# THE AGGRESSIVE VIRTUES

STEPHEN I. VLADECK*

One need not look far these days to find commentators who ought to know better repeatedly deriding rulings against the federal government by lower federal courts, claiming that such decisions are motivated by personal bias against President Trump rather than faithful interpretation and application of the relevant legal standards and rules. Whether in reaction to decisions striking down different iterations of the "travel ban," the injunction against President Trump's directive regarding transgender servicemembers, rulings concerning an immigration detainee's right of access to an abortion, or others, an increasingly common charge of critics is that these judges have "joined the resistance."[1] Indeed, one of the things these critiques have in common is puzzlement at the temerity of federal judges to rule against the government in these cases and not to simply defer to the putatively legitimate objectives for these policies proffered by government lawyers or the "presumption of regularity" to which administrative action is ordinarily entitled.[2]

With Dahlia Lithwick, Leah Litman, and Helen Klein Murillo, I've written elsewhere about why this meme is both analytically troubling and normatively dangerous, and I won't rehash those arguments here.[3] But in reading Nancy Gertner's thoughtful reflection on "Judging in a Time of

 My thanks to Johanna Kalb for inviting me to participate in the Brennan Center roundtable from which this response essay derives.

1 *See, e.g.*, Josh Blackman, *The Legal Resistance to President Trump*, NAT'L REV. (Oct. 11, 2017), http://www.nationalreview.com/article/452506/donald-trump-courts-lawyers-legal-resistance; David B. Rivkin, Jr. & Lee A. Casey, *The Fourth Circuit Joins the 'Resistance,'* WALL ST. J. (May 29, 2017), https://www.wsj.com/articles/the-fourth-circuit-joins-the-resistance-1496071859; Ilya Shapiro, *Courts Shouldn't Join the #Resistance*, CATO AT LIBERTY (May 29, 2017), https://www.cato.org/blog/courts-shouldnt-join-resistance.

2 *E.g.*, Josh Blackman, *'Neutral Principles' and the 'Presumption of Regularity' in the Era of Trump*, LAWFARE, (Sept. 7, 2017), https://www.lawfareblog.com/neutral-principles-and-presumption-regularity-era-trump.

3 Dahlia Lithwick & Stephen I. Vladeck, *The Dangerous Myth of the Judicial 'Resistance,'* N.Y. TIMES (Oct. 31, 2017), https://www.nytimes.com/2017/10/31/opinion/myth-judicial-resistance-integrity.html; Leah Litman, Helen Klein Murillo, & Steve Vladeck, *The Rule of Law and the Resistance Police*, TAKE CARE (June 1, 2017), https://takecareblog.com/blog/the-rule-of-law-and-the-resistance-police; *see also* Dahlia Lithwick & Steve Vladeck, *Resisting the Myth of the Judicial Resistance*, SLATE (Jan. 25, 2018), https://slate.com/news-and-politics/2018/01/the-judges-whove-ruled-against-trump-arent-part-of-some-judicial-resistance.html.

Trump,"[4] I'm struck by a different prospect: that critics of the searching and skeptical review of government action conducted by the contemporary federal bench have found these rulings so alarming because we have *all* lost sight of the appropriate role of the federal courts vis-à-vis the Executive Branch. We have become accustomed to what Gertner calls "a passive judiciary" that has spent far too much of its time attempting to "duck, avoid, and evade" the hard cases.[5]

Indeed, I've written at some length about how, in national security cases especially, the lower federal courts have relied upon at least a dozen different procedural doctrines to avoid even *reaching* the merits of legal challenges to key U.S. counterterrorism policies, without regard to how those merits have (or should have) been decided.[6] And the Supreme Court's interventions in the same cases can perhaps best be described as reflecting the "passive-aggressive virtues": The Justices repeatedly assert the federal judiciary's authority to review controversial national security policies—while generally ducking opportunities to actually conduct such review.[7]

Especially where the allegedly unlawful government action has ceased (and the litigation has sought damages), passivity has become the norm, and even modest judicial skepticism has become the exception.[8] Through that lens, one way to understand the first year-plus of the Trump presidency is as providing repeated reminders of why courts *haven't* always deferred to reasonable government arguments, why not all government actions *should* be entitled to a "presumption of regularity,"[9] and why the trend over the past forty years toward ever-decreasing merits resolution of private civil litigation against government actors was not (and need not be) inevitable. The harder question is, as it has always been, not whether such judicial skepticism of government conduct is *ever* appropriate, but rather whether those with different political views can nevertheless agree on objective criteria to govern the cases in which skepticism is warranted, and those in which it isn't.[10]

---

4 Nancy Gertner, *The "Lower" Federal Courts: Judging in a Time of Trump*, 93 N.Y.U. L. REV. ONLINE 7 (2018).

5 *Id*. at 10 (citing Nancy Gertner, *Opinions I Should Have Written*, 110 NW. U. L. REV. 423, 426 (2016)).

6 Stephen I. Vladeck, *The Demise of Merits-Based Adjudication in Post-9/11 National Security Litigation*, 64 DRAKE L. REV. 1035 (2016).

7 Stephen I. Vladeck, *The Passive-Aggressive Virtues*, 111 COLUM. L. REV. SIDEBAR 122 (2011).

8 *See* Stephen I. Vladeck, *Implied Constitutional Remedies After* Abbasi, *in* AM. CONST. SOC'Y, SUPREME COURT REV., 2016–2017, at 193 (Steven D. Schwinn ed., 2017).

9 For an illustrative pre-Trump debate over the appropriateness of the presumption of regularity (in that case, as applied to government intelligence reports), contrast the majority and dissenting opinions in *Latif v. Obama*, 677 F.3d 1175 (D.C. Cir. 2012).

10 *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). *But see* Schuette v. BAMN, 134 S. Ct. 1623, 1644–45 (2014) (Scalia, J., concurring in the judgment) (critiquing

So conceived, Gertner's essay does not merely suggest that the first year of the Trump presidency witnessed a return to a mode of skeptical judging that had largely fallen out of style; it suggests that the mode has a political (albeit not necessarily *partisan*) valence—one likely to be met favorably by those opposed to the current President's policies, and critically by their supporters. To that end, it is telling that many of those criticizing the courts today championed what could easily have been described as comparably hostile lower-court rulings during (and against) the Obama administration; it is difficult to be persuaded by a normative assessment of the appropriate judicial role that varies in perfectly inverse proportion to one's policy preferences.

Although such a nakedly partisan conception of the judicial role is normatively undesirable, it is not clear to me that it is necessarily inevitable. For example, I suspect there can be (and is) cross-spectrum agreement that courts can and should reach the merits in more cases challenging government action than they currently do, without respect to *how* those merits are resolved. And on the far messier question of those merits, I also think there is still significant room for consensus, per footnote four, on the appropriateness of heightened judicial scrutiny in cases in which ordinary procedural norms are not observed by the relevant government actors,[11] or those in which one branch is making inroads into what appears to be the protected constitutional turf of another.[12] I harbor no illusion as to the (illusory) prospect of widespread agreement on how such heightened scrutiny should be *applied* in specific cases, but there's a world of difference between disagreeing as to whether courts are answering specific merits questions correctly and disagreeing as to how skeptically those questions should even be asked.

* * *

It is, of course, far too early to reach any broad conclusions about judging in a time of Trump—especially given how little the Supreme Court itself has thus far had to say on the subject (which is to say, virtually nothing). And so only time will tell whether, as Gertner suggests,[13] we will see a regression to pre-Trump norms as we get deeper into his tenure—

"the old saw, derived from dictum in a footnote," *i.e.*, the criteria for heightened judicial scrutiny advanced in *Carolene Products*' footnote four).

11 *Compare, e.g.*, Texas v. United States, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (affirming lower court's preliminary injunction of DAPA implementation), *with* Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017) (denying government's motion for a stay pending appeal of travel ban injunction).

12 *Compare, e.g.*, Boumediene v. Bush, 553 U.S. 723 (2008) (holding that the Military Commissions Act of 2006 violated the Suspension Clause), *with* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010) (ruling that the Sarbanes-Oxley Act's dual for-cause removal violated the Constitution's separation of powers).

13 Gertner, *supra* note 4, at 12–13.

which could result from softening in his policies, the judges, or both. But for those, like me, who have long viewed the jurisprudence of the Rehnquist and Roberts Courts as *overly* deferential to government and insufficiently protective of the rights of private citizens in suits challenging official action, the lesson from year one is not that judges have "joined the resistance"; it's that perhaps some are finally returning to the light.