

THE WALL STREET JOURNAL.

TRAVEL BAN HEADS TOWARD SUPREME COURT IN TRANSITION

Appeal of rulings blocking Donald Trump's revised executive order could reach the court as a conservative justice joins the bench

By Brent Kendall
March 16, 2017

WASHINGTON—President Donald Trump faces the prospect of mounting two quick appeals after judges blocked his revised executive order on immigration, a dispute that could arrive at the Supreme Court just as it gets a new conservative member whose vote could be crucial.

Judges in Hawaii and Maryland halted Mr. Trump's latest effort after finding he likely engaged in religious discrimination when he sought to bar U.S. entry for people from six Muslim-majority nations, a move the White House says could help fight terrorism.

Mr. Trump's revised travel restrictions made several concessions from his original Jan. 27 executive order in response to negative court rulings. That he lost anyway is increasing the friction between the White House and the courts, and it sets the stage for appellate proceedings that could have even higher stakes than during the initial round of litigation a month ago.

"We intend to appeal the flawed rulings," White House Press Secretary Sean Spicer said Thursday. "We expect action to be taken soon."

The Justice Department, which is defending the travel ban, could seek emergency stays of the Hawaii and Maryland rulings. Such a request in the Hawaii case would go to the Ninth U.S. Circuit Court of Appeals in San Francisco, a liberal-leaning court where a three-judge panel last month affirmed a nationwide halt of Mr. Trump's first travel ban.

An appeal by Maryland would go to the Fourth Circuit, based in Richmond, Va., which has also moved in a leftward direction in recent years after President Barack Obama appointed several judges there.

At the Ninth Circuit, a new three-judge panel has been designated to consider emergency motions this month, so the White House could get fresh eyes this time around. Those judges are Milan Smith, a President George W. Bush appointee, and two Obama appointees, Morgan Christen and John Owens.

Judges appointed by both Democrats and Republicans have ruled against Mr. Trump in travel-ban cases in the past few weeks. But five Republican-appointed judges on the Ninth Circuit late Wednesday signaled sympathy for the president's legal arguments, a sign the litigation could produce ideological divisions in future decisions.

Those judges published a dissent that objected to the Ninth Circuit's decision to leave the earlier three-judge ruling against Mr. Trump on the books.

“Whatever we, as individuals, may feel about the president or the executive order, the president’s decision was well within the powers of the presidency,” Judge Jay Bybee wrote for the dissenters.

If the Trump administration loses at the appeals-court level and seeks emergency Supreme Court intervention, it would need the votes of five justices for an order restoring the travel restrictions.

The high court has been split 4-4 between liberal and conservative justices since Justice Antonin Scalia died last year. While the court doesn’t always split ideologically, the White House’s prospects would be considerably better if a travel-ban appeal arrived after Mr. Trump’s high court nominee, Judge Neil Gorsuch, joins the bench.

Senate confirmation hearings for Judge Gorsuch, who currently sits on a Denver-based appeals court, begin Monday. If Republicans overcome Democratic opposition, it is possible he could be confirmed and join the Supreme Court as soon as April, meaning he could be a pivotal figure in the travel ban litigation.

“I think that’s almost a certainty,” said Robert Loeb, a Supreme Court and appellate litigator at the Orrick law firm.

As the travel-ban cases unfold, judges will likely continue grappling with Mr. Trump’s statements during the campaign that he favored a ban on Muslim entry into the U.S. The judges in both Hawaii and Maryland said those comments, combined with other remarks that he and his advisers have made since he took office, suggest his travel ban was motivated by an improper attempt to target Muslims. Mr. Trump said he signed the executive orders to better protect the public from terrorist threats.

No judge has issued a final ruling on the legality of Mr. Trump’s executive orders. Instead, they have been considering whether the orders should be blocked while the underlying litigation proceeds.

Mr. Trump continues to talk about the cases, and his comments could be a factor as the litigation moves forward. After the Hawaii ruling Wednesday evening, the president, speaking in Nashville, Tenn., expressed frustration that he had agreed to tone down his original ban after courts blocked it.

“But the lawyers all said, ‘Let’s tailor it.’ This is a watered-down version of the first one,” Mr. Trump said. “And let me tell you something, I think we ought to go back to the first one and go all the way, which is what I wanted to do in the first one,” he said.

Mr. Loeb, a former Justice Department lawyer, said such comments “are certainly unhelpful” as the department tries to defend Mr. Trump’s revised order, in part by distancing it from the first one.

The Ninth Circuit’s Judge Bybee, while writing a dissent Wednesday that could prove useful to the president in further legal proceedings, nevertheless took Mr. Trump to task for his unusually personal criticism of judges that have ruled against him.

Judge Bybee didn’t mention Mr. Trump by name, but said, “The personal attacks on the distinguished district judge and our colleagues were out of all bounds of civic and persuasive discourse – particularly when they came from the parties.”