

# THE “LOWER” FEDERAL COURTS: JUDGING IN A TIME OF TRUMP

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## INTRODUCTION

The scenes that unfolded in courtrooms across the country in the days and weeks after the inauguration of President Trump were unfamiliar to me, even though I had been a United States District Judge for seventeen years. The new President had announced a “travel ban” shortly after taking office.<sup>1</sup> The ban was wide ranging. It suspended entry of foreign nationals from seven countries for 90 days,<sup>2</sup> halted the U.S. refugee resettlement program for 120 days,<sup>3</sup> indefinitely suspended resettlement of Syrian refugees, reduced the cap on the number of refugees that can be accepted into the United States and suggested that Christians and others from minority religions be granted priority over Muslims. The policy, reportedly drafted without input from key officials and lawmakers, went into effect immediately, sweeping within it visa holders and lawful permanent residents, some in mid-flight to the United States. It was immediately challenged in district courts across the country; one court entered a national injunction halting its implementation.<sup>4</sup> In short order, the Ninth Circuit denied the government’s emergency motion for a stay on the injunction, pending appeal.<sup>5</sup>

Rather than continue to litigate the original order, the government revoked it and issued a new one.<sup>6</sup> Dropping Iraq from the list of targeted countries, the new ban exempted legal permanent residents and valid visa

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<sup>1</sup> Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

<sup>2</sup> *Id.* § 3(c).

<sup>3</sup> *Id.* § 5(a), (d).

<sup>4</sup> *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017).

<sup>5</sup> *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017).

<sup>6</sup> Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

holders and removed the indefinite restriction on the admission of Syrian refugees<sup>7</sup> as well as the language offering preferential status to persecuted religious minorities.<sup>8</sup> Yet, despite the changes, the revised ban was again enjoined by district courts in the Fourth and Ninth Circuits,<sup>9</sup> in decisions upheld by their respective courts of appeals.<sup>10</sup> The Supreme Court granted certiorari, put the case on the October 2017 calendar, and lifted the bans with some exceptions, ruling that the President's policy of restricted entry could only apply to refugees and travelers without a "bona fide" relationship to a person or entity in the United States.<sup>11</sup> By December 2017, the administration's third try had proved itself the charm, with the Supreme Court allowing the latest iteration of the policy to go into effect while the issue was being litigated in the lower courts.<sup>12</sup>

I was surprised by the travel ban's track record in the lower federal courts. The plaintiffs requested a preliminary injunction, an area which the Supreme Court acknowledged involved "an exercise of discretion and judgment."<sup>13</sup> In determining whether to issue an injunction, a court is charged with balancing the equities—the irreparable harm to the plaintiffs if the ban were implemented or to the government if it were suspended, the public interest which was arguably implicated on both sides of the case, and the likelihood of success on the merits of the claim.<sup>14</sup> The outcome was not a foregone conclusion: On the one hand, the Executive's bans were stunning in their breadth and in the speed with which they had been issued, with little or no process, let alone attention to detail. The comments made by the President while campaigning strongly suggested that religious and national-origin discrimination had motivated the travel bans' implementation. On the other hand, the bans concerned an area in which the President has substantial independent authority—namely, his significant power to set national security priorities and to exercise control over national borders.

In ordinary times, I would have expected a different result. Since a preliminary injunction is all about deference and judgment, I would have expected courts to defer to the President, trivialize the irreparable harm to the plaintiffs, and dramatize the costs to national security. I am not

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<sup>7</sup> *Id.* §§ 3(a), 6(a).

<sup>8</sup> *Id.* § 3(c).

<sup>9</sup> *Hawaii v. Trump*, 245 F. Supp. 3d 1227 (D. Haw. 2017) (entering a preliminary injunction); *Hawaii v. Trump*, 241 F. Supp. 3d 1119 (D. Haw. 2017) (entering a temporary restraining order); *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539 (D. Md. 2017).

<sup>10</sup> *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017); *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) (per curiam).

<sup>11</sup> *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017).

<sup>12</sup> *Trump v. Int'l Refugee Assistance Project*, 138 S. Ct. 542 (2017) (mem.).

<sup>13</sup> *Int'l Refugee Assistance Project*, 137 S. Ct. at 2087.

<sup>14</sup> *Id.* at 2087, 2089.

suggesting this would have been the correct result, only that it would have been a typical one.

The widespread negative reaction of the lower courts to the travel ban, no matter the party affiliation of the judge and no matter who had appointed him or her, made me consider whether judging in 2017, what I call “judging in a time of Trump,” would look different than the judging I was used to. I was a United States District Judge from 1994 to 2011. I am in the process of writing about that experience.

There is substantial literature about the role of context in judicial decisionmaking.<sup>15</sup> Context could mean the relative positions of power of parties in a lawsuit, the actual impact a judicial decision is likely to have,<sup>16</sup> or, looking at the case through an even broader lens, the political ramifications of the litigation.<sup>17</sup> To use the most graphic example, judging in a time of war is arguably different from judging in peacetime—different balances, different considerations.

What was the context in which the travel ban decisions were made? The bans were the work of a president who appeared to have no appreciation of constitutional checks and balances, let alone the role of the courts. For example, he questioned the impartiality of Judge Gonzalo Curiel, then presiding over a case against Trump University, because of Curiel’s “Mexican heritage,” even though Judge Curiel was born in Indiana. The President had no sense of the limits of his own authority, and his actions continue to evidence this lack of awareness. He has threatened to withhold funds from so-called sanctuary cities, notwithstanding congressional directives and Tenth Amendment limitations. He has been accused not simply of flouting constitutional rules but also constitutional norms. He reportedly suggested that the head of the FBI, a somewhat autonomous agency, was supposed to be “loyal” to him. Such challenges to checks and balances, to the separation of powers, even to elementary notions of federalism, are not abstract, but concrete; not aberrant, but systemic.

Does this reality figure into the process of judging in a time of Trump, especially in cases like those involving the travel ban preliminary injunction? My question is not the narrow one, about the admission of certain kinds of evidence (namely, whether courts evaluating the travel ban could consider what Trump had said on the campaign trail). It is about whether judging at a time when the systems of government seem to be, for

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<sup>15</sup> See, e.g., Larry A. DiMatteo, *Reason and Context: A Dual Track Theory of Interpretation*, 109 PENN. ST. L. REV. 397 (2004); Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597 (1990).

<sup>16</sup> Minow & Spelman, *supra* note 15, at 1598–99.

<sup>17</sup> *Id.* at 1603–04.

the most part, working looks different from judging when real executive overreach is a concern. The ordinary work of judging involves judgment and choice at all levels; contrary to the legal formalists, the law does not enforce itself. In that judicial work—those choices, that balancing, the exercise of judicial discretion, and the interpretation of often ambiguous provisions—does the Trump context play a role, explicitly or not?

I offer only preliminary thoughts here. The Trump presidency is young. The federal judiciary is changing, with more and more Trump appointees slated to join. Even in the district court, where judges sit alone, new judges can make a difference. Still, it is worth using judging in “ordinary” times, such as the period in which I served, as a benchmark and then extrapolating to what this might mean for judging in a time of Trump.

## I

### JUDGING IN “ORDINARY” TIMES

The “lower” federal courts are not just the waystations you must pass through to get to the Supreme Court. They are—or at least they are supposed to be—common law courts, considering new constitutional issues on the merits, prefiguring arguments that may one day be appealed to the Supreme Court—or not. They shape the way justice is actually delivered in the vast majority of cases.

Too often, however, they have behaved otherwise, in what I have called a strategy of “duck, avoid, and evade.”<sup>18</sup> The lower federal courts have resorted to doctrines that narrow access to justice; they have created a set of procedural tripwires to avoid dealing with the merits of cases. In so doing, they have reduced certain kinds of cases—notably, civil rights cases—to kabuki rituals in which the plaintiff regularly loses. As I wrote:

These were pressures—or better yet incentives—that cut across the usual political and ideological lines other scholars have written about. While they were presented to us as efficiency measures, and neutral in their impact, they in fact affected the way the job of judging was done, and, advertently or inadvertently, the outcomes. Indeed, in my view, the result of “duck, avoid, and evade” was a bench that seemed to be more reticent about the exercise of judicial power at all than were prior generations of judges. This was a passive judiciary, even timid, all the more extraordinary for being the first independent judiciary in the world.<sup>19</sup>

This was not appropriate judicial restraint, as the concept is usually understood.<sup>20</sup> Rather it was caving in to the pressure to avoid making any

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<sup>18</sup> Nancy Gertner, *Opinions I Should Have Written*, 110 Nw. U. L. Rev. 423, 428 (2016).

<sup>19</sup> *Id.* at 426–27.

<sup>20</sup> *See, e.g.*, ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH*, 111–29 (2d ed.

reasoned judgments at all.

There are many explanations for the timidity of the federal judiciary, which I have offered in other articles.<sup>21</sup> There are caseload pressures, or at the least, the appearance of caseload pressures, which have led to “managerial judging.” Managerial judging privileges dispute resolution, rather than generation of common law decisions.<sup>22</sup> Managerial judging’s concern for efficiency provides the incentive for judges to eschew writing opinions unless they must as a matter of law, as in a grant of summary judgment. As a result, a body of law evolves which is one sided. An asymmetric decisionmaking process leads to decision rules that provide a blueprint for summary judgment or dismissals. Over time, the decisional law is skewed. As I describe it with reference to Title VII law:

When the defendant successfully moves for summary judgment in a discrimination case, the case is over. [Under the Rules], the judge must “state on the record the reasons for granting or denying the motion,” which means writing a decision. But when the plaintiff wins, the judge typically writes a single word of endorsement—“denied”—and the case moves on to trial....

The result of this practice—written decisions only when plaintiffs lose—is the evolution of a one-sided body of law. Decision after decision grants summary judgment to the defendant.... After the district court has described—cogently and persuasively, perhaps even for publication—why the plaintiff loses, the case may or may not be appealed. If it is not, it stands as yet another compelling account of a flawed discrimination claim. If it is appealed, the odds are good that the circuit court will affirm the district court’s pessimistic assessment of the plaintiff’s case.<sup>23</sup>

Over time, the way judges view these cases changes:

If case after case recites the facts that do not amount to discrimination, it is no surprise that the decisionmakers have a hard time envisioning the facts that may well comprise discrimination. Worse, they may come to believe that most claims are trivial.<sup>24</sup>

Concerns about the costs of litigation because of groundless claims trump concerns about access to justice.

Another explanation for the evolution of civil rights law, however, may be context—the changing political and social context in which civil

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1986).

<sup>21</sup> See, e.g., Nancy Gertner, *The Judicial Repeal of the Johnson/Kennedy Administration’s “Signature” Achievement*, in *A NATION OF WIDENING OPPORTUNITIES: THE CIVIL RIGHTS ACT AT FIFTY* (Samuel R. Bagenstos & Ellen D. Katz eds., 2015); Nancy Gertner, *Losers’ Rules*, 122 *YALE L.J. ONLINE* 109, 116–23 (2012) [hereinafter Gertner, *Losers’ Rules*]; Gertner, *supra* note 18, at 427.

<sup>22</sup> See, e.g., Judith Resnik, *Managerial Judges*, 96 *HARV. L. REV.* 374 (1982).

<sup>23</sup> Gertner, *Losers’ Rules*, *supra* note 21, at 113–14.

<sup>24</sup> *Id.* at 115.

rights claims are heard. In the case of employment discrimination cases, courts interpreted the statutes to outlaw cases of intentional discrimination only. And that approach maps onto what may be a prevailing political view, namely that the market is simply working fairly in a country that is post-race and post-gender. On this view, the law's goal is to identify the aberrant individuals who still do not get the anti-discrimination message. At least before the presidential election, and surely before the #MeToo movement, these beliefs provided a disincentive for judges to probe very deeply into employment discrimination cases, rather than dismiss them.

Whether it was administrative pressures and asymmetric opinion writing, a widespread belief that we were post-racial and post-gender, or a sense that the government was for the most functioning within bounds, certain features of these "normal times" enabled courts to "duck, avoid, and evade."

## II

### JUDGING IN A TIME OF TRUMP

After the election, I was not only concerned about what the President did—the executive orders that he enacted—but also the official conduct—of border officials, police officers, etc.—he enabled and even encouraged. I predicted a plethora of cases raising civil rights claims against government officials. And not just the big cases, the ones that garner media attention like the travel ban, but the little cases that were a federal court's regular fare, too. At the same time, I was pessimistic about the extent to which courts would serve as a meaningful backstop to official abuse, given what I had observed in my tenure.

Now I am not so certain. I don't want to overstate this, but perhaps "judging in a time of Trump" has a different resonance than judging did when I was on the bench. It is one thing to "duck, avoid, and evade" when you believe that official actors are acting more or less within constitutional bounds. It is another to do so when you are concerned about real abuse of power.

To be sure, the travel ban cases may be *sui generis*. Executive orders in year two or three of this administration may be given more and more deference. The run-of-the-mill discrimination or police abuse case may fit into the old patterns. And one reaction to the President's attack on judges may be for them to seek to prove their neutrality by bending over backwards to sustain official acts, a version of what Robert Cover described in his account of the Northern anti-slavery judges who enforced the Fugitive Slave Act with a rigor that was not required by the law.<sup>25</sup>

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<sup>25</sup> ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 119–

Finally, all of this may look different with new Trump appointees emboldened not to “duck, avoid, and evade,” but on an explicit mission to transform the decisional law. Their goal may be to change the prevailing assumptions of the past thirty years—about civil rights, the rights of criminal defendants, checks and balances, etc. And if that is the case, if some judicial colleagues are seeking to rethink settled precedent, to unreasonably defer to a government that is undermining constitutional norms, then there will be no justification for the “old” ways of judging for the rest of the bench. Case management concerns, assumptions about the regular functioning of government, even prevailing assumptions about race and gender relations, will pale before the judiciary’s constitutional obligation to engage with the substance of legal issues rather than evade them at all costs, whatever the outcome and whatever the President’s reaction.