THE | C. BOYDEN | GRAY | CENTER

How Should the U.S. Public Law System React to President Trump?

Richard J. Pierce, Jr.

CSAS Working Paper 18-12
"New Normals?" The Trump Administration, the Courts, and the Administrative State
December 7, 2018

Antonin Scalia Law School
C. BOYDEN GRAY CENTER FOR THE STUDY OF THE ADMINISTRATIVE STATE
George Mason University

How Should the U.S. Public Law System React to President Trump?

Richard J. Pierce, Jr.[1]

In this essay Professor Pierce uses six actions that President Trump has taken or threatened to take to illustrate the ways in which courts can preclude him from undermining core legal and cultural values while preserving his power and that of his successors to take all actions needed to execute effectively the powers conferred on the president in Article II of the constitution. He concludes that courts are capable of performing that difficult task through application of existing public law doctrines.

President Trump has many characteristics that are unique among modern Presidents. Some of those characteristics will test our system of public law. I am confident that the courts can respond to the challenges in ways that will leave us with a strong public law regime, but the task will not be easy.

The most important of President Trump's unique characteristics are his strong bias against members of some religious and ethnic groups and his powerful antipathy toward individuals who criticize him. He has not made a secret of either of those characteristics. He has repeatedly used extremely derogatory language to characterize Muslims, Mexicans, Mexican Americans, the Washington Post, CNN, and former senior officials in the FBI and the intelligence community who have criticized him, among many others.

[1] Lyle T. Alverson Professor of Law, George Washington University.

If President Trump acts on the basis of his antipathy toward Muslims, his actions will violate the establishment and free exercise clauses of the First Amendment. If he acts on the basis of his antipathy toward some individuals, his actions will violate the due process clause of the Fifth Amendment. If those actions are motivated by the views expressed in media outlets owned by those individuals, they will also violate the freedom of the press clause of the First Amendment. If they are motivated by public statements that individuals have made that are critical of him, they will violate the freedom of speech clause of the First Amendment.

The constitutional prohibitions of government actions based on antipathy toward religious groups and individuals and against actions that punish news media or individuals based on the views they express are among the oldest, most durable tenets of constitutional law. They are deeply embedded in our law and our cultural values.

One of the important goals of the courts should be to preclude President Trump from acting in accordance with his animosity toward groups and individuals. Courts will find it challenging to further that goal at the same time that they further two other important goals, however.

Courts should allow President Trump to take any lawful actions that are not rooted in his bias against groups or individuals. He was elected President. He should have the same degree of discretion to pursue his lawful goals and those of the citizens who elected him as any other President.

Courts also should refrain from issuing opinions that will have the effect of unduly limiting the discretion of President Trump's successors. Bad presidents can make bad precedents. Courts should not create undue limits on the power of future presidents in their efforts to preclude President Trump from acting on the basis of his powerful antipathy toward some ethnic and religious groups and toward his critics.

One well-known example illustrates the difficulty of the task. When President Trump issued the executive orders that limited entry of foreign nationals from several mostly Muslim nations he claimed that he was motivated by his desire to protect the U.S. from terrorists.[2] Many parties challenged the orders based on their claim that the orders were motivated by his powerful bias against Muslims. The legality of the orders should depend on the answer to that question. The question is so difficult to answer, however, that it has elicited conflicting opinions from the judges and Justices who have attempted to answer it.

[2] The travel bans and the judicial opinions that address the bans are discussed in detail infra. at notes 5-50.

If it were not for some other unique characteristics of President Trump, courts would have to answer difficult questions of that type in only a few cases. The President has the power to take direct actions that harm individuals or groups in only a few circumstances. In the vast majority of cases, only an agency has the power to take an action that harms an individual or group.

Ordinarily, a court should ignore any presidential bias in the process of evaluating an action taken by an agency that harms an individual or group. In other administrations, it would be inappropriate to attribute any bias of the president to an agency head. The starting point in evaluating the agency's action should be a presumption that the agency head took the action for reasons unrelated to any biases of the president.

President Trump has other unique characteristics that suggest that it is risky to rely on that presumption, however. President Trump is quick to fire his appointees. He demands personal loyalty. And he does not tolerate dissenting views among his appointees.

President Trump's Solicitor General has urged the Supreme Court to hold unconstitutional statutory limits on the power of the President's political appointees to fire any officer of the United States, even an officer whose sole responsibility is to

adjudicate disputes between the government and private parties.[3] He has also expressed the view that any such limits must be interpreted to allow a political appointee, and by extension the President, to fire any officer for virtually any reason.[4] Any agency official in the Trump Administration has reason for concern that he might be fired if he refuses to act in accordance with the President's powerful expressions of antipathy toward groups and individuals.

Those characteristics suggest that courts should be sensitive to the possibility that an action taken by an agency against a group or individual that the President has vilified was motivated by the President's bias against the individual or group. Thus, for instance, the Justice Department's attempt to enjoin the proposed merger between AT&T and Time Warner raises troubling questions of motivation, given President Trump's many expressions of antipathy toward CNN--a subsidiary of Time Warner.[5] Similarly, the President's creation of a Task Force to decide whether the postal rates paid by firms like Amazon are too low and his demand that the Postmaster General double the rates that Amazon is charged raise troubling questions of motivation, given his many angry tweets about the Washington Post, a newspaper that is owned by the same individual who owns Amazon.[6]

[3] Brief for Respondent Supporting Petitioners, in Lucia v. SEC, Sup. Ct. No. 17-130, pp. 39-56 (2018).
[4] Id. at pp. 39-56.
[5] Discussed infra. at notes 51-64.
[6] Discussed infra. at notes 65-72.

In this essay, I will explore the question whether a variety of public law doctrines and regimes are capable of accommodating the potentially conflicting goals the courts should try to further simultaneously during the Trump Administration. I will discuss the travel bans, the antitrust challenge to the merger of AT&T and Time Warner, the president's request that the Postal Service double the rates it charges Amazon and his creation of a task force to study whether to increase postal rates to firms like Amazon, the president's threats to remove officials who are not personally loyal to him, his use of revocations of security clearances and threats to revoke security clearances to punish individuals who have criticized him, and the potential for the president to use the rulemaking process to punish groups and individuals he dislikes.

The Travel Bans

Two executive orders and a presidential proclamation are often referred to collectively as the "travel bans." They illustrate well the tension among the three goals that the judiciary must attempt to pursue simultaneously during the Trump Administration.

The travel bans are a paradigmatic example of a presidential action that is entitled to extraordinary deference. The stated purpose of the travel bans is to protect national security by reducing the risk that terrorists can enter the U.S. from countries that are

known to include a large number of terrorists and that have been determined to have ineffective systems of screening potential travelers to the United States.

The travel bans also are an excellent example of presidential actions that would violate constitutional prohibitions against discrimination based on religion if they are motivated by bias against Muslims. Each of the three bans would have had a massively disproportionate adverse effect on Muslims.

President Trump issued the first ban seven days after he took office.[7] It temporarily banned all foreign nationals from entering the U.S. from seven predominantly Muslim countries. It was not preceded by any consultation with national security or immigration officials, and it was issued immediately after a conversation in which the president told Rudolph Giuliani that he wanted to ban all Muslims from entering the country and asked him how he could accomplish that result legally.[8] President Trump also stated publicly that he would give preference to any Christian who wanted to enter the U.S. from a country that was on the banned list.[9]

[7] Executive Order 13769 (2017).
[8] Trump v. Hawaii, 138 S.Ct. 2392, 2436 (dissenting opinion of Justices Sotomayor and Ginsburg).
[9] Id. at 2436.

The second ban was issued six weeks after the first ban and after several courts had enjoined the first ban.[10] It removed Iraq from the banned list, and announced that the President had directed the Secretary of Homeland Security (DHS) to investigate the procedures used by the other countries on the banned list to determine whether they were providing adequate information to the U.S. about travelers to the U.S.[11]

The third ban was issued six months after the second ban and after several courts had enjoined the second ban.[12] It imposed indefinite duration bans on travelers attempting to enter the U.S. from any of the six primarily Muslim countries that were on the prior lists, but it added two non-Muslim countries to the banned list and exempted travelers who had visas or who qualified for visas. The government attempted to defend the third ban on the basis that it was justified by a study that DHS had conducted that found that each of the eight countries had inadequate systems for determining whether travelers to the U.S. posed risks of engaging in terrorism and of communicating any such risk information to the U.S. Notably, however, the government refused to make the report of the findings of the investigation available to reviewing courts.[13]

The travel bans have yielded dozens of inconsistent judicial opinions. The many lower court opinions that have been issued so far rely on a wide variety of reasoning to support

[10] Executive Order 13780 (2017).
[11] Id. at 2436-37.
[12] Proclamation No. 9645 (2017).
[13] International Refugee Assistance Project v. Trump, 883 F.3d 233, 251-53 (4th Cir. en banc 2018).

disparate results. The Supreme Court addressed the issues in an opinion in which a five-Justice majority reversed the grant of a preliminary injunction and remanded the case to the lower courts for such further proceedings as may be appropriate.[14] Both the Supreme Court opinions and the 150 pages of opinions issued by the en banc Fourth Circuit in *International Refugee Assistance Project v. Trump*[15] are valuable as windows into the difficulties that judges face in applying traditional public law doctrines in a manner that will simultaneously further the three goals that courts must attempt to further as they review actions taken by the Trump Administration.

The en banc Fourth Circuit upheld the district court's preliminary injunction with respect to the third travel ban by a vote of nine to three. Three judges dissented. They expressed the view that the decision to issue the third ban was unreviewable and that, even if it was reviewable, it was impermissible for a court to consider the president's many statements that vilified Muslims in the review process. The dissenting judges relied primarily on statutory language that seems to confer complete discretion on the President to "suspend the entry of all aliens or any class of aliens" "whenever he finds that the entry . . . would be detrimental to the interests of the United States."[16] They referred to language in the presidential proclamation that included such a presidential finding and supported it by reference to the findings of the DHS investigation of the eight countries that were

[14] 138 S.Ct. 2392, 2423.
[15] 883 F.3d 233.
[16] Id. at 372.

included in the ban.[17] And they noted the existence of over a century of judicial decisions that "leave essentially no room for judicial intervention in immigration matters."[18]

The dissenting judges criticized the majority and the district judge for relying on "campaign statements and other similar statements" as the basis for a finding that the proclamation was motivated by impermissible bias against Muslims when it made no reference to religion.[19] They complained that this use of presidential statements would allow any judge to hold unlawful any presidential action that the judge disliked by finding "one statement that contradicts the official reasons given for a subsequent executive action."[20] The dissenting judges also criticized the majority for adopting constructions of the applicable statutes that can not be reconciled with the language of the statutes and that would have greatly restricted the president's power.[21]

The approach taken by the dissenting judges obviously would not further the goal of precluding the president from taking actions based on constitutionally impermissible biases. As the majority documented, there is abundant evidence that the bans were motivated by unconstitutional religious bias.[22] The dissenting judges justified that result by referring to the critical need to further the other two goals. They asserted that the

[17] Id. at 355-58.
[18] Id. at 361.
[19] Id. at 373.
[20] Id. at 374.
[21] Id. at 374.
[22] Id. at 264-65. See also 138 S.Ct. at 2434-39.

majority's use of the President's statements to prove that his actions were motivated by impermissible bias will "leave the president and his administration in an untenable position for future action" by precluding him from taking any future action to protect the nation from Muslim terrorists no matter how important the action might be.[23] They also asserted that the narrow constructions that the majority gave to the statutes that authorize the president to protect national security by restricting the entry of aliens would "wreak havoc" by precluding future presidents from taking actions that might be essential "if the United States were to enter a state of war with a foreign nation or were attacked by foreigners."[24]

The majority made two arguments in support of its decision to uphold the preliminary injunction. Some judges relied on only one of the two, while others relied on both.

The first argument was based on a combination of the constitution and President Trump's hundreds of statements that vilified Muslims and expressed his desire to keep all Muslims out of the country. The judges who made that argument began by recognizing the President's broad constitutional and statutory power over immigration and the heavy burden the plaintiffs had to bear to persuade a court to review a "facially legitimate" presidential restriction on entry of foreign nationals.[25] They then referred to the "rare circumstances" in which the Supreme Court had authorized such review. Plaintiffs must

[23] 883 F.3d at 374.
[24] Id. at 370.
[25] Id. at 263-64.

make an "affirmative showing of bad faith" which they must "plausibly allege with sufficient particularity." "Upon such a showing, a court may look behind the Government's proffered justification for its action." The judges then relied on President Trump's statements to satisfy that requirement and to show that "the Proclamation's invocation of national security is a pretext for an anti-Muslim religious purpose."[26]

The second argument made by some of the judges in the majority was based on concern that, if it was interpreted literally, the statutes that delegate to the president seemingly unreviewable discretion to restrict entry of foreign nationals would violate the non-delegation doctrine. Those judges reasoned that they had to apply the avoidance canon to protect the statutes from a holding that they are unconstitutional. They then adopted numerous narrow interpretations of the statutes that would restrict in various ways the seemingly limitless discretion the statutes confer on the president to control entry of foreigners into the country.[27]

The second argument made by some of the judges in the majority fares poorly when it is evaluated with reference to the three goals that courts should attempt to further when they review actions taken by the Trump Administration. It would not further the goal of protecting the country from actions that are motivated by President Trump's animosity toward Muslims. It would have potentially severe adverse effects on the other two goals--

[26] Id. at 264.
[27] Id. at 291, 319, 327.

allowing President Trump to take otherwise lawful actions that are not motivated by constitutionally impermissible bias, and allowing future presidents to exercise the discretion required to perform the many tasks of a chief executive effectively.

The dissenting judges' criticisms of the majority resonate if they are considered with reference to the use of the non-delegation doctrine to justify adoption of narrow constructions of the statutes that empower the president to protect national security by controlling the entry of foreigners into the country. Those narrow constructions would "wreak havoc" with the ability of either president Trump or his successors to protect the nation from a wide variety of potential grave dangers to national security. It is also strange to invoke the non-delegation doctrine--a doctrine that has been applied to domestic statutes only twice--to a statute that governs national security--a context in which broad delegations of power to the president are particularly easy to defend.

The first argument made by some of the judges in the majority fares much better when it is evaluated with reference to the three goals. It would further the goal of protecting the country from actions that are based on constitutionally impermissible bias. It also would not conflict with the other two goals as long as judges combine it with the many limits that some of the majority judges acknowledged.

One important limit is inherent in the way that the majority characterized the circumstances in which a court can rely on presidential statements to infer that the president acted on the basis of constitutionally impermissible bias. The judges in the majority emphasized the rarity of the circumstances in which judges can rely on such evidence to overcome the powerful presumption that the president is acting for legitimate reasons and the overwhelming nature of the evidence that rebutted that presumption in this case.[28]

It is unlikely that any future president will be affected by the rare exception the majority relied on because it is unlikely that we will elect another president with the powerful animus toward a religious group that President Trump has evidenced toward Muslims. If we do, an opinion like the majority opinion will provide an indispensable source of protection from actions that are based on the worst instincts of such a president.

Another important limit is illustrated by the majority's implicit recognition that the president could have defended the bona fide nature of his asserted reasons for the third travel ban by offering any credible evidence to support the stated reasons for the ban. The majority refused to give credence to the findings of the DHS investigation of the adequacy of the eight nations' measures to assist the U.S. in protecting itself from foreign terrorists that enter the U.S. from those countries for two reasons.[29]

[28] Id. at 264.
[29] Id. at 268-69.

First, the findings the government ascribed to the investigation and the criteria the government claimed to have used to support the ban were inconsistent with the actual scope of the ban. The findings the government ascribed to the study and the criteria it said it used to make its decision were inconsistent with the predominance of Muslim majority countries that were subject to the ban.

Second, the government refused to make the results of the investigation available to the court. At oral argument the government even disavowed any claim that the investigation could save the proclamation.

The judges' discussion of the investigation strongly suggests that they would have upheld the travel ban if the government had made the study available to the court and the findings and criteria provided plausible support for the ban.

Finally, the judges recognized that "the President's past actions cannot forever taint his future actions." In the words of the judges:

> President Trump could have removed the taint of his prior troubling statements; for a start he could have ceased publicly disparaging Muslims. . . . In fact, instead of taking *any* actions to cure the "taint" that we found infected EO2, President Trump continued to disparage Muslims and the Islamic faith.[30]

The ability of some of the judges who were in the majority in the Fourth Circuit to identify a method of reasoning that furthers one of the goals without seriously compromising the other two goals is broadly encouraging. There are many public law doctrines that allow judges to use similar reasoning. Thus, for instance, the presumption of regularity that attaches to all actions of federal agencies can be rebutted by powerful evidence to the contrary[31] and the rule that limits courts to the use of the record before the agency when it reviews an agency action is subject to an exception when a petitioner makes a strong showing of bad faith or improper behavior by the agency.[32]

---

[30] Id. at 268.

[31] U.S. v. Chemical Foundation, 272 U.S. 1,14-15 (1926)

[32] Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985). The reasoning in the Seventh Circuit's opinion in Latecore International v. Department of Navy, 19 F. 3d 1342 (11th Cir. 1994), is analogous to the reasoning in the majority opinion in International Refugee Assistance Project. It provides a good illustration of the way in which courts can resolve the rare case in which the many presumptions that benefit the government can be overcome by a petitioner that presents powerful extrinsic evidence of bad faith or impermissible bias. When the French company that was an unsuccessful bidder for a government contract presented persuasive extrinsic evidence that the contracting officer's decision was motivated by his bias against a French firm, the court concluded that the evidence overcame a variety of pro-government presumptions that courts regularly invoke because it qualified as evidence of "bad faith or improper behavior." The court went on to hold unlawful the award of the contact to a U.S. company because of the impermissible bias of the contracting officer.

In *Trump v. Hawaii*, a five-Justice majority disagreed with the Fourth Circuit majority and reversed the orders that temporarily enjoined implementation of the third travel ban.[33] The majority did so, however, in a carefully-crafted opinion that preserves the power of the judiciary to provide a check on the tendency of President Trump to act in accordance with his powerful animosities toward some groups and individuals.

While the Supreme Court majority reached the same result as the judges who dissented in the Fourth Circuit, the reasoning of the Justices is closer to the reasoning of the Fourth Circuit majority than it is to the reasoning of the Fourth Circuit judges who dissented. Contrary to the views expressed by the Fourth Circuit dissenters, the Justices reviewed the ban and considered President Trump's many statements that vilified Muslims as relevant to the review process they undertook.[34] They concluded that the evidence that the ban was based on national security was sufficient to overcome the concerns that were raised by the evidence that the ban was based on constitutionally impermissible religious bias, at least in the context of requests for preliminary injunctions.[35]

The Justices who joined the majority opinion reversed the preliminary injunctions based on a combination of many factors, including the factors the Fourth Circuit dissenters

[33] 138 S.Ct. 2392.
[34] Id. at 2407, 2416-18.
[35] Id. at 2418-23.

invoked--the national security context in which the case arose, the statutory language that confers extraordinary discretion on the president to "suspend the entry of all aliens or classes of aliens" when he "finds" that their entry "would be detrimental to the interests of the United States;" the history of judicial deference to presidential decisions in this context; the presence of language in the proclamation in which the president made the findings required to support the temporary ban on entry; and the absence of any evidence on the face of the presidential proclamation that it was based on animus toward Muslims.[36]

However, the Supreme Court majority emphasized other factors that were also important to its decision. The factors the majority discussed in detail included: the unprecedented level of detail in the proclamation;[37] "the worldwide review process undertaken by multiple Cabinet officials and their agencies" that preceded issuance of the proclamation;[38] the subsequent removal of three Muslim-majority countries from the scope of the temporary ban based on steps the countries had taken to improve their processes for vetting applicants for visas and for communicating information with respect to risks posed by visa applicants to the U.S. government;[39] the inclusion in the proclamation of "significant exceptions for various categories of foreign nationals;"[40] and,

[36] Id. at 2407-10.
[37] Id. at 2409.
[38] Id. at 2421.
[39] Id. at 2422.
[40] Id. at 2422.

the inclusion in the proclamation of "a waiver program open to all covered foreign nationals seeking entry as immigrants or nonimmigrants."[41]

Given the emphasis the majority placed on those factors, it is unlikely that the majority would have upheld the temporary ban in the absence of most, if not all, of those features of the ban, the process through which it was issued, and the process through which it was being implemented. It is highly unlikely that the Court would have upheld either of the first two travel bans since neither had the characteristics that the majority identified as important to its decision to uphold the third ban.

Two of the Justices who dissented did so on a narrow basis that the government can overcome on remand. They noted that: "Members of the Court principally disagree about the answer to this question, i.e. about whether or the extent to which religious animus played a significant role in the Proclamation's promulgation or content." [42] They expressed the view that "the Proclamation's elaborate system of exemptions and waivers can and should help us answer this question."[43] They premised their disagreement with the majority on evidence that the government was not actually applying the system of exemptions and waivers.[44] They admitted, however, that the only evidence available at

[41] Id. at 2422-23.
[42] Id. at 2429.
[43] Id. at 2429.
[44] Id. at 2431.

the time the Court decided the case was inconclusive.[45] They recognized that the majority opinion gave the district judge both the opportunity and the duty to conduct further proceedings to determine whether the government is actually implementing the exemptions and waivers created in the proclamation.[46]

The other two dissenting Justices differed with the majority on bases that are much broader than the contingent objections of the first two dissenters. They would have applied a completely different test to determine the validity of the proclamation. They expressed the view that the proclamation should be held invalid if "a reasonable observer would conclude that [it] was based on anti-Muslim bias."[47] They then argued that the evidence, in the form of President Trump's many statements, was sufficient to persuade a "reasonable observer" that the ban was motivated by his anti-Muslim animus.[48]

The majority responded to the second dissenting opinion by noting that the Court had applied the "reasonable observer" standard only in "cases involving holiday displays and graduation ceremonies."[49] The majority concluded that it would not be appropriate to apply that standard to cases involving national security, foreign affairs and entry of aliens into the United States.[50]

---

[45] Id. at 2433.
[46] Id. at 2433.
[47] Id. at 2433.
[48] Id. at 2438.
[49] Id. at 2420 n.5.
[50] Id. at 2420 n.5.

While the Supreme Court majority and the Fourth Circuit majority reached opposite conclusions, the similarity in their methods of reasoning illustrate the ability of the U.S. public law system to further simultaneously the three potentially competing goals of: protecting the nation from actions that are inconsistent with our most fundamental values, allowing President Trump to take any lawful action, and preserving the power of future presidents to take the actions needed to lead and to protect the nation.

The Challenge to the Proposed Merger of AT&T and Time Warner

The first antitrust case brought by the Trump Administration was a Department of Justice (DOJ) challenge to the proposed merger of AT&T and Time Warner. The circumstances surrounding the case give rise to concern that the challenge was motivated by President Trump's often-expressed powerful antipathy toward CNN, a subsidiary of Time Warner, rather than DOJ's stated reason--to protect consumers.

The DOJ challenge was unusual. The proposed merger did not raise any horizontal issue. The firms do not compete in any market, so the merger will not increase the merged firm's share of any market. DOJ alleged that the merger would harm consumers because of the vertical issues it raises. DOJ argued that the merged firm's control over the actions in one part of the chain of distribution would give it the power and incentive to abuse its market power in other parts of the chain of distribution and to increase the prices it charges consumers.[51]

In the 1960s, antitrust enforcement agencies and courts took vertical issues seriously and blocked many mergers based on concerns of the type DOJ raised in the AT&T/Time Warner case.[52] Since then, however, antitrust scholars have persuaded both enforcement agencies and courts that vertical mergers rarely harm consumers and often improve the performance of markets.[53] Enforcement agencies had not fully litigated a challenge to a proposed vertical merger in many decades before the Trump DOJ challenged the proposed AT&T/Time Warner merger.[54] Moreover, the head of the Antitrust Division of DOJ in the Trump Administration had stated publicly that he did not see the proposed

[51] The District Judge who rejected the DOJ challenge to the merger wrote a lengthy opinion in which he described the government's theory of the case. United States v. AT&T, ___F. Supp. ___, ___ (D. D.C. 2018).
[52] See e.g., Brown Shoe Co. v. United States, 370 U.S. 294, 323-34 (1962) (agreeing with the government's argument that the merger of a shoe manufacturer with a shoe retailer that accounted for 2.3% of the market would harm consumers by foreclosing part of the market to competitors.)
[53] Francine LaFontaine & Margaret Slade, Vertical Integration and Firm Boundaries: The Evidence, 45 J. Econ. Lit. 629, 680 (2007); Oliver Williamson, The Economics of Organization: The Transaction Cost Approach, 87 Am. J. Soc. 548 (1981).
[54] ___F. Supp. at ___.

merger as a major antitrust problem before he apparently changed his mind after President Trump made him head of the division.[55]

DOJ's position in the Time/Warner case was a break from precedent in another way as well. The government urged the court to require Time Warner to divest itself of CNN as a condition of permitting the merger to proceed.[56] It took the position that the conduct-based remedies that are usually adopted in cases of this type are inadequate and that only a structural remedy, such as divestiture of CNN, is sufficient to avoid the harm to consumers that DOJ argued the merger would facilitate.

The evidence that the DOJ opposition to the merger was attributable to President Trump's oft-stated antipathy toward CNN is powerful but not dispositive. It could have been based solely on DOJ's views with respect to the likely effects of the proposed merger. Some scholars maintain that enforcement agencies and courts should be more receptive to arguments that some vertical mergers harm consumers.[57] That view of antitrust law has gained traction recently, as illustrated by its adoption in the Democratic Party's 2017 statement of it positions on various issues under the title: "A Better Way."[58] Similarly, the choice of appropriate remedies in antitrust cases has long been the subject of serious

[55] http://www.competitionpolicyinternational.com/us-trumps-delrahim-sees-no-no-problem-with-the-att-time-warner-merger.
[56] http://competitionpolicyinternational.com/us-DOJ-wraps-up-att-trial-with-a-call-for-remedies.
[57] E.g., Lina Khan, The Separation of Platforms and Commerce, 119 Col. L. Rev. ___(2018); American Antitrust Instittute, AAI Applauds Move to Block AT&T-Time Warner Merger, Sets Record Straight on Vertical Merger Enforcement (2018).
[58] Democratic Party, A Better Way (July 2017).

scholarly debate, with liberals often criticizing conduct-based remedies as ineffective and urging enforcement agencies and courts to opt instead for structural remedies such as the divestiture of CNN that DOJ has urged in the AT&T/Time Warner case.[59]

We probably will never know whether the positions that DOJ has taken in the AT&T/ Time Warner case were motivated by President Trump's bias against CNN or by the decision of the head of the Antitrust Division to adopt the views of the left-leaning scholars who have urged enforcement agencies and courts to pay more attention to the potential harm caused by vertical mergers and to avoid those harms through mandatory divestiture. Even if DOJ's actions were motivated solely by the president's bias against CNN, however, there is no reason to believe that CNN will be the victim of unconstitutional bias.

DOJ does not have the power to block a proposed merger. It can only express its opposition in the form of a complaint filed in court and in the positions it takes in the resulting judicial proceeding. A district court is the only institution that can block a proposed merger that DOJ opposes. It can only do so after conducting a trial in which it considers the evidence of both parties and decides whether the proposed merger is likely to harm consumers.

[59] E.g., John Kwoka & Diana Moss, Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement, 57 Antitrust Bulletin 979 (2012).

Courts have long distinguished between biased decision makers and biased prosecutors. A decision in an adjudication by a decision maker who is biased against the individual or firm that loses the case is a violation of due process.[60] A decision against an individual or firm in a case in which the prosecutor is biased against the firm or individual is not a violation of due process.[61] As long as the decision maker is unbiased, the potential effects of the bias of the prosecutor are too remote to invalidate the decision on constitutional grounds.

There is no reason to attribute any bias that President Trump has to any judge, including a judge who was nominated by President Trump. The safeguards of confirmation by the Senate and life-tenure are sufficient to insure that federal judges will not act based on the biases of the president. Indeed, the District Judge who presided in the case rejected the DOJ effort to block the merger,[62] eliciting expressions of disappointment from both DOJ and the left-leaning American Antitrust Institute.[63] The government has appealed that decision to a circuit court.

I would not have been as sanguine about the potential effects of the president's bias against CNN if the proposed AT&T/Time Warner had fallen within the jurisdiction of the

[60] E.g., Tumey v. Ohio, 273 U.S. 510, 532 (1927) (holding unconstitutional a system of adjudication in which the adjudicator benefited from a decision against a defendant). See generally Kristin Hickman & Richard Pierce, Treatise on Administrative Law §7.8 (6th ed. 2018).
[61] E.g., Marshall v. Jerrico, 446 U.S. 238 (1980).
[62] ___F.Supp. ___.
[63] American Antitrust Institute, AAI Says Federal Court Decision to Clear AT&T-Time Warner Will Set Back Competition, Innovation , Consumers, and Diversity in the Media (2018).

Federal Trade Commission (FTC), rather than DOJ. Unlike DOJ, FTC has the power to decide whether to approve or disapprove a proposed merger. It is plausible that FTC Commissioners chosen by President Trump would act on the basis of his bias against CNN. I would not be concerned that the FTC might decide that the merger is unlawful. Any such decision would be subject to judicial review. I would have been concerned, however, that FTC might obtain a temporary injunction from a court and then delay its resolution of the merits of the case until the merger agreement expires. That is the sequence of actions that FTC regularly takes with respect to proposed mergers that it opposes.[64]

The Attempt to Raise Amazon's Postal Rates

On April 12, 2018, President Trump created an inter-agency task force to study the U.S. Postal Service (USPS).[65] He explained the action by stating that: "The USPS is on an unstable financial path and must be restructured to prevent a taxpayer-funded bailout."[66] In a string of contemporaneous tweets, he attributed the financial problems of USPS to the low rates that Amazon pays, claiming that the USPS loses billions of dollars because

[64] Richard Pierce, the Rocky Relationship Between the Federal Trade Commission and Administrative Law, 83 Geo. Wash. L. Rev. 2026, 2042-43 (2015).
[65] Executive Order on the Task Force on the Postal Service (Apr. 12, 2018).
[66] Brett Samuels, Trump Launches Task Force to Evaluate Postal Service Operations, The Hill Apr. 12, 2018).

of Amazon.[67] Around the same time, he asked the Postmaster General to double Amazon's rates.[68]

It is virtually certain that President Trump's actions were motivated in part by the powerful antipathy he has often expressed toward the Washington Post, a newspaper that often contains stories and opinion pieces that are critical of the president and that is owned by the same person who owns Amazon. Yet, there is no reason for concern that President Trump's actions will yield actions that punish the owner of the Post for criticizing him.

Neither the task force nor the Postmaster General have the power to take any action that injures Amazon. Moreover, both of President Trump's actions have the potential to yield benefits to the nation. Indeed, a few days after President Trump created the task force to study the USPS, the Washington Post published an editorial in which it praised the President for taking that action.[69] Every knowledgeable observer of USPS agrees that it is in an increasingly precarious financial situation that will require it, and possibly Congress as well, to make changes in the way it operates.[70]

---

[67] Donald J. Trump@realDonaldTrump (9:35 Apr. 2, 2018).
[68] Damien Paletta & Josh Dawsey, Trump Personally Pushed Postmaster General to Double Rates for Amazon, Other Firms, Wash. Post, p. A1 (May 19, 2018).
[69] Trump's Postal Service Audit Is Actually a Welcome Chance to Reform, Washington Post editorial (Apr. 17, 2018).
[70] E.g., https://www.bloomberg.com/view/articles/2018-04-21/trump-versus-bezos-they-may-both-be-right; Steven Pearlstein, Running the Math on the Post Office, Amazon Deal, Wash. Post, p. G1 (Apr. 8, 2018).

Understandably, the Post did not publish a similar editorial praising President Trump for urging USPS to double the rates it charges the Post's sister corporation, Amazon. However, most observers of USPS believe that, while the rates it charges customers like Amazon are not the most important source of its financial problems, USPS might well need to increase those rates as part of the restructuring plan it needs to implement to put it on a financially sustainable path.

The Postmaster General responded to the president's request by noting that he lacks the power to increase the rates that USPS charges.[71] Any such increase in rates would have to be authorized by the Postal Regulatory Commission (PRC), a five member agency, each member of which serves for a term of six years. It is plausible that President Trump will obtain control of the PRC by appointing people to the agency who will do his bidding, but there are multiple checks on the PRC's power to punish Amazon by increasing its rates.

To become a member of the PRC, a presidential nominee must be confirmed by the Senate. No more than three members of the PRC can be members of the same political party, so the two members who are Democrats would be in a position to blow the whistle on any attempt by the Republican majority to act in a manner that was designed to punish Amazon. Amazon could obtain judicial review of any increase in its rates that it believed to be unjustified. The thirty-page opinion the D.C. Circuit recently issued in United

[71] Paletta & Dawsey, supra. note 68.

Parcel Service v. PRC[72] illustrates the detailed and careful scrutiny that courts apply when they review PRC orders. Moreover, there are market-based limits on the power of PRC to punish Amazon by increasing its rates--Amazon can switch from use of USPS to use of other delivery services, thereby rendering the USPS financial situation even worse than it now is.

Threats to Remove Officials Who Are Not Personally Loyal to Him

President Trump has removed far more officials from his administration than any of his predecessors.[73] He regularly threatens to remove officials that he considers less than completely loyal to him personally. Thus, for instance, he fired the Director of the FBI for investigating his alleged role in colluding with Russia during the 2016 election, and he has repeatedly threatened to fire the Independent Counsel, the Deputy Attorney General and the Attorney General for the same reason.[74]

President Trump's Solicitor General has taken the position before the Supreme Court that it is unconstitutional to limit the power of an agency to remove any government official from office even if the sole function of the official is to preside in adjudicatory hearings

[72] ____F.3d ____(D.C. Cir. 2018).
[73] Danielle Paquette, Rex Tillerson Is Latest Casualty in Trump's Record-Breaking Turnover, Wash. Post (Mar. 13, 2018).
[74]

to resolve disputes between the government and private individuals.[75] He has also argued that any "for cause" limit on the power of any agency to fire such an official must be interpreted to allow an agency to fire the official for virtually any reason, potentially including disagreement with the actions taken by the official in a past adjudicatory hearing.[76]

It is at least premature to be concerned that President Trump's attitude toward removal of government officials will enable him to take, or to direct others to take, actions that threaten constitutional rights and values. The vast majority of removals of officials and/or threats to remove officials have no potential to empower the President to take actions that threaten constitutional rights. Thus, for instance, the President's decision to fire the Secretary of State did not implicate any important constitutional value. Removal or threat of removal has that effect only when the official is performing functions in which constitutional rights are at stake.

The only functions that clearly implicate constitutional rights are adjudicative functions. In its 1935 decision in *Humphrey's Executor*, the Court held that Congress can insulate a government official from potential plenary control by the president by limiting the president's power to remove the official.[77] The official at issue in that case had no power

[75] Brief, supra. note 8, at pp. 39-56.
[76] Id. at 39-56.
[77] 295 U.S. 602 (1935).

to make policy decisions. He had only the power to adjudicate disputes between the government and private individuals or firms.

The continued viability of the holding in *Humphrey's Executor* and its scope are the subject of vigorous debate. If the Court continues to follow the holding in all circumstances in which the rights of parties to adjudications are at issue, it will insure that President Trump can not coerce a government official into acting in a manner that is inconsistent with the right of an individual to have his rights adjudicated by an unbiased government official.

The Supreme Court had a case before it this Term that that had the potential to test the continued viability and scope of the holding in *Humphrey's Executor*. In *Lucia v. SEC*, the government argued that the statutory limit on the power of agencies to fire Administrative Law Judges (ALJs) is unconstitutional.[78] The Court refused to consider the removal issue, but Justice Breyer expressed concern that the Court's holding that ALJs are inferior officers might turn out to be a step in the direction of holding that the President must have the power to remove an ALJ without stating any cause for removal.[79]

[78] Brief, supra. note 8, at pp. 39-56.
[79] 138 S.Ct. 2044, 2057, 2059-62 (2018).

The other function that arguably implicates constitutional rights and values is investigation and potential prosecution or impeachment of the president. Congress has sometimes attempted to insulate people who have that responsibility from plenary control by the President by limiting the president's power to remove them to circumstances in which he, or someone under his control, can prove that there is good cause to remove the official. Limiting the president's power to remove an official who is investigating the president furthers the ancient due process-based principle that no man can be a judge in his own case. The Supreme Court upheld a statutory limit on the president's removal power based on application of that principle in its 1988 decision in *Morrison v. Olson*.[80]

The Court's opinion in *Morrison* is the subject of even greater debate than its opinion in *Humphrey's Executor*. Even if the Court overturns the *Morrison* decision or interprets "good cause" in ways that give it little effect, however, there are powerful political limits on the power of a president to remove an official who is investigating him. As President Nixon discovered, a removal decision of that kind can be the end of a presidency.

Even if the President believes that he can survive an effort to remove him from office through impeachment, he knows that he would pay a high political price for taking the action. Thus, for instance, there is no statutory limit on the President's power to remove Attorney General Sessions, but the President knows that he would not be able to persuade Congress to confirm any potential replacement as Attorney General. Thus, the president

[80] 487 U.S. 654, (1988).

has expressed his displeasure with Sessions on many occasions, but he has not removed Sessions from office.

There are no analogous political limits on the exercise of the power to remove any of the thousands of officers who have responsibility to adjudicate individual rights at agencies. The Court's 2018 decision in *Lucia* leaves open the possibility that the Court might strip such adjudicatory officers of their statutory protections against removal without cause. This is a continuing concern that I address in detail in another article. [81]

Threats to Revoke the Security Clearances of Individuals Who Have Criticized the President

Beginning in July 2018, President Trump has threatened to revoke the security clearances of retired leaders of the FBI and of intelligence agencies if they criticize him.[82] On August 15 he followed through on that threat by revoking the security clearance of former CIA-Director John Brennan, who had accused the president of treason because of his collusion with Russia in its efforts to interfere with the 2016 presidential election.[83]

[81] Richard Pierce, Should the Court Change the Scope of the Removal Power? forthcoming in George Mason Law Review in 2019.
[82] Julie Davis & Julian Barnes, Trump Weighs Stripping Security Clearances from Officials Who Criticized Him, New York Times, p. A1 (July 23, 2018).
[83] Julie Davis & Michael Shear, Trump Revokes Ex-CIA Director John Brennan's Security Clearance, New York Times, p. A1 (Aug. 16, 2018).

At the same time, he threatened to revoke the clearances of nine other former senior members of the FBI and of intelligence agencies if they continue to criticize him.[84]

Like the law with respect to the president's power to remove officers with adjudicative responsibilities who displease him, the law with respect to the power of the president to use revocation of security clearances and threats to remove security clearances to silence his critics is not clear. We cannot answer definitively the question whether the courts can stop President Trump from taking such blatantly unconstitutional actions while simultaneously preserving his power and the power of his successors in office to take all lawful actions needed to exercise the powers vested in the president by Article II of the Constitution.

The well-developed law applicable to analogous exercises of power in the name of national security provides reasons for optimism that the courts will be able to accomplish that difficult task, however. In its 1988 decision in *Webster v. Doe*, the Supreme Court held that a decision of the Director of the CIA to fire an employee is unreviewable because Congress committed such decisions to the Director's discretion.[85] A six-Justice majority also held, however, that a court can review such a decision for the limited

[84] Id.
[85] 486 U.S. 592, 601 (1988).

purpose of deciding whether the Director fired the employee for a reason that rendered his decision a violation of the Constitution.[86]

The Court was unwilling to use congressional silence with respect to that issue as the basis for a holding that Congress intended to withdraw from courts the power to review actions that are putatively based on national security to determine whether they were instead motivated by factors that render them unconstitutional. The courts can further simultaneously all of the three potentially conflicting goals they must pursue when they consider the actions of President Trump by applying the holding and reasoning in *Webster v. Doe* in the analogous context of President Trump's use of revocation of security clearances and threats of revocation of security clearances for the constitutionally-impermissible purpose of silencing his critics.

Potential Use of the Rulemaking Power to Threaten Constitutional Rights or Values

President Trump has made rollback of regulations a major goal of his administration. He has stated his intention to rescind all rules issued since the 1960s. He has issued many Executive Orders that require agencies to act in accordance with his regulatory agenda, including an order that requires each agency to rescind two rules for every one it issues.[87]

[86] Id. at 602-04.
[87] Executive Order No. 13,771 (2017).

Rescission of a rule may have serious adverse effects but it rarely threatens constitutional rights or values. Rules rarely single out individuals or members of particular faiths, races or ethnic groups for adverse treatment. Even on the rare occasions when rescission of a rule would have the potential to violate a core constitutional value, the law applicable to rescission insures that an agency can not rescind a rule unless the rescission is accomplished through use of lawful procedures and is consistent with all applicable substantive law principles.

In 1983, the Supreme Court issued a unanimous opinion in which it held that an agency cannot rescind a rule unless it follows the procedures that apply to issuance or amendment of a rule and that an agency's decision to rescind a rule must survive judicial application of the same criteria and tests that apply to issuance of a rule.[88] Those procedures, criteria and standards are extremely demanding.

An agency cannot issue, amend or rescind a rule without first using the notice and comment procedure required by section 553 of the Administrative Procedure Act (APA.)[89] As it has been interpreted by the courts, that procedure requires an average of

[88] Motor Vehicle Manufacturers Assn. v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29 (1983).
[89] 5 U.S. C. §553.

over five years to complete.[90] At the end of that lengthy, resource-intensive process, a reviewing court engages in a process often referred to as "hard look" review. The court upholds the action taken in the rulemaking only if: it is within the applicable statutory boundaries; the agency has adequately explained the action; and, the action is supported by the facts on which it is predicated.

Agencies in the Trump Administration will be able to rescind very few major rules.[91] The vast majority of the major rules that have been issued in the past forty years have been upheld by a court through application of those demanding substantive and procedural criteria. Moreover, the vast majority of major rules issued over the last forty years have been the subject of review by an office in the White House that has determined that the benefits of the rule exceed its costs by an average of over seven to one.[92]

Agencies in the Trump Administration will be able to identify few, if any, major rules that can be rescinded through use of notice and comment subject to judicial review. Any rule that can be rescinded through that demanding process should be rescinded.

Conclusion

[90] Wendy Wagner et al., Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emissions Standards, 63 Admin. L. Rev. 99, 110-13 (2013).
[91] For a description of the near total failure of the Trump Administration efforts to rescind major rules during its first two years, see Robert Glicksman & Emily Hammond, _____.
[92] Richard Pierce, The Regulatory Budget Debate, 19 NYU J. L.&. Pub. Pol. 249 (2016).

The U.S public law system is resilient. Existing doctrines are sufficient to preclude President Trump, or any successor with similarly abhorrent views, from acting in ways that threaten our core constitutional values. I have a long list of concerns about the ways in which the Trump presidency threatens the nation, but none of those concerns lie in areas in which we can rely on our public law system to protect our core constitutional values.

My long list of concerns begins with President Trump's destruction of important institutions like the EPA, DOI, and the State Department by driving out most of the experienced leaders of those institutions and his destruction of public trust in other important institutions like the FBI, DOJ and the intelligence agencies by routinely lying about the way they perform their duties. It will take decades to rebuild the institutions he has destroyed and to rebuild public trust in the institutions whose reputation with large parts of the public he has tarnished.

Postscript

At a workshop held at George Mason School of Law, many scholars questioned whether my optimistic evaluation of the ability of the U.S. public law system to address

effectively the problems posed by the election of President Trump is justified. They identified three contexts in which the public law system does not have adequate means of checking President Trump's apparent intention to act for reasons that threaten our constitutional norms--exercises of prosecutorial discretion, grants and denials of requests for waivers of rules, and grants of pardons to discourage individuals from providing evidence of wrongdoing against the president. I agree. They also accused me of excessive reliance on the judiciary's continued willingness and ability to serve as a bipartisan check on presidential power. I agree that I rely heavily on those characteristics of the judiciary, but I hope that my reliance proves to be justified.