

The Trump Administration and the Breakdown of Intra-Executive Legal Process

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ABSTRACT. In the first year of the Trump Administration, a breakdown of internal norms and legal processes within the executive branch has led to a remarkable series of government losses in the courts. The drafting and execution of many of the administration's executive orders and presidential memoranda—including the initial travel ban, the military transgender ban, and the sanctuary cities order—exhibited a clear lack of legal vetting and interagency coordination. This lack of process led to judicial skepticism of the true purpose behind these policies and enjoinderment of their enforcement. The process-based criticisms at the core of these adverse court decisions are essentially self-inflicted wounds. They demonstrate that inattention to process and the attendant breakdown in institutional norms can substantially damage the viability of an administration's policy agenda and undermine the confidence that the courts and the public place in those policies and in the President.

INTRODUCTION

A remarkable series of court orders has enjoined the Trump Administration's policies in its first year. Some of these court actions are, of course, not final and may be reversed at later stages of the proceedings. What is now apparent, however, is that these losses seem to be at least in some measure caused by a breakdown of internal norms and legal processes within the executive branch itself.

The extensive legal vetting and interagency exchange of legal opinions that generally precede any major policy shift both strengthen public support for new policies and prepare those policies for judicial scrutiny. The judicial decisions enjoining the new administration's policies make it evident that these internal processes are in disarray.

As a result, executive orders like the travel ban plunged the country into temporary chaos while cabinet members reportedly learned through the media that the new policy had become effective. A presidential decision banning transgender service members from the military was first announced on the President's Twitter feed, apparently without any notice to or prior study by the military. And an executive order authorizing the withholding of federal grant funds from sanctuary cities was rejected in the courts when the Attorney General memorandum purporting to substantially limit the executive order's reach did not reflect "input from several divisions, offices, and high-ranking officials within the DOJ."¹

Whatever the substantive merits of these policies may be, the breakdown of institutional norms in crucial internal legal processes has consistently undermined the Trump Administration's policy agenda in the courts, which have viewed the procedural deficiencies as evidence of discriminatory purpose. The decisions serve as a warning to an unconventional administration that such process flaws invite judicial scrutiny and weaken public confidence in the President.

Part I of this Essay will discuss the extensive legal vetting and interagency coordination that have, in the past, typified the internal executive branch processes that precede large policy announcements. Part II will briefly describe the three policies that best reflect the Trump Administration's deviation from those practices in its first year. Part III will explore the implications of these failures in process, which include unforced legal errors, judicial inferences of discriminatory animus, and a general decline in judicial deference to the President's claims of national security necessity.

I. PROPER EXECUTIVE PROCESS REQUIRES EXTENSIVE LEGAL VETTING AND INTERAGENCY COORDINATION

The executive branch has the power to interpret and apply constitutional law for itself.² Should an executive policy be challenged in court, its chances of surviving judicial scrutiny are highest when that policy was subject to rigorous legal vetting by lawyers in all relevant executive agencies. Sweeping policy changes should not happen overnight, and they certainly should not be announced without first consulting relevant agencies and experts. Instead, proper internal executive legal process requires that the White House, the Department of Justice, and

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1. *City of Seattle v. Trump*, No. 17-497-RAJ, 2017 WL 4700144, at *5 (W.D. Wash. Oct. 19, 2017).
 2. See Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1209 (2012); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 676 (2005); Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805, 809 (2017).

other executive agencies give its lawyers the opportunity to review rigorously the legality of any policy likely to make its way to the President's desk. It also requires proper coordination among the legal departments of various agencies to create a strong record supporting the necessity of a given policy and to arrive at the best – or at the very least, plausible – legal justifications available for that policy. Finally, such process benefits from transparency whenever possible.

A well-functioning White House Counsel's Office (WHCO) is a crucial hallmark of a functioning executive branch. For every major legal initiative that goes before the President, the WHCO should consult with key offices in the Department of Justice and lawyers in any other relevant agencies to exchange opinions on the initiative's legality.³ The Obama Administration's legal process in deciding whether to continue operations in Libya, as reported by the media, provides an instructive example. In 2011, President Obama sought advice on the legality of continuing a military operation in Libya. He was presented with legal opinions from various executive agencies. The White House Counsel at the time, Robert Bauer, and the State Department Legal Advisor, Harold Koh, believed the raid did not meet the definition of "hostilities" under the War Powers Resolution and therefore did not require congressional authorization.⁴ Jeh Johnson, the Pentagon general counsel, and Caroline Krass, acting head of the Department of Justice Office of Legal Counsel (OLC), disagreed, believing congressional authorization was necessary for further military action. After "a full airing of views within the administration and a robust process" internally, President Obama adopted the former opinion.⁵ These interagency legal exchanges are essential to a healthy and functional executive branch. As one prominent legal practitioner has noted, "[w]hen the State and Defense Departments have to convince each other of why their view is right, . . . better decision-making results."⁶

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3. "President" in this context refers to the "collection of institutional actors inside the White House complex," including the President's staff, national security advisors, and the White House Counsel's Office itself. Renan, *supra* note 2, at 849-50.
 4. Charlie Savage, 2 *Top Lawyers Lost to Obama In Libya War Policy Debate*, N.Y. TIMES (June 17, 2011), <http://www.nytimes.com/2011/06/18/world/africa/18powers.html> [<http://perma.cc/74QX-98T4>]; see also Bob Bauer, *Toward Transparency of Legal Position and Process and a White House Obligation To Disclose*, LAWFARE (Apr. 12, 2017), <http://www.lawfareblog.com/toward-transparency-legal-position-and-process-and-white-house-obligation-disclose> [<http://perma.cc/6GDF-QSUN>] (explaining that the Obama Administration defended its position on Libya through congressional testimony by Koh).
 5. Savage, *supra* note 4.
 6. Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2317 (2006); see also Bob Bauer, *The National Security Lawyer, in Crisis: When The "Best View" of the Law May Not Be the Best View* 6 (New York Univ. Pub. Law & Legal Theory Research Paper Series, Working Paper No. 17-08, Mar. 2017), <http://ssrn.com/abstract=2931165> [<http://perma.cc/68Y6-YY4T>] (noting that sometimes the "best view" of

The policies discussed here were all known to the Administration and the Department of Justice to be ones that would attract significant challenges in court. In those circumstances, the ordinary process would be to collect experts across the government to review the policy for potential legal attack. If the policy is sufficiently important to merit White House attention, the process is ordinarily lead by the WHCO. The WHCO would work closely with the Department of Justice to conduct a litigation risk assessment. Career lawyers, who nearly always know more about the substance of the governing law, are critical to the process and are generally brought in quite early. The outcome of this review process will frequently be changes to the policy that reduce the likelihood of losing in court without undermining the policy objective.

Transparency is another hallmark of functional executive process. Though the executive branch has no formal obligation to explain its legal justifications for its policies, and its ability to do so is often constrained by restrictions on discussing classified information, the President should disclose the legal justifications (and on appropriate occasions, the formal legal opinions) underlying controversial policies whenever possible.⁷ Transparency (particularly around

the law must give way to a “reasonable” or “plausible” view of the law that supports a particular policy).

7. The Obama Administration consistently provided legal justifications for its military operations abroad. At the end of his term, President Obama released the sixty-one page *Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations*, WHITE HOUSE (Dec. 2016) [hereinafter *Transparency Report*], http://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf [<http://perma.cc/D2MW-2324>]. The Transparency Report expanded on the domestic and international legal frameworks that guided the use of military force in Afghanistan, Iraq, Syria, Yemen, Libya and Somalia, as well as military operations against non-state actors undertaken during his administration. Prior presidents have similarly provided public explanations of the legal analysis underlying their authority for unilateral military interventions abroad. See, e.g., Auth. To Use Military Force in Libya, 35 Op. O.L.C. ___ (2011); Auth. of the President Under Domestic and Int’l Law To Use Military Force Against Iraq, 26 Op. O.L.C. 143 (2002); Authorization for Continuing Hostilities in Kosovo, 24 Op. O.L.C. 327 (2000). Though the Trump Administration deserves credit for releasing some OLC Opinions supporting its policies, including a recent one that identified the President’s legal authority to name an interim director of the Consumer Financial Protection Bureau, see Designating an Acting Dir. of the Bureau of Consumer Fin. Prot. 45 Op. O.L.C. ___ (2017), it has yet to offer publicly any legal frameworks or justifications for its own use of military force abroad. Nor has it explained the legal basis for President Trump’s order to strike a Syrian air force base in response to the Syrian government’s chemical gas attack on Syrian civilians in April 2017. In a letter to Congress pursuant to the War Powers Resolution, President Trump later explained only that he acted “in the vital national security and foreign policy interests of the United States, pursuant to [his] constitutional authority to conduct foreign relations and as Commander in Chief and Chief Executive.” Letter from Donald J. Trump, President to Congress (Apr. 8, 2017), <http://www.whitehouse.gov/briefings-statements/letter-president-speaker-house-representatives-president-pro-tempore-senate> [<http://perma.cc/9S3Z-TMUD>]. The President offered no further explanation, let alone a thorough legal analysis and justification, to Congress or to the

military operations) is important to our constitutional processes and performs a powerful signaling function to the international community. The United States cannot expect other countries to follow the rule of law if it does not explain its own legal justifications for its actions abroad. This is an area where the United States should continue to lead.

In its first year, the Trump Administration has departed dramatically from almost every norm of intra-executive process. Part II briefly reviews three examples of this phenomenon. Part III analyzes the implications of these deviations from standard executive process.

II. WHEN FLAWED PROCESS MEETS JUDICIAL SCRUTINY: THREE EXAMPLES

A. *The Travel Ban*

The Trump Administration's rollout of its initial travel-ban is likely the most widely known example of this phenomenon. Issued only a week into the President's term, the profound lack of internal executive process preceding the order created substantial unforced errors and ultimately undermined the policy in the courts.

On January 27, 2017, President Trump issued Executive Order 13,769, entitled "Protecting the Nation from Foreign Terrorist Entry into the United States" (EO-1).⁸ EO-1 suspended the entry of non-citizens from seven countries – Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen – deemed "detrimental to the interests of the United States."⁹ This was an exclusion of unprecedented breadth. EO-1 also directed the Secretary of State to prioritize refugees claiming religious-based persecution "provided that the religion of the individual is a minority religion in the individual's country of nationality."¹⁰

public. If there is an internal memo delineating the Trump Administration's legal rationale for its Syria attacks, it should be released. Heidi Przybyla, *Sen. Tim Kaine Demands Release of Secret Trump War Powers Memo*, NBC (Feb. 9, 2018), <http://www.nbcnews.com/politics/donald-trump/sen-tim-kaine-demands-release-secret-trump-war-powers-memo-n846176> [<http://perma.cc/8SJG-DJQM>].

8. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017) [hereinafter, EO-1].

9. *Int'l Refugee Assistance Project v. Trump*, No. TDC-17-0361, 2017 WL 4674314, at *3 (D. Md. Oct. 17, 2017).

10. EO-1, *supra* note 8, § 5(b).

EO-1 unleashed chaos within the government and across the country.¹¹ Neither the White House nor the Department of Justice appears to have asked career lawyers within the Department of State, the Department of Defense, the Department of Homeland Security, or any other agency to review EO-1 before it was issued.¹² According to media reports, General John Kelly, then the Secretary of Homeland Security, was first briefed on the order via telephone as it was being signed on television.¹³ Upon learning of the order, the State Department “immediately stopped conducting visa interviews of, and processing visa applications from, citizens of any of the seven banned countries,” and 60,000 to 100,000 visas were revoked.¹⁴ Meanwhile, nationals of the countries listed in EO-1 arriving in the United States were detained for hours as private lawyers across the country raced to the airports to represent them. Thousands protested at the airports and outside courthouses. Several lawsuits followed, with multiple courts issuing nationwide injunctions against enforcement of the executive order.¹⁵ The acting Attorney General, Sally Yates, refused to defend the order in court, and President Trump fired her.¹⁶ The DHS Inspector General has since confirmed that federal agents openly ignored court orders amidst the widespread confusion of EO-1’s rollout.¹⁷

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11. Michael Shear & Ron Nixon, *How Trump’s Rush To Enact an Immigration Ban Unleashed Global Chaos*, N.Y. TIMES (Jan. 29, 2017), <http://www.nytimes.com/2017/01/29/us/politics/donald-trump-rush-immigration-order-chaos.html> [[http://perma.cc/B\]2X-ZQDH](http://perma.cc/B]2X-ZQDH)]; Aaron Blake, *Trump’s Travel Ban Is Causing Chaos - And Putting His Unflinching Nationalism to the Test*, WASH. POST (Jan. 29, 2017), <http://www.washingtonpost.com/news/the-fix/wp/2017/01/29/president-trumps-travel-ban-is-causing-chaos-dont-expect-him-to-back-down> [<http://perma.cc/R9W9-B6HD>]; *Chaos at Airports as America Introduces Travel Ban*, ECONOMIST (Jan. 30, 2017), <http://www.economist.com/blogs/gulliver/2017/01/no-fly-zone> [<http://perma.cc/4RNL-VE93>].
 12. *Int’l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 545 (D. Md.), *aff’d in part, vacated in part*, 857 F.3d 554 (4th Cir. 2017); *see also* Shear & Nixon, *supra* note 11.
 13. Shear & Nixon, *supra* note 11.
 14. *Int’l Refugee Assistance Project*, 241 F. Supp. 3d at 545.
 15. *See, e.g.*, *Washington v. Trump*, No. C17-0141(JLR), 2017 WL 462040 (W.D. Wash. Feb. 3, 2017).
 16. Matt Zapotosky et al., *Trump Has Fired the Acting Attorney General Who Ordered Justice Dept. Not To Defend President’s Travel Ban*, WASH. POST (Jan. 30, 2017), http://www.washingtonpost.com/world/national-security/acting-attorney-general-an-obama-administration-holdover-wont-defend-trump-immigration-order/2017/01/30/a9846f02-e727-11e6-b82f-687d6e6a3e7c_story.html [<http://perma.cc/4GCK-N9TT>].
 17. Devlin Barrett & Carol D. Leonnig, *DHS Inspector General: Travel-Ban Confusion Led Agents To Violate Court Order*, WASH. POST (Nov. 20, 2017), http://www.washingtonpost.com/world/national-security/dhs-inspector-general-travel-ban-confusion-led-agents-to-violate-court-order/2017/11/20/850f6fc8-ce3f-11e7-81bc-c5a220c8cbe_story.html [<http://perma.cc/EUT8-GLZD>].

The district courts enjoined the ban on Establishment Clause grounds, among others.¹⁸ The Ninth Circuit denied the administration's appeal to stay the injunction.¹⁹ Soon after, the Administration abandoned its defense of EO-1, deciding that rewriting it was preferable to continuing litigation. On March 6, 2017, President Trump issued the re-written Executive Order 13,780 (EO-2), which removed all references to religion and exempted lawful permanent residents from the ban.²⁰ Once again, the courts enjoined the order's enforcement, and the Fourth and Ninth Circuits upheld the injunctions on appeal.²¹ The Supreme Court upheld the injunctions except as applied to foreign nationals lacking a "bona fide" relationship to a person or organization in the United States.²² It vacated the case as moot in October 2017 when EO-2 expired by its own terms.²³

Meanwhile, on September 24, 2017, President Trump issued Presidential Proclamation 9645 (EO-3), adding two non-Muslim countries to the list of banned countries, which now included Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen.²⁴ EO-3 was again enjoined by the District Court for the Districts of Maryland and Hawaii, and affirmed by the Fourth and Ninth Circuits on appeal.²⁵ However, the injunction itself is stayed pending the Supreme Court's decision on appeal.²⁶

B. The Transgender Ban

The Trump Administration's ban on transgender individuals serving in the military suffered still more worrisome deficiencies in process. The President announced the policy on Twitter without subjecting it to any intra-executive review

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18. *Aziz v. Trump*, 234 F. Supp. 3d 724, 739 (E.D. Va. 2017); *Washington v. Trump*, No. 17-141, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017).
 19. *Washington v. Trump*, 847 F.3d 1151, 1169 (9th Cir. 2017).
 20. Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13,780, 82 Fed. Reg. 13209 § 2(f) [hereinafter EO-2].
 21. *Hawai'i v. Trump*, 245 F. Supp. 3d 1227, 1239 (D. Haw. 2017), *aff'd Hawai'i v. Trump*, 859 F.3d 741 (9th Cir. 2017) (per curiam); *IRAP v. Trump*, 241 F. Supp. 3d 539, 566 (D. Md. 2017), *aff'd IRAP v. Trump*, 857 F.3d 554 (4th Cir. 2017).
 22. *Trump v. IRAP*, 137 S. Ct. 2080, 2087-88 (2017).
 23. *Trump v. IRAP*, 138 S. Ct. 353 (2017).
 24. *Int'l Refugee Assistance Project v. Trump*, No. TDC-17-0361, 2017 WL 4674314, at *7 (D. Md. Oct. 17, 2017).
 25. *Int'l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570 (D. Md. 2017), *aff'd Int'l Refugee Assistance Project v. Trump*, No. 17-2231 (4th Cir. Feb. 15, 2018); *Hawai'i v. Trump*, 265 F. Supp. 3d 1140, 1160 (D. Hawai'i 2017), *aff'd Hawai'i v. Trump*, 878 F.3d 662 (9th Cir. 2017).
 26. *Trump v. Int'l Refugee Assistance Project*, 138 S. Ct. 542 (2017).

beforehand. On July 26, 2017, President Trump issued the following announcement in three successive tweets:

After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you[.]²⁷

Soon after the Twitter announcement,²⁸ the media widely reported that top military leaders “were not aware President Donald Trump planned to tweet a ban on transgender service members.”²⁹ Secretary of Defense James Mattis was on vacation when the new policy was announced and was “silent on the new policy” when it was issued.³⁰ The *New York Times* reported that the President’s “decision was announced with such haste that the White House could not answer basic inquiries about how it would be carried out.”³¹

The next day, the Chairman of the Joint Chiefs of Staff, Marine General Joseph Dunford, distributed a memo within DOD stating, “I know there are ques-

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27. Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 5:55 AM), <http://twitter.com/realDonaldTrump/status/890193981585444864> [<http://perma.cc/K7J8-FVX2>]; Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:04 AM), <http://twitter.com/realDonaldTrump/status/890196164313833472> [<http://perma.cc/UAW4-XGB3>]; Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:08 AM), <http://twitter.com/realDonaldTrump/status/890197095151546369> [<http://perma.cc/9XAE-LLA2>] [hereinafter “July 26, 2017 Twitter announcement”].
28. President Trump’s former Press Secretary, Sean Spicer, repeatedly asserted that the President’s tweets should be “considered official statements.” Jason Le Miere, *Trump’s Tweets are ‘Official Statements,’ Sean Spicer Says, Completely Contradicting White House Aides*, NEWSWEEK (June 6, 2017), <http://www.newsweek.com/trump-tweets-spicer-official-statements-621919> [<http://perma.cc/SV3B-WMMC>]; Amber Philips, *Sean Spicer Just Settled It: We Should All Pay Attention to Trump’s Tweets*, WASH. POST (June 6, 2017), <http://www.washingtonpost.com/news/the-fix/wp/2017/06/06/sean-spicer-just-settled-it-we-should-all-pay-attention-to-trumps-tweets> [<http://perma.cc/AJF7-H4UJ>]. Courts have also used President Trump’s tweets as evidence of his intent. See, e.g., *Int’l Refugee Assistance Project*, 2017 WL 4674314, at *7.
29. Barbara Starr et al., *US Joint Chiefs Blindsided by Trump’s Transgender Ban*, CNN (July 27, 2017, 5:40 PM), <http://www.cnn.com/2017/07/27/politics/trump-military-transgender-ban-joint-chiefs/index.html> [<https://perma.cc/Y6YY-WKUN>].
30. Julie Hirschfeld Davis & Helene Cooper, *Trump Says Transgender People Will Not Be Allowed in the Military*, N.Y. TIMES (July 26, 2017), <http://www.nytimes.com/2017/07/26/us/politics/trump-transgender-military.html> [<http://perma.cc/L5SN-HKXZ>].
31. *Id.* (“Of eight defense officials interviewed, none could say [what would happen to openly transgender people on active duty].”).

tions about yesterday's announcement on the transgender policy by the President."³² The memo continued, "There will be no modifications to the current policy until the President's direction has been received by the Secretary of Defense and the Secretary has issued implementation guidance. In the meantime, we will continue to treat all of our personnel with respect."³³ Dana White, the chief spokesperson for Secretary of Defense James Mattis, similarly told the media that "[t]he Department of Defense is awaiting formal guidance from the White House as a follow-up to the commander-in-chief's announcement on military service by transgender personnel."³⁴ The Army Chief of Staff, General Mark Milley, told the National Press Club that, "[t]o [his] knowledge, the Department of Defense, Secretary Mattis has not received written directives yet."³⁵

A formal Presidential Memorandum followed on August 25, 2017.³⁶ Transgender military service members brought suit, seeking preliminary injunctive relief on equal protection grounds.³⁷ Applying intermediate scrutiny, the courts required that "the government . . . demonstrate an 'exceedingly persuasive justification' for its actions," one that was "genuine, not hypothesized or invented *post hoc* in response to litigation."³⁸

The District Courts for the District of Columbia and the District of Maryland ruled that the Trump Administration did not meet that burden, and enjoined the policy. On appeal, both the D.C. Circuit and the Fourth Circuit denied the administration's motions to stay the injunctions.³⁹ On December 30, 2017, the

32. Laurel Wamsley, *Joint Chiefs Chairman Says Transgender Policy Won't Change Yet*, NPR (July 27, 2017), <http://www.npr.org/sections/thetwo-way/2017/07/27/539760575/joint-chiefs-chairman-says-transgender-policy-wont-change-yet> [<http://perma.cc/Z7BP-RH6T>].

33. *Id.*

34. Bryan Bender & Jacqueline Klimas, *Pentagon Takes No Steps To Enforce Trump's Transgender Ban*, POLITICO (July 27, 2017), <http://www.politico.com/story/2017/07/27/trump-transgender-military-ban-no-modification-241029> [<http://perma.cc/T6B2-88SN>].

35. *Id.*

36. Memorandum on Military Service by Transgender Individuals, 2017 DAILY COMP. PRES. DOC. 587 (Aug. 25, 2017) [hereinafter Presidential Memorandum]. The Court in *Doe* viewed the Presidential Memorandum as "the operative policy toward military service by transgender service members," but held that "to the extent there is ambiguity about the meaning of the Presidential Memorandum, the best guidance is the President's own statements regarding his intentions with respect to service by transgender individuals." *Doe v. Trump*, No. 17-1597 (CKK), 2017 WL 4873042, at *17 (D.D.C. Oct. 30, 2017).

37. *Stone v. Trump*, No. MJG-17-2459, 2017 WL 5589122, at *4-5 (D. Md. Nov. 21, 2017); *Doe*, 2017 WL 4873042, at *18.

38. *Doe*, 2017 WL 4873042, at *29 (quoting *United States v. Virginia*, 518 U.S. 515, 531 (1996)).

39. *Doe v. Trump*, No. 17-5267, 2017 WL 6553389, at *1 (D.C. Cir Dec. 22, 2017) (per curiam); *Stone v. Trump*, No. 17-2398 (4th Cir. Dec. 21, 2017) (per curiam).

Trump Administration announced that it would not seek certiorari, allowing the case to go forward in the District Court. On February 6, 2018, the District Court for the District of Maryland noted that the Government had informed the court it would “not be defending the policy now at issue,” and instead would issue a new policy on February 21, 2018.⁴⁰ As of this writing, the Government has formally abandoned the original policy.

C. *The Sanctuary Cities Order*

The Trump Administration’s sanctuary city policies were similarly launched without sufficient process, creating unforced errors that limited its chances of surviving judicial scrutiny.

On January 25, 2017, President Trump issued Executive Order 13,768, entitled “Enhancing Public Safety in the Interior of the United States,” which directed the Attorney General and Secretary of Homeland Security to designate “jurisdictions that fail to comply with applicable Federal law” as “sanctuary jurisdictions,” and to “take appropriate enforcement action” against them, including withholding federal funds.⁴¹ Several jurisdictions, including the cities of San Francisco, Seattle, Chicago and Philadelphia, brought suit and obtained an injunction to enjoin the policy.⁴²

40. *Stone v. Trump*, No. MJG-17-2459, Dkt. No. 107 (D. Md. Nov. 21, 2017).

41. Exec. Order 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017). Section 9 of the Order reads as follows:

Sanctuary Jurisdictions. It is the policy of the executive branch to ensure, to the fullest extent of the law, that a State, or a political subdivision of a State, shall comply with 8 U.S.C. 1373.

(a) In furtherance of this policy, the Attorney General and the Secretary, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary. The Secretary has the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction. The Attorney General shall take appropriate enforcement action against any entity that violates 8 U.S.C. 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law.

42. *County of Santa Clara v. Trump*, No. 17-cv-00485-WHO, 2017 WL 5569835 (N.D. Cal. Nov. 20, 2017); *City of Seattle v. Trump*, No. 17-497-RAJ, 2017 WL 4700144 (W.D. Wash. Oct. 19, 2017); *City of Chicago v. Sessions*, 264 F. Supp. 3d 933 (N.D. Ill. Sept. 15, 2017); *City of Philadelphia v. Sessions*, No. 17-3894, 2017 WL 5489476 (E.D. Pa. Nov. 15, 2017).

In response, Attorney General Sessions issued a two-page memorandum (the “AG memorandum”) asserting that E.O. 13,768 simply directed the executive branch to “follow existing law.”⁴³ This narrow interpretation sought to, in the words of one court, “effectively castrate the Executive Order,” and render it meaningless.⁴⁴ All four district courts, in Seattle, San Francisco, Philadelphia, and Chicago, enjoined the policy.⁴⁵ The administration’s appeals are pending.

III. WHEN FLAWED PROCESSES MEETS JUDICIAL SCRUTINY: IMPLICATIONS FOR THE PRESIDENCY, THE COURTS, AND THE PUBLIC

This administration’s policy actions have repeatedly evidenced an outright disregard for the essential functions of lawmaking within the executive branch, and a failure to engage in crucial interagency legal processes designed to protect the viability of the President’s legal agenda. The unavailability of any reasonable legal justifications for the policies discussed herein is yet another symptom of a breakdown of intra-executive process. Of course, not every presidential initiative will necessarily prevail in court. But no policy should reach the President’s desk if it cannot be credibly defended in court. The criticisms at the core of the adverse court decisions that have come down in this administration were a consequence of highly flawed process. They demonstrate that inattention to process and the attendant breakdown in institutional norms can substantially damage the viability of an administration’s policy agenda and undermine the confidence that the courts and the public place in those policies, and in the President.

A. Flawed Process as Evidence of Animus

The internal executive processes preceding the travel ban and the transgender ban were so deficient that the courts, remarkably, found the process itself to be evidence of a discriminatory motive, rather than a good-faith interest in the national security.

43. *City of Seattle v. Trump*, No. 17-497-RAJ, 2017 WL 4700144, at *8 (W.D. Wash. Oct. 19, 2017).

44. *Id.*

45. *City of Seattle v. Trump*, No. 17-497-RAJ, 2017 WL 4700144 (W.D. Wash. Oct. 19, 2017) (granting permanent injunction); *County of Santa Clara v. Trump*, No. 17-cv-00485-WHO, 2017 WL 5569835 (N.D. Cal. Nov. 20, 2017) (granting permanent injunction); *City of Chicago v. Sessions*, 264 F. Supp. 3d 933 (N.D. Ill. Sept. 15, 2017) (granting preliminary injunction in part); *City of Philadelphia v. Sessions*, No. 17-3894, 2017 WL 5489476 (E.D. Pa. Nov. 15, 2017) (granting preliminary injunction).

Prior to the announcement of EO-1, executive branch lawyers should have understood the necessity of establishing a record of nondiscriminatory policy justifications to counter President Trump's long record of public statements supporting a "Muslim ban." During his campaign, President Trump repeatedly called for "a total and complete shutdown of Muslims entering the United States," and noted that "[p]eople were so upset when I used the word Muslim," so he was instead "talking territory instead of Muslim."⁴⁶ Upon signing EO-1, President Trump announced, "This is the 'Protection of the Nation from Foreign Terrorist Entry into the United States.' We all know what that means."⁴⁷ The following day, "Mayor Giuliani asserted on Fox News that President Trump told him he wanted a Muslim ban and asked Giuliani to '[s]how [him] the right way to do it legally.'"⁴⁸

With that public record of animus, executive branch lawyers bore an additional burden to ensure that the Executive Order was reviewed by the relevant agencies to produce compelling, nondiscriminatory justifications for the ban. Ordinarily, an administration seeking to impose what it surely knew would be a highly controversial policy would seek input from immigration experts, including career lawyers, in the agencies. Competent career lawyers who practice in this field would have told the administration that attempting to exclude lawful permanent residents would substantially increase the likelihood that a court would strike down the policy. Similarly, career lawyers would have told the administration that an explicit exception for religious minorities in predominately Muslim countries would give rise to a powerful inference that the policy was motivated by anti-Muslim animus.

Predictably, the courts found that the administration had not offered any viable justification in support of EO-1 to convince them that it was motivated by anything other than President Trump's well-documented desire to ban Muslims as a group from entering the United States, in violation of the Establishment Clause.

Notably, the District Court for the District of Maryland held that the fact that EO-1 "*was issued without traditional interagency consultation*" – along with the extensive record of public statements advocating a Muslim ban, and the absence of "any articulated connection between the scope of the ban and particular national

46. *Int'l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 585, 620 (D. Md. 2017), *appeal docketed*, No. 17-2240 (4th Cir. Oct. 23, 2017).

47. *Id.* at 620.

48. *Id.*

security threats” – made a “convincing case” that it was motivated by discriminatory animus.⁴⁹

Similarly, the District Court for the Eastern District of Virginia found that the “specific sequence of events” leading to the adoption of the order supported the “argument that the EO was not motivated by rational national security concerns.”⁵⁰ It noted that while “*ordinarily an executive order prioritizing national security is based on cleared views from expert agencies with broad experience on the matters presented to the president,*” in this case, “*there is no evidence that such a deliberative process took place.* To the contrary, there is evidence that the president’s senior national security officials were taken by surprise.”⁵¹ The absence of a regular process to determine and support a national security purpose for the order only reinforced the courts’ view that the order’s true purpose was discriminatory.

Similarly, the unusual lack of process preceding the announcement of the transgender military ban led the District Court for the District of Columbia to conclude that the government had engaged in discrimination of an “unusual character”:⁵²

[T]he President abruptly announced, via Twitter – *without any of the formality or deliberative processes that generally accompany the development and announcement of major policy changes* that will gravely affect the lives of many Americans – that all transgender individuals would be precluded from participating in the military in any capacity. These circumstances provide additional support for Plaintiffs’ claim that the decision to exclude transgender individuals was not driven by genuine concerns regarding military efficacy.⁵³

49. *Id.* (emphasis added) (quoting *Int’l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 558-59 (D. Md. 2017)).

50. *Aziz v. Trump*, 234 F. Supp. 3d 724, 736 (E.D. Va. 2017) (emphasis added) (internal citations omitted).

51. *Id.* (emphasis added) (internal citations omitted).

52. *Doe v. Trump*, No. 17-1597 (CKK), 2017 WL 4873042, at *30 (D.D.C. Oct. 30. 2017) (quoting *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013)) (explaining that when determining whether a new policy is motivated by an improper discriminatory animus, “discriminations of an unusual character’ especially require careful consideration”).

53. *Id.* (emphasis added) (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) (“The specific sequence of events leading up the challenged decision . . . may shed some light on the decisionmaker’s purposes” and “[d]epartures from the normal procedural sequence also might afford evidence that improper purposes are playing a role.”)).

The near-complete absence of process produced rationales for the ban that could not withstand even minimal scrutiny.⁵⁴ The District Court for the District of Columbia chastised the Administration for failing to build any record establishing a national security justification for the policy, finding the government had “provide[d] practically no explanation at all, let alone support, for their suggestion that the presence of transgender individuals may be harmful to ‘unit cohesion.’”⁵⁵ In fact, the court noted with frustration that “all of the reasons proffered by the President for excluding transgender individuals from the military in this case were not merely unsupported, but were actually *contradicted* by the studies, conclusions and judgment of the military itself.”⁵⁶

The District Court for the District of Maryland similarly drew a connection between the absence of process and the absence of a plausible national security basis for the transgender ban.⁵⁷ Its opinion reflected that “*President Trump’s tweets did not emerge from a policy review*, nor did the Presidential Memorandum identify any policymaking process or evidence demonstrating that the revocation of transgender rights was necessary for any legitimate national interest.”⁵⁸ Nor, for that matter, was the policy subject to “methodical and systematic review by military stakeholders qualified to understand the ramifications of policy changes.”⁵⁹ The court also took note of amici briefing of retired military officers and former national security officials, who argued that deference was not warranted “in light

54. The government led with an argument that “*some* transgender individuals suffer from medical conditions that *could* impede the performance of their duties” – a rationale the Court correctly pointed out was both “hypothetical and extremely overbroad,” in that it could be raised about *any* service member, and certainly did “not explain the need to discharge and deny accession to *all* transgender people who meet the relevant physical, mental and medical standards for service.” *Id.* at *29 (first emphasis added).

55. *Id.* at *29.

56. *Id.* at *30. A RAND Corporation study cited in the briefing and the Court’s decision examined eighteen foreign militaries that allowed transgender individuals to serve openly and found no negative impact on military readiness. That study estimated that covering gender-reassignment surgery and treatment would cost the military “between \$2.4 million and \$8.4 million annually, representing a 0.04- to 0.13-percent increase in active-component health care expenditures.” Agnes Gereben Schaefer et al., *Assessing the Implications of Allowing Transgender Personnel To Serve Openly*, RAND CORP. (2016), http://www.rand.org/pubs/research_reports/RR1530.html [<http://perma.cc/8S4E-XETG>].

57. *Stone v. Trump*, No. MJG-17-2459, 2017 WL 5589122, at *17 (D. Md. Nov. 21, 2017), *appeal docketed*, No. 17-2398 (4th Cir. Dec. 6, 2017).

58. *Id.* at *15 (emphasis added). The court also took note of amici briefing of retired military officers and former national security officials, who argued that deference was not warranted “in light of the absence of any considered military policymaking process, and the sharp departure from decades of precedent on the approach of the U.S. military to major personnel policy changes.” *Id.*

59. *Id.* at *17.

of the absence of any considered military policymaking process, and the sharp departure from decades of precedent in the approach of the U.S. military to major personnel policy changes.”⁶⁰ The Court concluded that, “[b]ased on the *circumstances* surrounding the President’s announcement and *the departure from normal procedure*,” there was sufficient support for Plaintiffs’ claims that the policy was not driven by concerns of military efficacy, but rather, by animus against transgender individuals.⁶¹ Both courts concluded that a “bare invocation of ‘national defense’” could not overcome the fact that there was “absolutely no support for the claim that the ongoing service of transgender people would have *any* negative effect on the military at all.”⁶² In fact, they noted the “considerable evidence that it is the *discharge* and *banning* of such individuals that would have such effects.”⁶³

While the Trump Administration abandoned its defense of the transgender military ban, it is unclear how courts will consider future iterations of the ban. Similarly, the Supreme Court has yet to rule on the merits of the travel ban’s third iteration. Regardless of how those decisions come out, the lower courts’ finding that a breakdown of internal legal process was an indicator of its discriminatory purpose was a significant rebuke to the Trump Administration, and a reflection of how far the decision-making process had deviated from internal procedural norms. This finding also compromises the viability of EO-3 and the future of the ban.⁶⁴ By all accounts, EO-3 appears to have gone through at least some review, including by lawyers in the Department of Homeland Security and the State Department’s Office of the Legal Advisor, and the resulting Orders lack the glaring errors of their predecessor. The obvious flaws of EO-1 and the process that produced it ensured that courts would be skeptical of later versions of the ban as well, and would question whether the animus underlying its original draft

60. *Id.* at *15.

61. *Id.* at *15 (citing *Doe 1 v. Trump*, No. CV 17-1597-CKK, 2017 WL 4873042, at *30 (D.D.C. Oct. 30, 2017)).

62. *Id.* at *16 (citing *Doe 1*, at *33) (emphasis added) (citation omitted).

63. *Id.* (citing *Doe 1*, at *33).

64. While EO-3 appears to have been vetted by executive branch lawyers and could ultimately be upheld in the Supreme Court, lower courts have enjoined the Order on grounds that it, like its predecessors, failed to present an adequate “finding” that the entry of the banned foreign nationals would be “detrimental to the interests of the United States,” and contained “internal incoherencies” that undermined its purported national security rationale. *State v. Trump*, 265 F. Supp. 3d 1140, 1155-56 (D. Haw. 2017). See also *Int’l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 610 (D. Md. 2017) (noting that EO-3 did not explain why existing screening procedures for visa applicants were deficient to begin with, nor did it offer any “examples of vetting failures involving nationals from the Designated Countries that resulted in the entry of terrorists or others who should not have been admitted.”).

should “forever taint” later iterations of the policy.⁶⁵ Certainly, the courts are entitled to expect an airtight explanation of the national security need for a travel ban that still primarily affects individuals of a particular religion.

B. Flawed Process Leads to Unforced Legal Errors

The flawed processes that produced these orders led to a number of clear legal errors that any form of proper legal vetting should have caught. The initial travel ban’s effective date was not forward-dated, a standard feature designed to allow agencies time to prepare for the changes in protocol and to avoid precisely the type of chaos that ensued in the nation’s airports. It also excluded legal permanent residents, or green card holders, who have by definition already passed a rigorous vetting process and been granted the right of permanent residence in the United States. This latter error was so glaring that White House Counsel Donald McGahn published a memorandum days after the order was issued attempting to clarify that EO-1 would no longer apply to legal permanent residents.⁶⁶ The courts rightly pointed out that the White House Counsel had no power to rewrite a Presidential directive. The White House Counsel should obviously have raised the issue before the EO was issued, not after. Moreover, the error had already telegraphed to the courts and the public that the policy had not been carefully reviewed by immigration or national security experts.

Similarly, the Sanctuary Cities Order, EO 13768, contained several basic and avoidable legal errors that undermined its viability in the courts. The District Court for the Northern District of California deemed the Order unconstitutionally vague because it failed to define “sanctuary jurisdictions,” or to “make clear what conduct it proscribes.”⁶⁷ That court also found that the Order’s language directing the Attorney General to take “appropriate enforcement action” was “so

65. See *Int’l Refugee Assistance Project v. Trump*, No. 17-2231, Slip. Op. at *49 (4th Cir. Feb. 15, 2018) (stating that the President’s past actions cannot “forever taint” his future actions, but holding that President Trump continued to “taint” the travel ban policy with anti-Muslim rhetoric after his election); see also Josh Blackman, *Reality Sets In for Federal Courts: The Travel Ban Was a ‘Temporary Pause,’* LAWFARE (Sept. 25, 2017, 4:40 PM), <http://www.lawfareblog.com/reality-sets-federal-courts-travel-ban-was-temporary-pause> [<http://perma.cc/8BY8-NLFW>] (discussing *McCreary Cty. v. ACLU*, 545 U.S. 844, 874 (2005)).

66. *Memorandum to the Acting Secretary of State, the Acting Attorney General, and the Secretary of Homeland Security from Counsel to the President, Donald F. McGahn II* (Feb. 1, 2017), <https://case.edu/executive-order-updates/docs/f.pdf> [<http://perma.cc/Q4GQ-HPCK>] (“I understand that there has been reasonable uncertainty about whether those provisions apply to lawful permanent residents of the United States. Accordingly, to remove any confusion, I now clarify that [those provisions] do not apply to such individuals.”).

67. *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 534-35 (2017).

standardless that it authorizes or encourages seriously discriminatory enforcement.”⁶⁸ When the court rejected the DOJ’s attempt to recast the order as “a mere directive” to comply with existing laws,⁶⁹ the government sought reconsideration and submitted a two-page memorandum from the Attorney General (the “AG Memorandum”) that purported to be DOJ’s “conclusive” interpretation of the Executive Order,⁷⁰ asserting that EO 13768 simply directed the executive branch to “follow existing law,”⁷¹ rendering the order essentially meaningless.⁷²

For the Attorney General to issue a memorandum purporting to interpret the Executive Order is remarkable. The President issued the Order, and the Attorney General cannot contradict it through his own memorandum. If DOJ has legal issues with the Order, those issues should have been raised through the review of the Order before it was issued. Just as the White House Counsel’s attempt to amend EO-1 by memorandum failed, Attorney General Sessions’s attempt to rewrite the sanctuary cities order by memorandum was rejected by the courts as neither binding nor authoritative. Once again, inattentiveness to process belied the effort. The court found there was “no evidence that the head of an executive department requested the opinion of the Attorney General on any question of law,”⁷³ and the memorandum was also silent on whether it was binding on other agencies. The court noted that unlike an OLC legal opinion, which “thoroughly analyze[s] the relevant legal issues,” and includes “input from several divisions, offices, and high-ranking officials within the DOJ,” the AG Memorandum did neither of those things.⁷⁴

These unforced errors are symptoms of a serious breakdown in legal process, both within the White House and among the agencies. They are also not limited to the national security context. For example, the Trump Administration’s hasty decision to exempt Florida from its off-shore drilling policy – a decision also announced via tweet, and reportedly made without any internal executive process, without legally required public hearings, and without providing any scientific justification or environmental-impact statement supporting the exemption – has now compromised the administration’s larger policy around off-shore drilling,

68. *Id.* at 535.

69. *Cty. Of Santa Clara v. Trump*, 267 F. Supp. 3d 1201, 1206 (2017) (“*Santa Clara II*”).

70. *Id.*

71. *City of Seattle v. Trump*, No. 17-497-RAJ, 2017 WL 4700144, at *8 (W.D. Wash. Oct. 19, 2017) (citation omitted).

72. *Id.*

73. *City of Seattle v. Trump*, 2017 WL 4700144, at *5.

74. *Id.* (distinguishing *Tenaska Wash. Partners II, L.P. v. United States*, 34 Fed. Cl. 434, 439 (1995)).

and given other coastal states an opening to challenge the policy.⁷⁵ Similarly, the administration's recent decision to approve the construction of a road through Alaska's Izembek National Wildlife Refuge, overturning an Obama-era decision based on a four-year scientific analysis concluding the road would be harmful to the local environment, was made without offering any scientific analysis in support of the new policy.⁷⁶ The absence of this analysis, required by law and generally made publicly available, will almost certainly render the policy more difficult to defend in the courts. Like the transgender ban, the reversal of a policy originally supported by thousands of pages of findings of fact and analysis will be hard to defend, particularly where no countervailing facts and analysis are offered in support of the reversal.⁷⁷

C. Flawed Process Undermines Judicial Deference to, and Public Trust in, the President

With each attempt to defend policies and executive orders issued without proper legal vetting, using dubious and inadequate legal justifications that are fatally undermined by the President's own statements to the contrary, courts are becoming more wary of deferring to the government's briefing and arguments.

Certainly, the cases examined here demonstrate this phenomenon. In the case of the Sanctuary Cities Order, executive branch lawyers failed to create a record of viable constitutional justifications they could present in court. Instead, they attempted to recast it as "a mere directive" to the Department of Homeland Security to comply with existing laws rather than an introduction of new conditions on federal funds.⁷⁸ The Northern District of California rejected that argument, finding the Government's new interpretation "not legally plausible."⁷⁹ The Washington court also reacted to the President's campaign promises to "withhold federal funds to punish so-called sanctuary cities"⁸⁰ and Attorney General

75. Coral Davenport, *Trump's Environmental Rollbacks Were Fast. It Could Get Messy In Court*, N.Y. TIMES (Jan. 31, 2018), <http://www.nytimes.com/2018/01/31/climate/trump-zinke-environmental-rollback.html> [<http://perma.cc/TN4F-KVJD>] ("His lawyers must be cringing . . . they may have shot themselves in the foot.").

76. *Id.*

77. *Id.* ("As one professor noted, 'If the previous action by the Obama administration was made based on findings of fact,' reversing it 'will have to be justified by saying, "those facts are no longer true." And that will be difficult to do.").

78. *Santa Clara II* at 1206.

79. *Id.*

80. *City of Seattle v. Trump*, No. 17-497-RAJ, 2017 WL 4700144, at *5 n.3 (W.D. Wash. Oct. 19, 2017). The court further noted that President Trump declared (a) "that sanctuary cities are out . . . sanctuary cities are over," adding that "[t]he federal government is going to have to

Sessions' call for Congress "to make its first item of business the immediate passage of legislation to cut off relevant federal monies to sanctuary cities."⁸¹ Once again, the Trump Administration had done little to counter this record before issuing the ban on funding for sanctuary cities, and its legal arguments were belied by the extensive record of the President's—and the Attorney General's—public statements.

As a result, courts were skeptical of the Administration's inadequate legal justifications of its Sanctuary Cities Order, which it noted could not be attributed to "the product of agency expertise," and in fact, ran counter to evidence before the agency showing that the policy would accomplish the *opposite* of the order's purported purpose of protecting public health and safety.⁸² Nor were not inclined to simply accept the DOJ's interpretation of the Sanctuary Cities Order as a toothless directive to comply with existing laws, given the President's numerous public statements on the campaign trail indicating that he would "withhold federal funds to punish so-called sanctuary cities."⁸³

Courts were similarly skeptical of the purported national-security interest underlying the transgender ban, which was contradicted by the military's own findings as well as "considerable evidence that it is the *discharge* and *banning* of such individuals that would" negatively affect the military.⁸⁴ In fact, the District

get involved and they're going to have to get involved very sharply"; (b) "[i]n a speech to congressional Republicans . . . declared: 'And finally, at long last, cracking down on Sanctuary Cities'"; (c) "that he is 'very much opposed to sanctuary cities,' and that '[i]f we have to, we'll defund'"; and (d) "that he had 'ordered a crackdown on sanctuary cities.'" *Id.* (internal citations omitted).

81. *Id.*

82. *City of Philadelphia v. Sessions*, No. CV 17-3894, 2017 WL 5489476, at *33 (E.D. Pa. Nov. 15, 2017)

83. Among these were the President's warning that he was ready and able to use "defunding" as a "weapon" so that sanctuary cities would change their policies, and Attorney General Sessions' own warning that the government intended to enforce EO 13768's defunding provisions, stating that if jurisdictions do not comply with Section 1373, such violations would result in "withholding grants, termination of grants, and disbarment or ineligibility for future grants." *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 523 (2017). The court also took judicial notice of Bill O'Reilly's interview on February 5, 2017 with President Trump, where he claimed, "I don't want to defund anybody. I want to give them the money they need to properly operate as a city or a state. If they're going to have sanctuary cities, we may have to do that. Certainly that would be a weapon." *Id.* at 522; *see also supra* note 80 and accompanying text.

84. *Stone v. Trump*, No. CV MJG-17-2459, 2017 WL 5589122, at *16 (D. Md. Nov. 21, 2017) (citing *Doe 1 v. Trump*, No. CV 17-1597-CKK, 2017 WL 4873042, at *33 (D.D.C. Oct. 30, 2017)).

Court for the District of Columbia explicitly rejected the Administration's argument that the transgender ban deserved deference under *Rostker v. Goldberg*,⁸⁵ distinguishing that case as one in which Congress "did not act unthinkingly or reflexively and not for any considered reason," when it passed the challenged policy, but rather "extensively considered [it] in hearings, floor debate, and in committee."⁸⁶ This, of course, sharply contrasted with the consideration given the transgender ban, a policy that was first announced to the executive branch, along with the public, in a series of tweets published in the span of thirteen minutes, between 5:55 a.m. and 6:08 a.m.⁸⁷

Courts appear to be even more unlikely to defer when the President's own statements undermine his lawyers' arguments. Certainly, the courts were not prepared to ignore President Trump's myriad statements undermining his lawyers' claims that EO-1 was neutral with regard to religion. In its recent decision affirming the injunction of EO-3, the Fourth Circuit found "the Government's proffered rationale for [EO-3]" was "at odds with the statements of the President himself," and that Plaintiffs had not only adequately alleged anti-Muslim bias, they had offered "undisputed evidence of such bias: the words of the President."⁸⁸ The President's discriminatory rhetoric, it held, created "highly unusual facts" that overcame the "strong presumption" of deference to the executive branch on issues relating to immigration and national security.⁸⁹

The President's words matter and have widespread consequences. The District Court for the Eastern District of New York announced it would consider President Trump's "incendiary" and "extremely volatile" statements regarding Latinos in deciding whether to enjoin his Executive Order rescinding the Deferred Action for Childhood Arrivals (DACA) program.⁹⁰ The court ultimately enjoined the Order on grounds that the administration offered only "legally erroneous" and "internally contradictory" rationales for the policy.⁹¹

Similarly, the military court that tried and sentenced Sergeant Bowe Bergdahl took note of President Trump's comments calling him a "dirty rotten traitor," as well as his suggestion that Bergdahl should be executed or returned to

85. 453 U.S. 57, 69 (1981).

86. *Doe 1*, at *31 (citing *Rostker*, 453 U.S. at 72) (emphasis added).

87. July 26, 2017 Twitter announcement, *supra* note 27.

88. *Int'l Refugee Assistance Project v. Trump*, No. 17-2231, Slip Op. at *42 (4th Cir. Feb. 15, 2018)

89. *Id.* at *52.

90. Paul Frangipane, *Brooklyn Judge Will Consider Trump's Anti-Latino Remarks in DACA Decision*, BROOKLYN DAILY EAGLE (Jan. 30, 2018), <http://www.brooklyneagle.com/articles/2018/1/30/brooklyn-judge-will-consider-trump%E2%80%99s-anti-latino-remarks-daca-decision> [<http://perma.cc/Y84W-4X3P>].

91. *Batalla Vidal v. Trump*, Civ. No. 17-5228-NGG, Dkt. No. 209 at *5, 29, 37 (E.D.N.Y. Feb. 13, 2018).

the Taliban.⁹² President Trump reaffirmed these comments immediately before Bergdahl's sentencing and appeared to achieve the opposite effect he sought: though the government sought a fourteen-year sentence, Bergdahl received no prison time.⁹³

These outbursts also undermine the public's faith in the government.⁹⁴ The public has become skeptical of the administration's motives even in cases where the government is advancing policies that may otherwise be based on perfectly sufficient legal justifications. For example, the administration's decision to bring an antitrust lawsuit challenging the merger of AT&T and Time Warner was met with immediate cynicism due to President Trump's long public record of personal animus toward CNN, a subsidiary of Time Warner.⁹⁵ This widespread reaction is deeply troubling, and a pervasive distrust of the Executive's true motives risks continuing to compromise the Trump Administration's policy agenda.

CONCLUSION

In each of the cases explored in this Essay, the Trump Administration should have been aware that one of the most significant challenges in defending its pol-

92. *Trump's Railing Against Bowe Bergdahl Called 'Disturbing' By Military Judge*, GUARDIAN (Feb. 13, 2017 4:38 PM EST), <http://www.theguardian.com/us-news/2017/feb/13/bowe-bergdahl-trial-donald-trump-comments> [<http://perma.cc/2A3S-CSN8>].

93. Instead, military judge Col. Jeffery R. Nance ordered Bergdahl to be dishonorably discharged from the military, reduced his rank to private, and required him to pay forfeiture of \$1,000/month for 10 months. See Richard A. Oppel Jr., *Bowe Bergdahl Avoids Prison For Desertion; Trump Calls Sentence a 'Disgrace'*, N.Y. TIMES (Nov. 3, 2017), <http://www.nytimes.com/2017/11/03/us/bowe-bergdahl-sentence.html> [<http://perma.cc/J54V-V48L>]; Alex Horton, *Trump's 'Traitor' Rhetoric Looms Over Bowe Bergdahl's Sentencing*, WASH. POST (Oct. 23, 2017), http://www.washingtonpost.com/world/national-security/trumps-traitor-rhetoric-looms-over-bowe-bergdahl-sentencing/2017/10/23/d2329aec-b809-11e7-be94-fabb0f1e9ffb_story.html [<http://perma.cc/24KF-7E36>].

94. Leah Litman, *Hargan v. Garza as the Trump Administration's Vision for DOJ*, TAKE CARE (Nov. 13, 2017), <http://takecareblog.com/blog/hargan-v-garza-as-the-trump-administration-s-vision-for-doj> [<http://perma.cc/PTS7-Q4BY>].

95. See, e.g., *Mr. Trump Casts a Shadow Over The AT&T-Time Warner Deal*, N.Y. TIMES (Nov. 15, 2017), <http://www.nytimes.com/2017/11/15/opinion/att-time-warner-deal-trump.html> [<http://perma.cc/RG8B-VN7V>]. It has also prompted discussions of whether this might constitute selective enforcement of the antitrust laws, and whether it conforms with a pattern of advocacy for politicized prosecution that the President promoted throughout his campaign and presidency. See, e.g., David A. Graham, *Trump Demands The Prosecution Of His Defeated Rival*, ATLANTIC (Nov. 3, 2017), <http://www.theatlantic.com/politics/archive/2017/11/trump-justice-department-clinton/544928> [<http://perma.cc/JS6H-KN4V>]. That discussion, however, is outside the scope of this Essay and will be reserved for others to explore.

icies would be overcoming the President's own statements articulating the executive's unconstitutional motivations. The travel ban implemented his stated intent to keep Muslims out of the country; the ban on transgender individuals in the military implemented animus toward the transgender community; and the sanctuary city policy was motivated by his desire to retaliate against cities that were not acting in accord with his desire to punish the undocumented. The only way to overcome this evidence of intentional bias would have been to create an extensive record indicating that, despite the President's statements, a strong policy rationale—supported by the opinions of career professionals—justified the policy initiative. This may have involved collecting legal opinions and documentary support from relevant agencies to lend legitimacy to the national-security justifications offered in support of these policies. Yet the Trump Administration failed to undertake this basic governmental function at a time when it was crucial to the viability of its policy agenda.

As a result of this failure to develop a counter-record and plausible legal justifications for its policies, government lawyers tasked with defending these policies instead attempted to recast the policies entirely. The DOJ unconvincingly argued that the Presidential memorandum announcing the transgender ban “did not actually announce a policy decision,” but merely “order[ed] the military to study the issue further.”⁹⁶ The White House Counsel's memorandum attempting to revise EO-1 post-facto to exclude its application to legal permanent residents was rejected by the courts as a legal maneuver having no binding effect. The Attorney General's memorandum argued the sanctuary cities executive order did not present any new policy at all, but simply directed cities to comply with the law—a claim courts dismissed as not credible.

When those attempts failed, the DOJ was left to offer inadequate reasons for the policies it was tasked with defending. The courts took the administration to task for failing to offer any plausible, rational connection between (a) national security and an indiscriminate ban on all individuals from the list of countries in EO-1; (b) military efficacy and a ban on transgender service members; or (c) public safety and the withholding of federal funds from sanctuary cities. What is more, the courts repeatedly found that the administration offered legal justifications that were *directly contradicted* by the relevant agencies' findings on national security concerns: the military had made an affirmative finding that transgender service members posed no threat to the military, and the Department of Homeland Security had made findings showing that the administration's sanctuary cities policy would *counteract* its purported purpose of protecting health and public safety.

96. *Stone v. Trump*, No. MJG-17-2459, 2017 WL 5589122, at *18 (D. Md. Nov. 21, 2017).

As of this writing, many of the cases discussed here have not reached the appellate courts or the Supreme Court for adjudication on the merits. As such, the ultimate outcome of these cases is not known. The appellate courts or the Supreme Court may decide to overlook the sidestepping of process that occurred in these cases. Nevertheless, the fact that this deviation from the norm, a norm that is intended to provide good advice and counsel to the executive, has occurred, is well-established. It has caused courts to become more skeptical of executive branch claims, a skepticism that may persist and jeopardize the Administration's ability to cure the "taint" of discrimination that clings even to properly vetted later iterations of those policies. Courts are inclined to defer to the President's judgments in the national security arena, in no small measure because of the perception that a full array of experts at the National Security Council, the State Department, the Central Intelligence Agency, the Department of Homeland Security, the Department of Justice and other agencies is there to provide him with legal advice, intelligence, diplomatic information, and policy development to formulate the best policy. When a President wakes up one morning and decides to change a policy by tweet without involving that extensive apparatus, the courts simply cannot be expected to defer to the President's judgment.

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