The White House counsel is not the President, and he is not known to be in the chain of command for any of the Executive Departments. Moreover, in light of the Government's shifting interpretations of the Executive Order, we cannot say that the current interpretation by White House counsel, even if authoritative and binding, will persist past the immediate stage of these proceedings."

The court ruling says that claims that the Trump executive order violates the establishment clause of the First Amendment because it was aimed at Muslims should be taken seriously, and it flatly rejects the White House claim that Trump's intentions can only be inferred from the text of the order—which makes no mention of Muslims—and not from his public statements.

The judges write: "It is well established that evidence of purpose beyond the face of the challenged law may be considered in evaluating Establishment and Equal Protection Clause claims... The States' claims raise serious allegations and present significant constitutional questions." But they decline to pronounce further on the issue, pending actual discussion of this issue in further proceedings.



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