The Federal Judiciary Revolts…not Quite and not Enough: Trump's Travel Bans and Judicial Review †

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Round 3 of the travel ban litigation in US courts has begun.[2] The administration has issued Travel Ban 3.0 and the district courts have, once more, ordered preliminary injunctions. As we watch the judicial response to this third iteration of President Trump's travel ban order develop, it is worth considering the judiciary's approach so far and what the emphasis on 'the *especially troubling* Presidency of Donald Trump' motif surrounding the litigation may obscure about the stakes.

Soon after several district courts around the United States struck down the second travel ban executive order issued by the Trump administration, a piece on *Lawfare* blog (one of the top national security blogs in the US) raised a question: "why are so many judges being so aggressive here?"[3] After all, when it is the immigration policy (especially matters of entry) mixed with claims of national security, the judiciary traditionally sings a very different tune: deference, avoidance, and faith in political judgement. The question came up in a lengthier discussion on reasons why different political, civil, and judicial actors have reacted to the Trump presidency with less deference and trust than is typically enjoyed by the holder of that office. The main argument advanced by the authors is that the Oath Clause of the Constitution has significant legal and political purchase, which accounts for institutional and doctrinal respect for presidential decision-making; the courts defer, the media extends the benefit of the doubt, executive officers fall in line because we all trust that the president is acting in 'good faith' and with constitutional principles in mind.[4] The problem is, the authors argue, "[t]he idea that Trump's swearing this or any other oath 'solemnly' is, not to put too fine a point on it, laughable."[5] The courts are willing to

† Previewed on 7th December 2017, https://joxcsls.com/new-articles/.

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[2] *IRAP v Trump*, Civ No TDC-17-0361 (D Md 17 Oct 2017) https://assets.documentcloud.org/documents/4112212/Md-Memo-Opinion.pdf; *Hawaii v Trump*, Civ No 17-00050 DK1-KSC (D Haw 17 Oct 2017) https://assets.documentcloud.org/documents/4111837/Hawaii-v-Trump-TRO.pdf. See also Vivian Yee, 'Judge Temporarily Halts New Version of Trump's Travel Ban' (*NYTimes*, 17 Oct 2017) <https://www.nytimes.com/2017/10/17/us/trump-travel-ban-blocked.html> accessed 30 Oct 2017.

[3] Benjamin Wittes & Quinta Jurecic, 'The Revolt of the Judges' (*Lawfare*, 16 March 2017) < https://lawfareblog.com/revolt-judges-what-happens-when-judiciary-doesnt-trust-presidents-oath> accessed 25 May 2017.

[4] Benjamin Wittes & Quinta Jurecic, 'What Happens When We Don't Believe the President's Oath?' (*Lawfare,* 3 Mar 2017) < https://lawfareblog.com/what-happens-when-we-dont-believe-presidents-oath> accessed May 25, 2017.

[5] ibid.

step up and be aggressive, the line of thinking goes, because this president cannot be thought to be acting in 'good faith'. This line of argument is troubling, as is how the federal judiciary has approached the travel ban litigation more generally.

Personal shortcomings of President Trump may be cause for serious concern, but any legal doctrine developed and limited to these unique circumstances will fail to confront the core legal problem these cases present. The real problem is that our regular assumptions of 'good faith' have produced doctrines that grant almost absolute deference to the executive, to the point that it is accurate to characterize the law as allowing the president to use discriminatory, arbitrary, and irrational reasons for action. Two circuit courts ruled President Trump's Executive Orders unconstitutional, but neither court's approach confronts the issue of the breadth of discretion granted to the Executive and the need to develop principled standards for placing constitutional limits on that discretion.[6]

The 9th Circuit Court of Appeals' decision against the first travel order and the 4th Circuit Court of Appeals' *en banc* decision against the second travel ban order highlight two different judicial approaches. Each approach shows the judiciary failing to confront the substantive constitutional issues involved, finding refuge instead in lines of reasoning that fail to grapple with the challenge of unbounded discretion. The 9th Circuit's focus on the separation of powers and procedural due process arguments avoids the question of 'bad faith' by following a more familiar national security/immigration context line of reasoning, one that has already proved incapable of examining the justification for and legitimacy of executive practice. Meanwhile, the 4th Circuit's reliance on 'bad faith' sidesteps challenging doctrinal questions by developing a rule focused on *this* president and *these* circumstances. As the federal courts take up these issues again, it is worth considering what the circuit courts' constitutional lines of reasoning so far tell us about judicial review of executive discretion.

I. The First Travel Ban

On 9th February 2017, 9th Circuit Court of Appeals issued a decision refusing to stay the temporary restraining order against the first executive order.[7] Soon after the decision was handed down, President Trump announced he would not appeal; as a result the courts never conducted a full merits review. However, the 9th Circuit's emphasis on separation of powers and procedural due process principles when justifying the exercise of judicial review signals that the substantive rights of the

[6] There was a third circuit court decision, the 9th Circuit's opinion on the second travel ban order, but that case was decided on statutory and not constitutional grounds. Though there are some interesting constitutional implications for how the 9th Circuit conducted statutory interpretation in the case, that decision will not be analyzed in this article. *Hawaii v Trump,* 859 F3d 741 (9th Cir 2017).

[7] *Washington v Trump*, 847 F3d 1151 (9th Cir 2017).

people affected by this order (or an examination of the justifications offered for it) may never have been a significant part of the eventual merits analysis.[8]

President Trump's first executive order implicated important individual interests: whether it stranded legal permanent residents abroad; or trapped residents and aliens domestically by restricting their right to travel; or refused to grant entry to someone because of their religion. Judicial review of the legality and constitutionality of such an order should give proper weight to those interests.

There are two main kinds of separation of powers arguments in the court's analysis, both of which are familiar. One focuses on the executive's institutional powers in immigration and national security matters and the second on the judiciary's role as the institutional check against illegal and unconstitutional exercises of executive power. I want to focus on the checks and balances arguments for the exercise of judicial review. Given how much the circuit court references the Supreme Court decision in *Boumediene v. Bush*, a case in which the separation of powers arguments for exercising judicial review were effectively severed from the underlying individual interests mandating judicial review, there is reason to be concerned.[9] Federal courts have, in the past, relied on structural arguments to assert the need for judicial review.[10] Grand rhetoric about the need for checks and balances has proved to be just that, institutional grandstanding without much substantive doctrinal safeguarding of the principles and interests at stake. In other words, an institutional powers-based justification for the exercise of review is likely to get mired in duelling arguments for institutional domains of authority, conducted at a highly abstracted level at which executive national security and immigration powers are likely to win over any claims of judicial guardianship of constitutional structure.[11]

An institutional powers-based approach that merely pays lip service to checks and balances will not provide any meaningful review. The reasoning needs to be able to link the exercise of judicial power with a substantive principle/interest at stake in the litigation. The courts need to clearly explain that the judiciary is empowered to ensure the executive does not exercise discretionary authority in a discriminatory or unreasonable manner (perhaps finding arbitrariness from the fact that there is no evidence that the means chosen are related to the purported aims of the order).

Instead of identifying the applicable substantive standard, the court focused on the procedural due process claim as the main individual interest in the litigation. Given the Supreme Court's use of procedural due process in national security and immigration,[12] the emphasis on process is another means of avoiding articulating the substantive principles or rights at issue.

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[8] See *Kerry v Din,* 135 S Ct 2128 (2015).
[9] *Boumediene v Bush,* 553 US 723 (2008). See also Stephen Vladeck, 'Boumediene's Quiet Theory: Access to Courts and the Separation of Powers' (2009) 84 Notre Dame L Rev 2107.
[10] ibid.
[11] *United States v Curtiss-Wright*, 299 US 304 (1936); *Korematsu v United States,* 323 US 214 (1944); *Boumediene v Bush,* 553 US 723 (2008).
[12] *Kerry v Din,* 135 S Ct 2128 (2015).

There were important individual interests at stake in the litigation over the first travel ban. The rule of law concerns dominated the political and public discussion of the executive order. While judicial analysis necessarily proceeds differently, any judicial analysis that severs the institutional and procedural standards from the substantive values at stake will fail to protect those values, thereby rendering judicial review a hollow guarantor of constitutionality.

II. The Second Travel Ban

Following the 9th Circuit's decision, President Trump withdrew the first order and on 6th March 2017 signed Executive Order 13780 (EO-2), which was to go into effect on 16th March 2017. EO-2 made some relevant changes to the first order. It removed Iraq from the list of covered countries and excluded from its coverage certain groups of individuals with relevant ties to the US.

On 16th March 2017, a district court in Maryland issued an injunction.[13] It was that decision that the *en banc* 4th Circuit affirmed (in part), 10-3. The 4th Circuit's majority opinion focused considerably on President Trump's statements, during his presidential run and after taking the Oath of office, to find 'bad faith' on the part of the administration in issuing the second order.[14] In looking at those statements and investigating the question of purpose of or justification for the executive order, the majority opinion had to confront a key precedent set by the Supreme Court in *Kleindienst v Mandel.* The Court in *Mandel* made the following rule for reviewing executive exercises of immigration power, when that exercise violates the First Amendment rights of citizens or residents:

> *"We hold that when the Executive exercises [the power to grant entry] negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests [of the plaintiffs]."*[15]

The 4th Circuit's majority opinion, through the examination of President Trump's public statements about the purpose of the executive order, found that there was ample reason to suspect that the purported national security purpose was in fact not '*bona fide'* and therefore to find a likelihood of a Establishment Clause violation.[16] This is a bit of a misreading of *Mandel*.

In the case of *Mandel*, evidence was presented by the plaintiffs to raise doubts about the '*bona fide'* nature of the decision, but the Supreme Court refused to consider them—a fact one of the dissents points out.[17] As Judge Niemeyer states, according to *Mandel* "a lack of good faith must appear on the face of the government's action [in the text of the executive order], not from looking behind it."[18] Given the stated reasons

[13] *IRAP v Trump,* __FSupp 3d__, 2017 WL 1018235 (D Md Mar 16, 2017).
[14] *IRAP v Trump*, __F3d__, 2017 WL 2273306 (4th Cir May 25, 2017) 50-53.
[15] *Kleindienst v Mandel,* 408 US 753, 770 (1972).
[16] *IRAP*, 2017 WL 2273306 (4th Cir May 25, 2017) 53.
[17] ibid 160-62.
[18] ibid 163 (Niemeyer dissenting).

for targeting the nationals of the named six nations,[19] the dissent argued, on its face, the government's reasons are legitimate and bona fide. The dissent is right about the state of the law, the precedent cited does dictate almost total judicial abdication, but that fact is a cause for concern about the state of our constitutional law and its compliance with the rule of law.

By focusing so much on the unique terribleness of *this* president, and devising a rule to get around *Mandel* so fitted to these circumstances, this case and the scholarly dialogue preoccupied with President Trump's lack of 'good faith' runs the risk of closing its eyes to deeper problems with the state of the law. The issue, at the core, is not that we had set legal doctrine just right and President Trump is now unsettling the arrangements we have made. The problem is that constitutional doctrine in the area of immigration (and national security) is so deferential that it is not at all clear that President Trump's policies (discrimination and all) are unconstitutional. We cannot say, examining cases like *Chae Chan Ping*,[20] *Korematsu*,[21] *Mandel*,[22] and *Kerry v Din*,[23] that using discriminatory, arbitrary, and unjustified reasons to deny, expel, and detain individuals is clearly unconstitutional. This fact may not trouble some people, but it should worry anyone in favour of imposing some limits on executive power. By focusing on the 'bad faith', or the personality and actions of this president, the legal analysis seeks to sidestep confronting the problem of unbounded deference and unreviewable power, which is the reality of this subject matter and these travel orders; its consequence.

III. The Supreme Court and the Second Travel Ban Order

On 26th June 2017 the Supreme Court granted cert in a pair of cases challenging EO-2 (appeals from the 9th and the 4th Circuit Courts of Appeal) and granted, in part, the government's motion to stay the lower courts' injunctions.[24] The Court ultimately dismissed the case (or rather the pair of appeals) due to mootness, given the temporal scope of the Order, and vacated the two circuit court opinions.[25] Nevertheless, the *per curium* opinion gives us a glimpse into the Court's thinking. The focus, in that opinion, on the 'relationship' between the individuals impacted by the Executive Order and the United States suggests the Court was leaning away from the Establishment Clause argument and was more likely to rely on the procedural due process protections to

[19] Executive Order 13780 'Protecting the Nation from Foreign Terrorist Entry into the United States', 82 (45) Fed Reg 13209, 13210 (Mar 6, 2017) ("Each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones.").
[20] 130 US 581 (1889).
[21] *Korematsu v United States,* 323 US 214 (1944).
[22] *Kleindienst v Mandel,* 408 US 753 (1972).
[23] *Kerry v Din,* 135 S Ct 2128 (2015).
[24] *Trump v International Refugee Assistance Project*, 582 US___ (2017) (per curium).
[25] *Trump v Hawaii,* Cert Summary Disposition 16-1540 (24 Oct 2017) https://www.supremecourt.gov/orders/courtorders/102417zr_e29f.pdf; *Trump v IRAP*, Cert Summary Disposition 16-1436 (10 Oct 2017) http://www.scotusblog.com/wp-content/uploads/2017/10/16-1436.pdf.

guide its reasoning.[26] As this essay has already argued, the Supreme Court's continued reliance on procedural due process and separation of powers arguments presents a real barrier to substantive scrutiny of executive policy. Where the emphasis remains on institutional competencies divorced from substantive principles of due process, reasonableness, and non-discrimination, the habitual (and superficially defended) assumption of 'good faith' will, most likely, translate into unchecked executive power.

IV. Afterword

On 4th December 2017 the Supreme Court granted the government's request to allow the third iteration of the travel ban order to go into force as the litigation works its way through the federal circuit courts. Travel ban 3.0 limits the entry into the United States of nationals from Iran, Libya, Yemen, Somalia, and Syria, all of which were included in earlier orders, and adds North Korea, Venezuela, and Chad to the list.

[26] *Trump v International Refugee Assistance Project*, 582 US at 9.