TAKE CARE

# The Rule of Law and the Resistance Police

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Some members of the legal right have taken to complaining loudly about claims that the Trump administration's policies are illegal. We'll call this group "the resistance police"—the group of individuals who, despite claiming to oppose many of Trump's actions as a matter of policy, spend their time either defending the legality of those very policies, or shaming those who do not.

What's troubling about the resistance police is not how they choose to spend their time (hey, different strokes). It's how they choose to frame their critiques of those who have challenged the lawfulness of the Trump administration's policies. Their critiques often involve less-than-subtle accusations that the challengers (and, increasingly, the judges who hold that the Trump administration's policies are unlawful) are all engaged in something other than law, and are driven primarily by motivated reasoning, as opposed to legal argument.

In this post, we highlight some of these critiques before offering some responses and critiquing the resistance police on their own terms. As we show, the resistance police assume that the President is taking actions that many other Presidents have taken before, and that his actions are being treated differently than those of other Presidents, even though he is doing the very same thing. But this view downplays both the novelty of the legal issues and factual circumstances presented by President Trump's actions and prior examples of courts making analogous moves in holding prior Presidents accountable. The resistance police also fall prey to the same sin of which they accuse Trump's critics, i.e., treating decisions with which the authors disagree as being driven by motivated reasoning, all while simultaneously empowering the President and his supporters in a particularly troubling frontier—the President's delegitimization of the federal judiciary. Indeed, because the resistance police's efforts to accuse the courts of mistreating the President are so transparently unconvincing, their efforts should perhaps better be understood as an indirect but important defense of the challenged policies on their merits.

## The Critiques

The resistance police have been out in full force. In the beginning, they policed academics and commentators who criticized the Trump administration's policies, and who argued the policies were unlawful. Some of this kind of resistance policing has continued. On Wednesday, Professor Kate Shaw penned a thoughtful New York Times op-ed that summarized a forthcoming Texas Law Review article about when the President's words matter in court. Generally, Shaw argues,

the President's words (at least those that depart from official or administrative statements) do not and should not matter. But the President's words do matter, she explained, when the President's intent is relevant to the legal analysis, as it is in the challenge to Trump's travel ban. (One of us has similarly written about how a President's words can matter in the context of "unlawful command influence" claims in courts-martial.) One professor immediately claimed, the nuance of the op-ed notwithstanding, that Shaw was "argu[ing] for [a] Trump exception to constitutional principle."

That kind of mischaracterization—with its unsubtle implication that academics are making legal arguments for purely political ends in order to oppose Trump policies they merely disagree with—has appeared before. For example, Josh Blackman took Dawn Johnsen's passing statement at a conference about deference to the Trump administration to reflect the views of, well, everyone who has challenged Trump's policies—"the ACLU and other Attorneys General" and Take Care's Joshua Matz, just to name a few. Blackman wrote that Johnsen was admitting what other groups merely "tap-dance around … openly asking courts to consider a litany of political grievances to determine that Trump is not entitled to the usual deference other Presidents have been afforded."

But Blackman took that critique (which, as one of us explained, misrepresents the arguments of many of the individuals he has called out) to a new low when he wrote about the Fourth Circuit's decision in IRAP v. Trump. In an "analysis" of the decision that Lawfare posted, he wrote:

"Ignoring the errors highlighted by the three pointed dissents, the majority opinion covers these gaps with papier-mâché bulwarks, seemingly designed to last only as long as needed to hold President Trump at bay. At bottom, the judicial resistance to the travel ban amounts to a not-too-transparent exercise of motivated reasoning: construe precedents as broadly or narrowly as needed and draw all inferences in the light least charitable to the President. Motivated reasoning is not new to the judiciary—all men are mortal—but it is brazen in the travel ban cases …. "

This argument is not unique to Blackman, but he framed the point with less subtlety than others have, and his framing has been parroted in a post by Ilya Shapiro titled, "Courts Shouldn't Join the #Resistance," and a Wall Street Journal op-ed by David Rivkin and Lee Casey titled, "The Fourth Circuit Joins the 'Resistance.'"

Blackman's accusation is that the judiciary is engaged in "resistance." The resistance, of course, is the name for the group of people who have committed themselves to opposing the Trump administration. By affiliating the federal judges who have found Trump's policies are illegal with the resistance, the implication (made explicit in the next sentences) is that the judiciary has committed themselves to opposing the Trump administration, without regard to law or anything like it. The judges are, according to Blackman, engaged in an "exercise of motivated reasoning," and a "brazen" one at that. He is accusing these judges of just opposing Trump to oppose Trump—for reaching the results they did because it's Trump, not because the law led the judges to that conclusion (notwithstanding the hundreds of pages of opinions with legal analysis in which many legal commentators and scholars concur). Blackman's argument is, in essence, that

these decisions are lawless—and are even worse for the rule of law than anything the current President (or Congress) has done or is doing.

## The Mistaken Premise

The first and most obvious problem with this line of reasoning is that its basic premise—that courts are treating President Trump differently than they have treated or would treat other presidents under similar circumstances—is demonstrably lacking for any evidence. The only real data point invoked by the resistance police is that, as the plaintiffs have conceded in the travel ban cases, the same Executive Order issued by a different President would likely be valid. Therefore, the argument goes, it must be the case that President Trump is being singled out for no other reason than inappropriate judicial hostility to him.

This reasoning borders on frivolity. No other President has said the kinds of things President Trump has said about Muslims, either while he was a candidate or even after his election and inauguration. Nor has any President ever adopted an immigration policy that so clearly raised a serious Establishment Clause question (however that question can and should be answered). So yes, had President Obama issued the exact same Executive Order (a hypothetical that borders on the fanciful, as Richard Primus has explained), but without any of the rather significant anti-Muslim rhetorical baggage, courts would almost certainly uphold it. That proves nothing about the courts, and everything about the constitutionally problematic biases of the current President.

Nor is it fair to claim, as some members of the resistance police have, that courts never look beyond the four corners of an Executive Order to assess the validity of executive action. We guess they've already forgotten how central a role President Obama's public statements (and those of other government officials) played in Judge Hanen's ruling striking down the Executive Order–based deferred action program, or how President Obama's public statements were also used to undermine "Don't Ask, Don't Tell."

To put the point more directly, the notion that courts or commentators are identifying a "Trump exception" is just as silly a characterization of the Fourth Circuit's decision in IRAP as it would be to call the Steel Seizure case a "Truman exception," or Ex parte Merryman a "Lincoln exception." All three represent situations in which courts faced with novel factual circumstances and novel legal questions about the scope of presidential power pushed back aggressively against the President—in rulings that were widely but not universally hailed by legal scholars. Were they doing so because they were so politically opposed to the President that they abandoned any pretense of judicial impartiality, or because, as impartial judges, they believed that, in those novel circumstances, the President had crossed the relevant constitutional lines? We think the answer is obviously the latter. But at the very least, the resistance police should have to do a lot more than identify novelty in a judicial ruling before they can assert that the answer is, in fact, the former.

## Advocacy and Analysis

Analysis can start to look like advocacy depending on how one characterizes the facts and the law, how one fills gaps or exploits ambiguities in fact and in law, and how one accords relative

weight to background values and principles. The gap-filling and manufactured ambiguity by some in the resistance police demonstrates an effort to bend over backwards to legally justify the administration's actions, even though they claim to disagree with the administration's policies.

In the travel ban dispute, there are questions on which the current case law simply does not provide clear answers. For instance, how much evidence of bad faith is enough to cause the court to look beyond the facial neutrality of an order? Or how should one weigh various categories of that evidence—say, the relative value of pre- versus post-inauguration statements? Even Blackman cannot consistently argue that Trump's statements shouldn't matter at all. He writes, "Courts need not be blind to Trump's awful past statements . . . However, courts should not uncharitably read every piece of evidence in the most negative possible light."

This is a statement about ambiguity. But it is difficult to read Blackman's analysis of the relevant facts as anything less than outright manufacturing of ambiguity in service of defending the policies. He writes that "[t]he courts tarred Trump with the brush of bigotry by citing statements that were not connected with the executive order at issue, but rather showed his general state of mind toward Muslims." Are courts really reading every statement in the most uncharitable light (what statements about the candidate's proposed ban on Muslims, and the reasons he gave for that proposal, are "not connected with the executive order at issue," which the plaintiffs allege does target Muslims)? Or are Trump's defenders manufacturing factual ambiguity where they are unwilling to say that his public statements should not or do not hold legal significance?

On a more granular level, there is also ambiguity in the central statute at issue in the case, 8 U.S.C. § 1182(f), a provision that allows the President to "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants" whenever he finds that such entry "would be detrimental to the interests of the United States." As Marty Lederman explained on Take Care, there is both a statutory precondition to the President's authority (that he make a finding) and an internal limitation on the scope of the authority (that the entry "would be detrimental" to U.S. interests). But the law is ambiguous as to how to satisfy the precondition and where the edge of that authority ends.

The analysis of the resistance police, when it aggressively resolves all ambiguity in the law and all ambiguity in the facts in favor of the policy, starts to blur the distinction between analysis and advocacy. That advocacy is laid bare in some of the derisive and dismissive language that has been used to describe the plaintiffs in the challenge. For instance, Blackman coined the phrase "Snowflake Standing" to refer to the theory of stigmatic injury in the travel ban cases, a terminology approvingly adopted by Ilya Shapiro. In the coded language of the alt-right, Washington Post columnist Steven Petrow explains, "snowflake" is a "derisive term for someone considered entitled, which to those using it includes people of color, LGBT folks, students." In Blackman's travel ban analogy, the "snowflakes" are the American Muslims who feel targeted by what they argue is the President targeting ... Muslims.

Confirming the intent behind the use of the term "snowflake," Blackman's original post on Lawfare, now edited to remove the reference, followed his analysis of "snowflake standing" by arguing that the court's logic "is more at home in a liberal arts college's safe space than in the

judiciary," and that "Article III is not so inclusive; not everyone can get their day in federal court." Over on his blog, where the post is still up, here is what Blackman had to say about the American Muslim "snowflakes":

"Trump's sectarian purpose is no longer a necessary condition to enjoin the order, because of how the order is perceived by Muslim-Americans–even as applied to internal-facing actions that will not directly impact anyone.

I'll call this the "snowflake" theory of standing: the order can be challenged as unconstitutional because of how it makes you feel …. This "snowflake" theory of standing melts on the closest of inspection."

(Emphasis his.) The language Blackman uses conveys his point well—the order, he maintains, doesn't actually "impact" (a word that should never be used as verb) anyone, and the American Muslims who feel targeted by the President of the United States and his policy are over-sensitive and silly, like liberal arts college students (but not others?) who could just choose not to attend a speech by a controversial speaker.

The stretch Blackman makes in attacking this theory of standing is especially evident given that this "theory" of standing is not really a "theory" at all (and it certainly does not "melt" upon an "inspection" that is not exactly the "closest"). The Supreme Court has stated over and over again that stigmatic injury suffices as an injury that provides a basis for a plaintiff's standing. So it is Blackman, not the Fourth Circuit or the IRAP plaintiffs, who is making a choice to ignore, or at least discount, prior cases, again, presumably because he disagrees with those cases—not because they, or subsequent decisions following them, represent some kind of lawless judicial resistance.

Self-Policing

What's especially odd is that when the resistance police accuses courts and commentators of brazen motivated reasoning, they commit many of the same errors that they've (somewhat miraculously) found in every judicial decision that has gone against the Trump administration. Blackman has argued, several times, that if courts are correct that the President's travel ban is unlawful because it targets Muslims, and we know this because of what the President has said about targeting Muslims, then the President will forever be restrained from taking any action that affects Muslims. Of course, this argument completely ignores the transparently thin justifications the President has offered for singling out these Muslim-majority countries, and the possibility that courts would react differently to a case with far stronger justifications. Blackman has also argued that courts and commentators should not impute "bad motives" to Trump merely because they disagree with Trump's travel ban. But he can reach that conclusion only by imputing the same "bad motives" to the judges who invalidate that ban—since he refuses to accept that the legal conclusions might be independently valid (perhaps because he disagrees with them).

Orin Kerr identified this phenomenon in a post he wrote about the rise of Donald Trump, back in May of last year:

"[The] argument relies on what I'll call the politics of delegitimization. When someone does something you don't want, you say they acted for improper and corrupt reasons. It's part of a rhetorical strategy that has found particular favor on the political right since Obama was elected. That strategy, repeated hundreds of times in different contexts, was designed to further conservative and libertarian ends. And it sometimes worked."

It seems not much has changed in the last year. Again consider Blackman's analysis of the Fourth Circuit's decision in IRAP:

"[R]ecognizing that the judicial resistance may ultimately defeat the Trump presidency, my sincere hope is that courts do so with as little collateral damage as possible to other areas of law."

We're not sure what it means for "the judicial resistance" to "defeat the Trump presidency." But the idea that the judges who find some of Trump's actions unlawful are taking a wrecking ball to the rule of law is emblematic of what Kerr called "the politics of delegitimization"—the tendency to dress up mere disagreement over a legal conclusion in terms of a broad accusation that the other side is engaged in politics, rather than law.

One other note on that point. Kerr wrote:

"You can sometimes find the same narrative on the left, of course. But you don't find it nearly as often or as prominently as you find it on the right. You can see the strategy at work if you follow popular conservative news or commentary programs. Too often, people who are barriers to good results (whether they are Democrats or the GOP "establishment") aren't described as simply disagreeing in good faith. Instead, you'll often hear that they are illegitimate. They are acting in bad faith. Their motives are corrupt."

After Steve initially raised some concerns about the resistance police on Twitter, some people responded that the kind of "respect" that Steve argued was due to the Fourth Circuit is also due to other academics with which we disagree, and to the judges who have voted (and may vote) to uphold the travel ban. Sure. But as is often the case in law, there are different kinds of cases and different kinds of contexts. It is one thing to poke holes in an argument (even with an acid pen or biting remarks). It's another to impute motived reasoning to other academics, and it's something else entirely to impute motivated reasoning to judges based on the conclusions they have reached, and thus empower, however unwillingly, the administration's alarming efforts to delegitimize the judiciary.

Disagreeing with a decision doesn't require imputing illegitimate motives to the other side, even when you mercilessly mock the substance of the other side's arguments, and especially when you try (but ultimately fail) to do so. An accusation of "judicial lawlessness" should have more behind it than a disagreement with a prior, unrelated Supreme Court decision, or a disagreement with how a court resolved an unsettled legal question in a case that presents unique facts. We'd always assumed that there is a difference between decisions with which we strongly disagree (e.g., Shelby County) and decisions in which courts have grossly exceeded their institutional authority (e.g., Dred Scott). For the resistance police, these appear to be one and the same. That's not how a pluralistic constitutional democracy works, regardless of who the President is.