HOW SHOULD THE U.S. PUBLIC LAW SYSTEM REACT TO PRESIDENT TRUMP?

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In this essay, Professor Pierce uses six actions that President Trump has taken or has 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.

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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 challenge of precluding President Trump from undermining our core values while leaving him and his successors with the power to execute effectively the functions that Article II vests in the President, but the task will not be easy.

President Trump’s most important unique characteristic is his strong bias against members of some religious and ethnic groups, as well as 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, the Washington Post, CNN, and former senior officials in the FBI and the intelligence community who have criticized

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him, among many others.

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.\(^1\) If he acts on the basis of his antipathy toward some individuals, his actions will violate the Due Process Clause of the Fifth Amendment.\(^2\) If those actions are motivated by the views expressed in media outlets owned by those individuals, his actions also will violate the Freedom of the Press Clause of the First Amendment.\(^3\) If his actions are motivated by public statements made by critics, they will violate the Freedom of Speech Clause of the First Amendment.\(^4\)

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 cultural values.

In this essay, I argue that courts should attempt to further three goals in order to preserve the core legal and cultural values of the public law system. First, courts should strive to preclude President Trump from acting in accordance with his animosity toward groups and individuals. Courts will find it challenging to pursue that goal while they further two additional important goals, however.

Second, courts should allow President Trump to take any lawful action that is not rooted in his bias against particular groups or individuals. He was elected President. He should be afforded the same degree of discretion to pursue his lawful goals and those of the citizens who elected him as any other president.

Third, courts should also 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 executive 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 na-

\(^1\) See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

\(^2\) See U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . .”).

\(^3\) See U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom . . . of the press . . .”).

\(^4\) See id. (“Congress shall make no law . . . abridging the freedom of speech . . .”).
tionals from several mostly Muslim nations, he claimed that he was motivated by his desire to protect the United States from terrorists. Many parties challenged the orders, claiming that the orders were motivated by President Trump’s powerful bias against Muslims. The legality of the orders should depend on the answer to that question. The question has proved so difficult to answer, however, that it has elicited a wide variety of conflicting opinions from the judges and Justices who have attempted to answer it.

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 most 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. That presumption should be rebuttable only by a combination of powerful evidence that the President actually made the decision to take the action, and that he acted based on undisclosed unlawful motives.

However, President Trump has other unique characteristics that suggest that it is risky to rely on that presumption. 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, Noel Francisco, has urged the Supreme Court to hold unconstitutional statutory limits on the power of the

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5. The travel bans and the judicial opinions that address the bans are discussed in detail infra at notes 16–57.


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.\textsuperscript{10} Francisco 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.\textsuperscript{11} 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 of President Trump suggest that courts should be sensitive to the possibility that an agency’s action against a group or individual that the President has previously vilified was motivated by the President’s bias. 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.\textsuperscript{12} 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 owned by the same individual who owns Amazon.\textsuperscript{13}

In this essay, I will explore whether a variety of public law doctrines can accommodate the potentially conflicting goals that the courts should attempt to pursue throughout 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 Amazon’s rates 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

President Trump’s two Executive Orders and Presidential Proclamation


\textsuperscript{11} See generally id. (arguing that an agency head should have the power to remove an Administrative Law Judge for virtually any reason).

\textsuperscript{12} Discussed infra notes 80–95.

\textsuperscript{13} Discussed infra notes 96–104.
are often collectively referred to as the “travel bans.” The travel bans illustrate the tension between the three goals that the judiciary must simultaneously attempt to pursue 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 United States 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. If motivated by bias against Muslims, the travel bans would also present excellent examples of Presidential actions that would violate constitutional prohibitions against discrimination based on religion. Each of the three bans would have, and arguably did have, a massively disproportionate adverse effect on Muslims.

President Trump issued the first ban seven days after he took office. It temporarily banned all foreign nationals from seven predominantly Muslim countries from entering the United States. It was not preceded by any consultation with national security or immigration officials, and was issued immediately after the President told one of his legal advisors that he wanted to ban all Muslims from entering the country and asked him how he could legally accomplish that result. President Trump also stated publicly that he would give preference to any Christian who wanted to enter the United States from a country that was on the banned list.

The second ban was issued six weeks after the first ban and after several courts had enjoined the first ban. It removed Iraq from the banned list, and announced that the President had directed the Secretary of the United States Department of Homeland Security (DHS) to investigate the procedures used by the other countries on the banned list to determine whether

17. Id. (“I hereby proclaim that the immigrant and nonimmigrant entry into the United States of aliens from countries referred to in section 217(a)(12) of the INA, 8 U.S.C. 1187(a)(12), would be detrimental to the interests of the United States, and I hereby suspend entry into the United States . . . ”). The seven countries referred to are Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. See Trump v. Hawaii, 138 S. Ct. 2392, 2403 (2018).
19. Id.
they were providing the United States with adequate information about travelers to the United States.\(^{21}\)

The third ban was issued six months after the second ban and after several courts had enjoined the second ban.\(^{22}\) The ban imposed indefinite duration bans on travelers attempting to enter the United States from any of the six primarily Muslim countries that were on the prior lists. However, it added two non-Muslim countries to the banned list and exempted travelers who had visas or who qualified for visas.\(^{23}\) The government attempted to defend the third ban, justifying it with a DHS study that found that each of the eight countries had inadequate systems for determining whether travelers to the United States posed risks of engaging in terrorism and of communicating any such risk information to the United States.\(^{24}\) Notably, however, the government refused to make the DHS report of the investigation available to reviewing courts.\(^{25}\)

The travel bans have yielded dozens of inconsistent judicial opinions.\(^{26}\) The various lower court opinions issued so far rely on a wide variety of reasoning to support disparate results. The Supreme Court addressed the issues in an opinion in which a five-Judge majority reversed the grant of a preliminary injunction and remanded the case to the lower courts for further proceedings as appropriate.\(^{27}\) 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*\(^{28}\) are valuable as insights 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 advance as they review actions taken by the Trump Administration.

The en banc Fourth Circuit upheld, by a vote of nine to three, the district court’s preliminary injunction with respect to the third travel ban.\(^{29}\) Three judges dissented.\(^{30}\) 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

\(^{21}\) See *Trump v. Hawaii*, 138 S. Ct. at 2421.


\(^{23}\) *Id.* at 45,167.

\(^{24}\) *Id.* at 45,163.


\(^{28}\) 883 F.3d 233.

\(^{29}\) *Id.* at 249, 273.

\(^{30}\) *Id.* at 353.
Muslims during 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.” The dissenters also referred to language in the Presidential Proclamation that included such a finding and supported it by reference to the findings of the DHS investigation of the eight countries that were included in the ban. Lastly, they noted the existence of over a century of judicial decisions that “leave essentially no room for judicial intervention in immigration matters.”

The dissenting judges criticized the majority and the district judge for relying on “campaign statements and other similar statements” as the basis for finding the Proclamation to be motivated by impermissible bias against Muslims when it did not directly reference religion. They complained that the 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.” The dissenting judges also criticized the majority for adopting constructions of the applicable statutes that are inconsistent with the language of the statutes and that greatly restrict the President’s power.

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. The dissenting judges justified that result by referring to the critical need to further the goals of allowing President Trump and his successors the discretion to act in ways that are required to protect national security. They asserted that the majority’s consideration 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”

31. *Id.* at 357, 372 (quoting 8 U.S.C. § 1182(f)).
32. *See id.* at 355–58 (describing the Department of Homeland Security’s (DHS’s) process for investigating the eight countries).
33. *Id.* at 361 (quoting Castro v. U.S. Dep’t of Homeland Sec., 835 F.3d 422, 442 (3d Cir. 2016)).
34. *Id.* at 373.
35. *Id.* at 374.
36. *Id.*
37. *Id.* at 264–65 (“The President’s own words—publicly stating a constitutionally impermissible reason for the Proclamation—distinguish this case . . . .”); *see also* Trump v. Hawaii, 138 S. Ct. 2392, 2434–39 (2018) (Sotomayor, J., dissenting) (detailing the numerous, specific statements of the President that were broadly critical of all Muslims).
by precluding him from taking any future action to protect the nation from Muslim terrorists—no matter how important the action might be.\textsuperscript{38} The dissent 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.”\textsuperscript{39}

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 United States.\textsuperscript{40} 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.\textsuperscript{41} They then referred to the “rare instances” in which the Supreme Court had authorized such review.\textsuperscript{42} Plaintiffs must make an “affirmative showing of bad faith” which they must “plausibly allege with sufficient particularity.”\textsuperscript{43} “Upon such a showing, a court may ‘look behind’ the Government’s proffered justification for its action.”\textsuperscript{44} 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.”\textsuperscript{45}

The second argument made by some of the judges in the majority was based on concern that, if interpreted literally, the statutes that delegate to the President seemingly unreviewable discretion to restrict entry of foreign nationals would violate the Non-Delegation Doctrine.\textsuperscript{46} Those judges reasoned that they had to apply the avoidance canon to protect the statutes from a holding that they are unconstitutional.\textsuperscript{47} 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

\footnotesize{\textsuperscript{38} See Int’l Refugee Assistance Project, 883 F.3d at 374.  
\textsuperscript{39} Id. at 370.  
\textsuperscript{40} Id. at 264.  
\textsuperscript{41} Id. at 263–64.  
\textsuperscript{42} Id. at 264.  
\textsuperscript{43} Id. at 264.  
\textsuperscript{44} Id. (quoting Kerry v. Din, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring)).  
\textsuperscript{45} Id. at 264.  
\textsuperscript{46} Id. at 290.  
\textsuperscript{47} Id. at 325–26.}
entry of foreigners into the country.\textsuperscript{48}

The second argument fares poorly when 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 advance 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—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” on the ability of either President Trump or his successors to protect the nation from a wide variety of potential grave dangers to national security.\textsuperscript{49} 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.\textsuperscript{50}

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 based on 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.\textsuperscript{51}

It is unlikely that any future president will be affected by the rare exception the majority relied on because it is improbable that we will elect another

\textsuperscript{48} Id. at 291, 319, 327.
\textsuperscript{49} Id. at 347.
\textsuperscript{50} Id. at 265–70 (requiring the President to offer a secular primary purpose consistent with concurrent statements or run afoul of the Establishment Clause).
\textsuperscript{51} Id. at 264.
president with such a powerful animus toward a religious group that President Trump has evinced toward Muslims. If we do, an opinion like 

*International Refugee Assistance Project v. Trump* will provide an indispensable source of protection from actions that are based on the worst instincts of such a president.

Another important limit illustrated by the majority’s implicit recognition is 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 United States in protecting itself from foreign terrorists that enter the United States from those countries for two reasons.\(^52\) 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.\(^53\) 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.\(^54\) 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.\(^55\)

The judges’ discussion of the investigation suggests that they were open to the possibility of upholding the travel ban if the government had made the study available to the court and the findings and criteria in the study provided plausible support for the ban.

Finally, the judges recognized that “the President’s past actions cannot ‘forever taint’ his future actions.”\(^56\) 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.\(^57\)

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

\(^{52}\) *Id.* at 268–69.

\(^{53}\) *Id.* at 268.

\(^{54}\) *Id.*

\(^{55}\) *Id.* at 268–69.

\(^{56}\) *Id.* at 268 (citing McCreary County v. Am. Civil Liberties Union, 545 U.S. 844, 874 (2005)).

\(^{57}\) *Id.*
actions of federal agencies can be rebutted by powerful evidence to the contrary 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. 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. 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.

The Supreme Court majority reached the same result as the judges who dissented in the Fourth Circuit. However, their reasoning is closer to the reasoning of the Fourth Circuit majority than it is to the reasoning of the Fourth Circuit dissenters. 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. 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 impermis-

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58. *See United States v. Chem. Found.*, 272 U.S. 1, 14–15 (1926). Actions of federal agencies are presumed to be regular, e.g. free from unconstitutional bias. This presumption is rebuttable but has a high standard of proof. *Id.*

59. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985) (“The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court.”). The reasoning in the Seventh Circuit’s opinion in *Latecore Int’l v. Dep’t of Navy*, 19 F.3d 1342 (11th Cir. 1994), is analogous to the reasoning in the majority opinion in *Int’l Refugee Assistance Project v. Trump*. 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.” *Latecore Int’l*, 19 F.3d at 1357. The court went on to hold unlawful the award of the contract to a U.S. company because of the impermissible bias of the contracting officer. *Id.* at 1364.


61. *See id. at 2423.*

62. *Id. at 2409; see also Int’l Refugee Assistance Project*, 833 F.3d at 255.

sible religious bias, at least in the context of requests for preliminary injunctions.\textsuperscript{64}

The Justices who joined the majority opinion reversed the preliminary injunctions based on a combination of many factors, including the factors the Fourth Circuit dissents 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.\textsuperscript{65}

However, the Supreme Court majority emphasized other factors that were also important to its decision. The factors the majority discussed included: the unprecedented level of detail in the Proclamation;\textsuperscript{66} “a worldwide review process undertaken by multiple Cabinet officials and their agencies” that preceded issuance of the Proclamation;\textsuperscript{67} 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;\textsuperscript{68} the inclusion in the Proclamation of “significant exceptions for various categories of foreign nationals”;\textsuperscript{69} and, the inclusion in the Proclamation of “a waiver program open to all covered foreign nationals seeking entry as immigrants or nonimmigrants.”\textsuperscript{70}

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 dissenting Justices did so on a narrow basis that the government can overcome on remand. They noted that: “[m]embers of the Court principally disagree about the answer to this question, i.e. about whether or the extent

\textsuperscript{64}. Id. at 2418–23.
\textsuperscript{65}. Id. at 2407–10.
\textsuperscript{66}. Id. at 2409.
\textsuperscript{67}. Id. at 2421.
\textsuperscript{68}. Id. at 2422.
\textsuperscript{69}. Id.
\textsuperscript{70}. Id. at 2422–23.
to which religious animus played a significant role in the Proclamation’s promulgation or content.”

They expressed the view that “the Proclamation’s elaborate system of exemptions and waivers can and should help us answer this question.”

They premised their disagreement with the majority on evidence that the government was not actually applying the system of exemptions and waivers.

They admitted, however, that the only evidence available at the time the Court decided the case was inconclusive.

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 was actually implementing the exemptions and waivers created in the Proclamation.

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.”

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.

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.”

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.

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 simultaneously further 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.

71. Id. at 2429 (Breyer, J., dissenting).
72. Id.
73. Id. at 2431.
74. Id. at 2433.
75. Id.
76. Id. at 2433 (Sotomayor, J., dissenting).
77. Id. at 2438 (Sotomayor, J., dissenting).
78. Id. at 2420 n.5.
79. Id.
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 issues. The firms do not compete in any market, so the merger would 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 further argued that the merged firms’ 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.

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. 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. Enforcement agencies had not fully litigated a challenge to a proposed vertical merger in many decades before the Trump Administration’s DOJ challenged the proposed AT&T/Time Warner merger. Moreover, the head of the Antitrust Division of DOJ in the Trump Administration had stated publicly that he did not see the proposed merger as a major antitrust problem before he apparently changed his mind after President Trump made him head of the Division.

81. Id. at 201.
82. 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. See id. at 198–254.
83. 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).
85. See AT&T, 310 F. Supp. 3d at 193–94.
86. See CPI, US: Trump’s Delrahim Sees No Problem with AT&T-Time Warner Merger,
DOJ’s position in the AT&T/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.87 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.88 That view of antitrust law has gained traction recently, as illustrated by its adoption in the Democratic Party’s 2017 statement of its positions on various issues under the title: “A Better Deal.”89 Similarly, the choice of appropriate remedies in antitrust cases has long been the subject of serious 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 urged in the AT&T/Time Warner case.90


90. See, e.g., John E. Kwoka & Diana L. Moss, Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement, 57 ANTITRUST BULL. 979, 979–89, 1008 (2012) (arguing structural remedies are preferred to resolve concerns with a proposed merger while the disadvantages of behavioral remedies cannot as easily be addressed).
We probably will never know whether the positions that DOJ took in the AT&T/Time Warner case were motivated by President Trump’s bias against CNN. It is plausible, but it could have been motivated instead 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, there is no reason to believe that CNN would 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.

Courts have long distinguished between biased decisionmakers and biased prosecutors. A decision in an adjudication by a decisionmaker who is biased against the individual or firm that loses the case is a violation of due process. However, 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. As long as the decisionmaker is unbiased, the potential effects of prosecutor’s bias 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 ensure 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, eliciting expressions of disappointment from both DOJ and the left-leaning American Antitrust Institute. The government has appealed

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92. See, e.g., Marshall v. Jerrico, 446 U.S. 238, 250–52 (1980) (holding a provision of the Fair Labor Standards Act that assessed civil penalties for child labor employment violations and collected the penalties on behalf of the agency assessing the fee did not violate due process by creating impermissible risk of bias in enforcement and administration of the Act).
94. See AAI Says Federal Court Decision to Clear AT&T-Time Warner Will Set Back Competition, Innovation, Consumers, and Diversity in the Media, MARKET SCREENER [June 23, 2018, 5:29 AM],
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 Federal Trade Commission (FTC), rather than DOJ. Unlike DOJ, the FTC has the power to decide whether to approve or disapprove a proposed merger. It is plausible that the FTC Commissioners chosen by President Trump would act based on his bias against CNN. I would not be concerned that the FTC might decide that the merger is unlawful because any such decision would be subject to judicial review. I would be concerned, however, that the 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 the FTC regularly takes with respect to proposed mergers that it opposes.95

**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).96 He explained the action by stating that: “[t]he USPS is on an unstable financial path and must be restructured to prevent a taxpayer-funded bailout.”97 In a string of contemporaneous tweets, he attributed the financial problems of the USPS to the low rates that Amazon pays, claiming that the USPS loses billions of dollars because of Amazon.98 Around the same time, President Trump asked the Postmaster General to double Amazon’s rates.99

It is virtually certain that President Trump’s actions were motivated in

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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 Jeff Bezos, the owner of Amazon. Yet, there is no reason for concern that President Trump’s actions will yield results that punish Jeff Bezos for criticizing him.

Neither the Task Force nor the Postmaster General has 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. Every knowledgeable observer of the 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.

Understandably, the Washington Post did not publish a similar editorial praising President Trump for urging the USPS to double the rates it charges the Post’s sister corporation, Amazon. However, most observers of the USPS believe that, while the rates it charges customers like Amazon are not the most important source of its financial problems, the 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. Any such increase in rates would have to be authorized by the Postal Regulatory Commission (PRC), a five-member agency wherein each member serves 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, the Senate must confirm a presidential nominee. No more than three members of the PRC can be members of the same political party. Thus, the two Democratic members would be in a position to blow the whistle on any attempt by the Republican majority to act


101. See, e.g., Tobin Harshaw, Trump Versus the Post Office: They May Both Be Right, BLOOMBERG (Apr. 21, 2018, 8:00 AM), 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, Apr. 8, 2018, at G1.

102. See Paletta & Dawsey, supra note 99.

103. Id.
in a manner 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 Court recently issued in *United Parcel Service v. Postal Regulatory Commission*\(^{104}\) illustrates the detailed and careful scrutiny that courts apply when reviewing PRC orders.\(^{105}\) Moreover, there are market-based limits on the power of PRC to punish Amazon by increasing its rates—Amazon can switch from use of the USPS to 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.\(^{106}\) He regularly threatens to remove officials that he considers less than completely loyal to him. For instance, he fired the Director of the Federal Bureau of Investigations (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. He followed through on his threat to fire the Attorney General immediately after the 2018 midterm elections.

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 to resolve disputes between the government and private individuals.\(^{107}\) 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.\(^{108}\)

It is at least premature to be concerned that President Trump’s attitude toward removal of government officials will enable him to take, or direct others to take, actions that threaten to erode constitutional rights and values. The vast majority of removals of officials and threats to remove officials have

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104. 890 F.3d 1053 (D.C.C 2018).
105. Id.
108. Id.
no potential to empower the President to take actions that threaten constitutional rights. Thus, for example, 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 v. United States, the Supreme 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. The official at issue in that case had no power 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 ensure that President Trump cannot 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 last Term 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. 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.

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 responsibility to investigate and potentially to prosecute the President from plenary control by the President. They have done so by limiting the President’s power to remove special prosecutors to circumstances in which the President, 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

110. Id. at 630–31.
113. See Lucia, 138 S. Ct. at 2057, 2059–62.
upheld a statutory limit on the President’s removal power based on application of that principle in its 1988 decision in *Morrison v. Olson.*

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.

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.

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

Beginning in July 2018, President Trump threatened to revoke the security clearances of retired leaders of the FBI and of intelligence agencies if they criticized him. 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. At the same time, the President threatened to revoke the clearances of nine other former senior members of the FBI and of intelligence agencies if they continued to criticize him.

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 unclear. We cannot definitively answer the question whether the courts can stop President Trump

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118. Id.
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 CIA Director to fire an employee is unreviewable because Congress committed such decisions to the Director’s discretion. A six-Justice majority also held, however, that a court can review such a decision for the limited purpose of deciding whether the Director fired the employee for a reason that rendered his decision a violation of the Constitution.

The Court was unwilling to use congressional silence with respect to that issue as the basis for a holding that Congress intended to preclude courts from reviewing actions that were putatively based on national security to determine whether they were instead motivated by factors that rendered them unconstitutional. The courts can simultaneously further all three potentially conflicting goals when they consider the actions of President Trump. They can do so by applying the holding and reasoning in *Webster v. Doe* to 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 the 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 rule that it issues.

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

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120. *Id.* at 601.
121. *Id.* at 602-04.
How Should the U.S. Public Law System React to Trump?

violate a core constitutional value, the law applicable to rescission ensures that an agency cannot 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 the 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. 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 § 553 of the Administrative Procedure Act (APA). As it has been interpreted by the courts, that procedure requires an average of over five years to complete. 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 evidence on which it is predicated.

Agencies in the Trump Administration will be able to rescind very few major rules. 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.

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

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.