

2018

Action and Reaction: The Trump Executive Orders and Their Reception by the Federal Courts

Anthony S. Winer

Mitchell Hamline School of Law, anthony.winer@mitchellhamline.edu

Follow this and additional works at: <https://open.mitchellhamline.edu/mhlr>

 Part of the [Constitutional Law Commons](#)

Recommended Citation

Winer, Anthony S. (2018) "Action and Reaction: The Trump Executive Orders and Their Reception by the Federal Courts," *Mitchell Hamline Law Review*: Vol. 44 : Iss. 3 , Article 4.

Available at: <https://open.mitchellhamline.edu/mhlr/vol44/iss3/4>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in Mitchell Hamline Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.

© Mitchell Hamline School of Law

ACTION AND REACTION: THE TRUMP EXECUTIVE ORDERS AND THEIR RECEPTION BY THE FEDERAL COURTS

Anthony S. Winer[†]

I.	INTRODUCTION.....	908
II.	TRUMP EXECUTIVE ORDERS	910
	A. <i>Travel Ban Orders</i>	910
	1. <i>First Travel Ban Order</i>	910
	2. <i>Second Travel Ban Order</i>	912
	3. <i>Third Travel Ban Order</i>	912
	B. <i>Sanctuary Jurisdictions Order</i>	913
	C. <i>Transgender Military Exclusion Memoranda</i>	915
	D. <i>DACA Rescission Statement</i>	917
	E. <i>Overview of the Judicial Response to the Trump Executive Orders</i>	920
III.	EXCLUSIONARY EFFECT OF THE TRUMP EXECUTIVE ORDERS	921
IV.	JUDICIAL TREATMENT OF THE TRUMP EXECUTIVE ORDERS..	922
	A. <i>Constitutional Travel Ban Cases Further Develop an Expansive Interpretation of the Establishment Clause</i>	922
	B. <i>Sanctuary Jurisdictions Case Deploys Conventional Constitutional Concepts to Reach Novel Results</i>	924
	C. <i>Transgender Exclusion Case Develops a Progressive Interpretation of Equal Protection</i>	927
	D. <i>The Current Litigation Environment for the DACA Rescission Appears to Support DACA</i>	929
	1. <i>Judicial Precedents for the DAPA Program Do Not Support Constitutional Invalidation of the DACA Program</i>	929

[†] Anthony S. Winer has served as a Professor of Law at Mitchell Hamline School of Law for well over 20 years. He has degrees from the University of California at Berkeley (A.B. 1977), the University of Chicago Law School (J.D. 1980), and the New York University School of Law (LL.M. 1991). He teaches chiefly in the areas of U.S. Constitutional Law and International Law, with special focuses on Law and Sexuality and Public International Law Research. He would like to express special thanks to the staff of the *Mitchell Hamline Law Review*, whose assistance was especially helpful in preparing this article.

2. *DACA Rulings Currently Support Reference to Public Statements by Officials as Bases for Helping to Determine Discriminatory Intent*..... 931

V. CONCLUSION 933

I. INTRODUCTION

In the legal sphere, some of the most dominant elements of President Donald Trump’s first year in office were his executive orders. This article focuses on the following (the “Trump Executive Orders”): the three travel ban orders,¹ the sanctuary jurisdictions order,² the two successive transgender military exclusion memoranda,³ and the Attorney General statement indicating rescission of the Deferred Action on Childhood Arrivals (DACA) program.⁴ These orders attracted much national media attention and were clearly intended to produce political effects. As a presidential candidate, Trump campaigned for a ban on Muslim immigration⁵ and a wall at the United States-Mexico border,⁶ and made other statements that solidified support among his populist base.⁷

1. See *infra* Part II.A.

2. See *infra* Part II.B.

3. See *infra* Part II.C.

4. See *infra* Part II.D. Although President Trump’s memorandum on transgender military exclusion and the statement from Attorney General Sessions on DACA are not technically executive orders, they are intended to have legal effects in the executive branch, and are accordingly treated in this article as akin to executive orders. The memorandum and DACA statement are encompassed whenever this article references the Trump Executive Orders.

5. Jeremy Diamond, *Donald Trump: Ban All Muslim Travel to U.S.*, CNN (Dec. 8, 2015, 3:18 AM), <http://www.cnn.com/2015/12/07/politics/donald-trump-muslim-ban-immigration/index.html> [<https://perma.cc/CNM7-AYN5>] (discussing candidate Trump’s press release calling for a “total and complete shutdown of Muslims entering the United States”).

6. See Politico Staff, *Full Text: Donald Trump Immigration Speech in Arizona*, POLITICO (Aug. 31, 2016), <https://www.politico.com/story/2016/08/donald-trump-immigration-address-transcript-227614> [<https://perma.cc/5ZDA-K3XW>] (announcing campaign promise to build a wall).

7. See Ronald F. Inglehart & Pippa Norris, *Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash* 5 (Harv. Kennedy Sch., Working Paper RWP16-026, 2016), <https://research.hks.harvard.edu/publications/getFile.aspx?Id=1401> [<https://perma.cc/PTZ2-Y36E>] (“[Trump’s] populism is rooted in claims that he is an outsider to D.C. politics, a self-made billionaire leading an

The Trump Executive Orders, as efforts to fulfill some of these promises made during the campaign, have significant political roots. As documents designed to have legal force and effect, they also have legal significance. Taken together, they demonstrate a strong desire to exclude certain populations and entities from the benefits of being part of American society. The Trump Executive Orders reflect the exclusionary bent of his populism. As a political proposition, calling to exclude the outsider benefitted Trump's candidacy. But, as a principle of presidential legal action, it has been problematic. Federal courts have been hostile to most of the Trump Executive Orders,⁸ and with respect to DACA, a federal court's initial invalidation of the related Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program left the door open to continued operation of DACA.⁹

The courts' decisions indicate somewhat ironic results. The exclusionary effect of the Trump Executive Orders is, in a sense, an effort to "turn the clock back" in the affected subject-matter areas. That is, they intended to halt the momentum built during President Obama's years in office and to begin movement in the opposite direction.¹⁰ Through enjoining these orders, federal courts are making analytical strides that move constitutional doctrine in a direction that conforms more with the momentum that the Trump administration is battling.¹¹ While the Trump administration has been trying to halt momentum toward liberalization in the political realm, some courts have been developing new doctrines moving liberalization forward in the judicial realm.¹² This article attempts to

insurgency movement on behalf of ordinary Americans disgusted with the corrupt establishment, incompetent politicians, dishonest Wall Street speculators, arrogant intellectuals, and politically correct liberals.").

8. See *infra* Part II.

9. See *infra* Part IV.D.1.

10. See Peter Baker, *Can Trump Destroy Obama's Legacy?*, N.Y. TIMES (June 23, 2017), <https://www.nytimes.com/2017/06/23/sunday-review/donald-trump-barack-obama.html> [<https://perma.cc/3H2X-GHWH>] ("The president seems determined to define his time in office by demolishing what his predecessor did.").

11. E.g., Jesse Lempel, *Tier III Terrorist Designations: The Trump Administration and Courts Move in Opposite Directions*, LAWFARE (Dec. 5, 2017), <https://lawfareblog.com/tier-iii-terrorist-designations-trump-administration-and-courts-move-opposite-directions> [<https://perma.cc/TA5P-Z3NU>] ("[T]he administration's boost to the [Patriot Act's] system [of granting the President unilateral authority] runs counter to the trend in the courts expressing skepticism—if not outright alarm—at the sweeping and unpredictable application of immigration bars . . .").

12. See *infra* Part IV.

describe, and point to the irony of, courts using doctrinal expansion and novel interpretation in ways that run counter to President Trump's exclusionary agenda.

II. TRUMP EXECUTIVE ORDERS

As others have noted, virtually all U.S. presidents have issued executive orders.¹³ There is nothing unconstitutional, *per se*, about a president issuing an executive order. However, any particular executive order with terms or effects that violate one of the proscriptions of the Constitution (such as the First Amendment or the Due Process Clause of the Fourteenth Amendment) is, of course, unconstitutional. And all executive orders unsupported by Congressional authorization are constitutionally valid only if they stay within the scope of legitimate executive authority.¹⁴

A. *Travel Ban Orders*

The three travel bans are probably the most notorious of the Trump Executive Orders—no doubt owing in part to the successive judicial invalidations of the first two, and their replacement by the third.¹⁵

1. *First Travel Ban Order*

Soon after the start of his administration, President Trump issued the first travel ban order, Executive Order 13769.¹⁶ This order

13. John Woolley & Gerhard Peters, *Executive Orders: Washington – Trump*, AM. PRESIDENCY PROJECT (Dec. 20, 2017), <http://www.presidency.ucsb.edu/data/order.s.php> [<https://perma.cc/CE23-9KST>] (identifying that only William Henry Harrison failed to issue an executive order during his term and no president since Chester Arthur has issued fewer than one hundred executive orders).

14. *See* *Youngstown Sheet & Tube & Tube Co. v. Sawyer*, 343 U.S. 579, 634–38 (1952) (Jackson, J., concurring) (“When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers . . .”).

15. *See generally* Jaweed Kaleem, *From ‘See You in Court!’ to the Supreme Court: Who’s Up and Down in the History of Trump’s Travel Ban*, LA TIMES (Dec. 5, 2017), <http://www.latimes.com/nation/immigration/la-na-travel-ban-history-2017-htmlstory.html> [<http://perma.cc/8ZTU-LXCN>] (providing a cursory overview of history regarding the Trump travel bans).

16. Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13769, 82 Fed. Reg. 8977 (Feb. 1, 2017) [hereinafter *First Travel Ban Order*].

barred entry of aliens from seven specified countries (with majority Muslim populations)¹⁷ into the United States for a period of ninety days.¹⁸ It also reduced the number of refugees to be admitted in 2017 by over fifty percent,¹⁹ barred the entry of Syrian refugees into the United States indefinitely,²⁰ and imposed a 120-day suspension of the U.S. Refugee Admissions Program.²¹

A salient feature of the first travel ban order was that it directed the Secretary of State to prioritize refugee claims by individuals on the basis of religion-based persecution when they were adherents of a religion that was a minority religion in their home country.²² This was widely perceived as a measure that favored Christian immigrants arriving from majority-Muslim countries.²³ A federal district court judge in Seattle imposed an injunction on the first travel ban order,²⁴ for reasons discussed below,²⁵ and this injunction was sustained by the United States Court of Appeals for the Ninth Circuit.²⁶

17. See Kyle Blaine & Julia Horowitz, *How the Trump Administration Chose the 7 Countries in the Immigration Executive Order*, CNN (Jan. 30, 2017), <http://www.cnn.com/2017/01/29/politics/how-the-trump-administration-chose-the-7-countries/index.html> [<https://perma.cc/939G-R8MV>] (noting that the countries of Iraq, Syria, Iran, Libya, Somalia, Sudan, and Yemen were all affected by the ban).

18. First Travel Ban Order, *supra* note 16, § 3(c), 82 Fed. Reg. at 8978.

19. *Id.* § 5(d), 82 Fed. Reg. at 8979 (permitting entry of no more than fifty thousand refugees).

20. *Id.* § 5(c), 82 Fed. Reg. at 8979.

21. *Id.* § 5(a), 82 Fed. Reg. at 8979.

22. *Id.* § 5(e), 82 Fed. Reg. at 8979 (“[T]he Secretaries of State and Homeland Security may jointly determine to admit individuals to the United States as refugees on a case-by-case basis . . . including when the person is a religious minority in his country of nationality facing religious persecution.”).

23. See Richard Gonzales, *Trump’s Refugee Plan Will Prioritize Christians Suffering Religious Persecution*, NPR (Jan. 26, 2017), <https://www.npr.org/sections/thetwo-way/2017/01/26/511903885/trump-s-refugee-plan-will-prioritize-christian-refugees> [<https://perma.cc/BMD2-Q6XH>] (“[T]he actions include a 120-day moratorium on any new refugees entering the United States to give the government time to come up with a plan that prioritizes Christians suffering from religious persecution.”).

24. *Washington v. Trump*, No. C17-014IJLR, 2017 WL 462040, at *1 (W.D. Wash. Feb. 3, 2017).

25. See *infra* Part IV.A.

26. *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017).

2. *Second Travel Ban Order*

The Trump administration issued the second travel ban order²⁷ to replace the first. Again, it provided for a temporary ban on entry of immigrants from specifically named Muslim-majority countries for a ninety-day period,²⁸ but with terms adjusted, ostensibly to address the defects criticized by the courts. This second order reduced the number of countries affected to six,²⁹ did not include an indefinite ban on entry by Syrian refugees, and eliminated the provision perceived to aid Christians from majority-Muslim states. This second travel ban order was in turn enjoined by federal district court judges in Maryland and Hawaii.³⁰ These injunctions were upheld by the Fourth and Ninth Circuits, respectively.³¹ The United States Supreme Court initially granted certiorari on both cases, but then vacated the earlier rulings upon determining that, with the expiration of the relevant ninety-day periods, the issues were moot.³²

3. *Third Travel Ban Order*

On September 24, 2017, President Trump issued a presidential proclamation putatively setting forth a permanent version of the travel ban,³³ limiting immigration from eight specified countries.³⁴ This version of the travel ban was enjoined by a federal district court judge in Maryland on October 17, 2017.³⁵ Shortly thereafter, the

27. Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 9, 2017) [hereinafter *Second Travel Ban Order*].

28. *Id.* § 2(c), 82 Fed. Reg. at 13213.

29. *Id.* (limiting the banned countries to Iran, Libya, Somalia, Sudan, Syria, and Yemen).

30. *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539 (D. Md. 2017); *Hawai'i v. Trump*, 245 F. Supp. 3d 1227 (D. Haw. 2017).

31. *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017); *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017).

32. *Trump v. Int'l Refugee Assistance Project*, 138 S.Ct. 353 (2017); *Trump v. Hawaii*, 138 S.Ct. 377 (2017).

33. *Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorist or Other Public-Safety Threats*, Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017) [hereinafter *Third Travel Ban Order*].

34. *Id.* § 2, 82 Fed. Reg. at 45165–67 (suspending immigration from the countries of Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen).

35. *Int'l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 633 (D. Md. 2017).

Supreme Court stayed the injunction pending review by the Fourth Circuit, and potentially by the Supreme Court itself.³⁶ As of this writing, the Fourth Circuit has issued no appellate opinion in the case.

Also on October 17, 2017, a federal district judge in Hawaii enjoined the third version of the travel ban.³⁷ This injunction, although stayed by the Supreme Court,³⁸ was confirmed by the United States Court of Appeals for the Ninth Circuit.³⁹ The federal government petitioned the Supreme Court for a writ of certiorari in the Hawaii case—which was granted on January 19, 2018—and oral argument took place on April 25, 2018.⁴⁰

B. *Sanctuary Jurisdictions Order*

A number of cities and counties in various parts of the United States have policies limiting their cooperation in certain respects with federal immigration authorities.⁴¹ Such cities and counties are often referred to as “sanctuary jurisdictions.”⁴² Even before President Trump issued the first travel ban order, he issued an executive order designed to inhibit cities and counties from limiting their cooperation in key respects.⁴³ The order directs the Secretary of Homeland Security and the Attorney General to “ensure” that

36. Order Granting Stay of Injunction Pending Appeal, *Trump v. Int’l Refugee Assistance Project*, No. 17A560 (Dec. 4, 2017), <https://cases.justia.com/federal/districtcourts/maryland/mddce/8:2017cv00361/379052/237/0.pdf?ts=1512637567> [<https://perma.cc/V7MV-355H>]. Specifically, the Court stayed the injunction “pending disposition of the Government’s appeal in the United States Court of Appeals for the Fourth Circuit and disposition of the Government’s petition for a writ of certiorari if such writ is sought.” *Id.*

37. *Hawaii v. Trump*, 265 F. Supp. 3d 1140, 1160 (D. Haw. 2017).

38. Order Granting Stay of Injunction Pending Appeal, *Trump v. Hawaii*, No. 17A550 (Dec. 4, 2017), https://www.supremecourt.gov/orders/courtorders/120417zr_4gd5.pdf [<https://perma.cc/65QX-QTLP>]. The terms of this order were substantially identical to those of the order in the *International Refugee Assistance Project* case.

39. *Hawaii v. Trump*, 878 F.3d 662, 702 (9th Cir. 2017).

40. *Trump v. Hawaii*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/trump-v-hawaii-3/> [<https://perma.cc/2E9C-BHAD>] (last visited June 20, 2018).

41. Jennifer C. Critchley & Lisa J. Trembly, *Historical Review, Current Status and Legal Considerations Regarding Sanctuary Cities*, 306 N.J. LAW. 32, 34 (June 2017) (estimating there are between 300–350 sanctuary cities in the U.S.).

42. *Id.* at 32.

43. Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

jurisdictions that do not supply information to federal immigration authorities be “[in]eligible to receive federal grants.”⁴⁴

In response to litigation initiated by Santa Clara County and the City and County of San Francisco,⁴⁵ a judge sitting on the Federal District Court for the Northern District of California issued a nationwide injunction against the sanctuary jurisdictions executive order.⁴⁶ The judge made this injunction permanent in a separate order granting summary judgment on November 20, 2017.⁴⁷

Early 2018 saw additional litigation concerning the sanctuary jurisdictions executive order. In the first few months of 2018, four federal courts issued notable opinions connected to the executive order, although they differ in an observable respect from the 2017 opinions for the Santa Clara/San Francisco case. These courts did not address enforcement of the sanctuary jurisdictions executive order itself. Rather, they addressed determinations by the Attorney General to withhold funding—under specific federal programs—from the relevant jurisdictions because they were sanctuary jurisdictions. The two programs involved were the Edward Byrne Memorial Justice Assistance Grant Program (often called the “Byrne JAG” Program),⁴⁸ and grants issued by the Office of Community Oriented Policing Services (often called “COPS” grants).⁴⁹

In one of these cases,⁵⁰ the United States District Court for the Eastern District of Pennsylvania initially granted a preliminary injunction against the Attorney General from rejecting, on sanctuary jurisdiction grounds, the application submitted by the City of Philadelphia under the Byrne JAG Program.⁵¹ The court also enjoined the Attorney General from so withholding any funding to

44. *Id.* § 9(a) at 8801.

45. *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 507 (N.D. Cal. Apr. 19, 2017).

46. *Id.* at 540.

47. *Cty. of Santa Clara v. Trump*, No. 17-cv-00574-WHO, No. 17-cv-00485-WHO, 2017 WL 5569835, at *1 (N.D. Cal. Nov. 20, 2017).

48. This program is administered pursuant to 34 U.S.C. §§ 10151–10158.

49. The basis for COPS grants is apparently internal within the Department of Justice, as opposed to expressly statutory. *See About*, U.S. DEP’T OF JUSTICE, CMTY. ORIENTED POLICING SERVS., <https://cops.usdoj.gov/about> [<https://perma.cc/BS94-365B>].

50. *City of Phila. v. Sessions*, No. 17-3894, 2018 WL 1305789 (E.D. Pa. Mar. 13, 2018).

51. *See id.* at *4.

the City under that program.⁵² The court then denied the government's motion to dismiss the City's complaint.⁵³

In the second case,⁵⁴ the United States District Court for the Central District of California granted partial summary judgment to the City of Los Angeles against the Attorney General, enjoining him from imposing conditions on the City's receipt of COPS grants that were rooted in the sanctuary jurisdictions executive order.⁵⁵

In the third case,⁵⁶ a panel of the United States Court of Appeals for the Seventh Circuit affirmed a preliminary injunction preventing the Attorney General from imposing certain conditions, rooted in the executive order, on the City of Chicago in its effort to obtain Byrne JAG Program funds.⁵⁷

The fourth case⁵⁸ was a bit of an outlier. It was brought by the State of California, rather than a city, and the United States District Court for the Northern District of California denied the State's motion for a preliminary injunction.⁵⁹ Unlike the other cases described in this section, this result was substantially in favor of the government.

C. *Transgender Military Exclusion Memoranda*

On August 25, 2017, President Trump issued a memorandum⁶⁰ that embodied three primary effects. First, it indefinitely extended the previous temporary prohibition against transgender individuals entering the military.⁶¹ Second, it required the military to authorize, no later than March 23, 2018, the discharge of transgender service members.⁶² These two measures are sometimes referred to as the

52. *Id.*

53. *Id.* at *13.

54. *City of L.A. v. Sessions*, 293 F. Supp. 3d 1087 (C.D. Cal. Apr. 11, 2018).

55. *Id.* at 1101.

56. *City of Chi. v. Sessions*, 888 F.3d 272 (7th Cir. Apr. 19, 2018).

57. *See id.* at 293 (concluding that the district court did not abuse its discretion in issuing the preliminary injunction).

58. *California ex rel. Becerra v. Sessions*, 284 F. Supp. 3d 1015 (N.D. Cal. Mar. 5, 2018).

59. *Id.* at 1037.

60. Memorandum on Military Service by Transgender Individuals, 2017 DAILY COMP. PRESS DOC. 587 (Aug. 25, 2017) <https://www.gpo.gov/fdsys/pkg/DCPD-201700587/pdf/DCPD-201700587.pdf> [<https://perma.cc/7BNG-QGUM>].

61. *Id.* § 2(a).

62. *Id.* § 3.

“Accession Directive” and the “Retention Directive,”⁶³ respectively. Third, the memorandum prohibited the expenditure of military resources on sex reassignment surgeries.⁶⁴

Four federal district courts enjoined the transgender military exclusion memorandum: the United States District Court for the District of Columbia,⁶⁵ the United States District Court for the District of Maryland,⁶⁶ the United States District Court for the Western District of Washington,⁶⁷ and the United States District Court for the Central District of California.⁶⁸

In February 2018, the Department of Defense issued a document titled “Report and Recommendations on Military Service by Transgender Persons.”⁶⁹ It announced three elements of a new

63. See *Doe 1 v. Trump*, No. 17-1597 (CKK), 2017 WL 4873042, at *1.

64. Memorandum on Military Service by Transgender Individuals, *supra* note 60, § 2(b).

65. *Doe 1*, 2017 WL 4873042, at *33. The United States Court of Appeals for the District of Columbia later denied an emergency motion for an administrative stay pending appeal. *Doe 1 v. Trump*, 2017 WL 6553389, at *1 (D.C. Cir. Dec. 22, 2017).

66. *Stone v. Trump*, No. MJG-17-2459, 2017 WL 5589122, at *16 (D. Md. Nov. 21, 2017).

67. *Karnoski v. Trump*, No. C17-1297-MJP, 2017 WL 6311305, at *10 (W.D. Wash. Dec. 11, 2017). The court also denied a subsequent defense motion for clarification and partial stay, *Karnoski v. Trump*, C17-1297-MJP, 2017 WL 6733723, at *3 (W.D. Wash. Dec. 29, 2017), and a later defense motion for a continuance under Federal Rule of Civil Procedure 56(d). *Karnoski v. Trump*, 2018 WL 993973, at *2 (W.D. Wash. Feb. 21, 2018).

68. Order Denying Defendants’ Motion to Dismiss Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure and Granting Plaintiffs’ Motion for Preliminary Injunction, *Stockman v. Trump*, No. 5:17-1799 JGB, at 21 (C.D. Cal. Dec. 22, 2017); see *Second Court Rejects Trump Bid to Stop Transgender Military Recruits*, REUTERS (Dec. 22, 2017), <https://www.reuters.com/article/us-usa-court-transgender/second-court-rejects-trump-bid-to-stop-transgender-military-recruits-idUSKBN1EH00R> [<https://perma.cc/EGK5-GZUD>] (last visited June 20, 2018):

Also on Friday [December 22], a federal trial court in Riverside, California, blocked the ban while the case proceeds, making it the fourth to do so, after similar rulings in Baltimore, Seattle and Washington, D.C. U.S. District Judge Jesus Bernal said without the injunction the plaintiffs, including current and aspiring service members, would suffer irreparable harm. “There is nothing any court can do to remedy a government-sent message that some citizens are not worthy of the military uniform simply because of their gender,” he added.

69. Declaration of Ryan B. Parker, *Karnoski v. Trump*, No. 2:17-cv-1297-MJP, Exhibit 2, at 10 (Mar. 23, 2018), militarypartners.org/wp-content/uploads/2018/

“transgender policy,” all of which were overtly hostile to military service by transgender persons. The first element of the policy was that “transgender persons without a history or diagnosis of gender dysphoria, who are otherwise qualified for service, may serve, like all other Service members, in their biological sex.”⁷⁰ The second element was that “transgender persons who require or have undergone gender transition are disqualified.”⁷¹ And the third element was that “transgender persons with a history or diagnosis of gender dysphoria are disqualified, except under certain limited circumstances.”⁷²

On March 23, 2018, President Trump issued a new memorandum, in light of this document.⁷³ In his new memorandum, he first revoked his earlier memorandum regarding military service by transgender persons from August 25, 2017.⁷⁴ The memorandum then stated that the Secretary of Defense and the Secretary of Homeland Security “may exercise their authority to implement any appropriate policies concerning military service by transgender individuals.”⁷⁵ This language, which at first glance may seem rather mild in view of the condemnatory tone and effects of the February report, may have been intended to help facilitate implementation of the February 2018 policy. On April 13, 2018, the District Court for the Western District of Washington granted in part and denied in part the plaintiffs’ and defendants’ opposing motions for summary judgment.⁷⁶

D. *DACA Rescission Statement*

DACA was originally set forth by former Secretary of Homeland Security Janet Napolitano in a June 15, 2012 memorandum, charging certain members of her staff with particular immigration

03/March-23-policy-implementation.pdf [https://perma.cc/GR8X-DBG7].

70. *Id.* at 32.

71. *Id.* at 32–41.

72. *Id.* at 41–43 (detailing the limited circumstances exempted from the third element of the transgender policy).

73. *Id.* at Exhibit 3.

74. *Id.* § 1.

75. *Id.* § 2.

76. Order Granting in Part and Denying in Part Plaintiffs’ and Washington’s Motions for Summary Judgment, *Karnoski v. Trump*, 2018 WL 1784464, at *14 (W.D. Wash. Apr. 13, 2018).

duties.⁷⁷ It was thematically linked to the DAPA program.⁷⁸ Neither program was specifically authorized by congressional action, but the Obama administration took the position that both were mere exercises of prosecutorial discretion.⁷⁹

The DAPA program was designed to provide leniency for undocumented adults whose minor children were born in the United States (and were therefore U.S. citizens) or whose minor children were otherwise U.S. legal residents.⁸⁰ The DACA program provides leniency for certain undocumented young U.S. residents who were brought to the United States as young minors and evinced certain positive indicators.⁸¹

In 2015, a federal district court in Texas enjoined the DAPA program.⁸² The Fifth Circuit upheld the injunction,⁸³ and that judgment was in turn upheld by an evenly divided Supreme Court.⁸⁴ The Trump administration rescinded the DACA program during its first year in office, thereby discontinuing any governmental attempt to defend the policy.⁸⁵ The move was taken in a statement by

77. Memorandum from Janet Napolitano, U.S. Sec'y of Dept. of Homeland Sec. to David V. Aguilar, Acting Comm'r of U.S. Customs & Border Prot. et al. (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/NLH9-VLFH>].

78. See Memorandum from Jeh Johnson, Sec'y of Dept. of Homeland Sec. to Leo Rodriguez, Dir. of U.S. Citizenship and Immigration Serv.'s et. al. (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf [<https://perma.cc/GC9V-WVP2>].

79. See, e.g., *2014 Executive Actions on Immigration*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/archive/2014-executive-actions-immigration> [<https://perma.cc/EN7H-3LWS>] (last visited June 20, 2018) (outlining President Obama's position on expansion of DACA and DAPA); President Barack Obama, Remarks by the President on Immigration (June 15, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration> [<https://perma.cc/HJF4-7Z5T>] (discussing his support of Secretary Napolitano's memorandum).

80. Johnson, *supra* note 78.

81. Napolitano, *supra* note 77.

82. *Texas v. United States*, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015).

83. *Texas v. United States*, 787 F.3d 733, 743 (5th Cir. 2015).

84. *Texas v. United States*, 136 S. Ct. 2271, 2272 (2016).

85. *Full Text: Jeff Sessions on Trump Ending DACA Program*, POLITICO (Sept. 5, 2017) <https://www.politico.com/story/2017/09/05/trump-ending-daca-dreamers-program-sessions-transcript-242326> [<https://perma.cc/Q8UL-EPM3>] [hereinafter *DACA Rescission Statement*].

Attorney General Jeff Sessions on September 5, 2017.⁸⁶ Other governmental statements indicated that the rescission would not be completely effective until March 2018, thereby giving Congress a chance to provide analogous relief in statutory form.⁸⁷

Two federal district courts then enjoined most of the operative prospective effect of the DACA rescission: the United States District Court for the Northern District of California on January 9, 2018,⁸⁸ and the United States District Court for the Eastern District of New York on February 13, 2018.⁸⁹ In the California case, the government asked the Supreme Court for a writ of certiorari before judgment—that is, before the Ninth Circuit could have an opportunity to review on appeal.⁹⁰ On February 26, 2018, the Supreme Court denied this request.⁹¹

86. *Id.*

87. See Presidential Statement on the Deferred Action for Childhood Arrivals Policy, 2017 DAILY COMP. PRESS DOC. 609 (Sept. 5, 2017) <https://www.gpo.gov/fdsys/pkg/DCPD-201700609/pdf/DCPD-201700609.pdf> [<https://perma.cc/89BE-24V3>] (“This is a gradual process, not a sudden phaseout. Permits will not begin to expire for another 6 months . . . I am not going to just cut DACA off, but rather provide a window of opportunity for Congress to finally act.”).

88. Order Denying FRCP 12(b)(1) Dismissal and Granting Provisional Relief, *Regents of the Univ. of Cal. v. Dep’t of Homeland Sec.*, No. C17-05211 WHA, at 48 (N.D. Cal. Jan. 9, 2018), <https://cases.justia.com/federal/district-courts/california/candce/3:2017cv05211/316722/234/0.pdf?ts=1515577022> [<https://perma.cc/M5AE-MZLN>]. The court ordered the government to “maintain the DACA program on a nationwide basis on the same terms and conditions as were in effect before the rescission on September 5, 2017,” but with the exceptions:

- (1) that new applications from applicants who have never before received deferred action need not be processed;
- (2) that the advance parole feature need not be continued for the time being for anyone; and
- (3) that defendants may take administrative steps to make sure fair discretion is exercised on an individualized basis for each renewal application.

Id.

89. Amended Memorandum & Order & Preliminary Injunction, *Batalla Vidal v. Nielsen*, No. 16-CV-4756 (NGG) (JO), at 53–55 (E.D.N.Y. Feb. 13, 2018), <https://cases.justia.com/federal/district-courts/new-york/nyedce/1:2016cv04756/390395/255/0.pdf?ts=1518610640> [<https://perma.cc/NJ5L-45LN>]. The court imposed a preliminary injunction substantially similar to, and with exceptions substantially similar to, that imposed in *Regents of the Univ. of Cal.* order. *Id.* at 53.

90. *Dep’t. of Homeland Sec. v. Regents of the Univ. of Cal.*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/department-homeland-security-v-regents-university-california/> [<https://perma.cc/C9FN-42LW>] (last visited June 20, 2018).

91. *Id.*

After the two injunctions, the government moved to dismiss in both the New York and California actions, and also in analogous litigation in the United States District Courts for the District of Maryland⁹² and District of Columbia.⁹³ The courts in all these actions granted in part and denied in part the motions to dismiss, although to different extents and for different reasons. Three of these four court orders were basically sympathetic to the plaintiffs,⁹⁴ and the fourth (from Maryland) was broadly sympathetic to the government.⁹⁵

The injunctions against the President's DACA rescission have had their effect. It was reported that during the first three months of 2018, the Trump administration has approved tens of thousands of DACA applications and renewals.⁹⁶

E. Overview of the Judicial Response to the Trump Executive Orders

The foregoing overview demonstrates that the judicial response to the four Trump Executive Orders has been singular. Every one of the Trump Executive Orders (including all three versions of the travel ban order) was enjoined by a federal district court. Furthermore, each of these injunctions that has been fully reviewed by a federal circuit court of appeal has been sustained.

92. *Casa de Md. v. Dep't of Homeland Sec.*, 284 F. Supp. 3d 758 (D. Md. Mar. 5, 2018).

93. *NAACP v. Trump*, 298 F. Supp. 3d 209 (D.D.C. Apr. 24, 2018).

94. In the New York case, the court ruled against the motion to dismiss on four out of six numbered bases for proposed dismissal. *Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260, 285–86 (E.D.N.Y. Mar. 29, 2018). In the California case, the court ruled against the motion to dismiss on only two of the five numbered bases for proposed dismissal, but these two were arguably the most significant and substantive, concerning the plaintiffs' due process and equal protection claims. *Order Granting in Part Defendants' Motion to Dismiss under FRCP 12(b)(6), Regents of the Univ. of Cal. v. Dep't of Homeland Sec.*, 298 F. Supp. 3d 1304, 1316 (N.D. Cal. Jan. 12, 2018). In the District of Columbia case, the court ruled against the motion to dismiss on all but one of the eight numbered bases for proposed dismissal. *NAACP*, 298 F. Supp. 3d at 249.

95. In the Maryland case, the court ruled in favor of the motion to dismiss on all but one of the ten numbered bases for proposed dismissal. *Casa de Md.*, 284 F. Supp. 3d at 758.

96. Chantal da Silva, *Is DACA Dead? Trump Administration Has Approved 55,000 Applications This Year*, NEWSWEEK (Apr. 3, 2018), <http://www.newsweek.com/daca-dead-trump-administration-has-approved-55000-applications-year-870134> [https://perma.cc/U8ZH-3JQE].

The consistency of the federal court reactions to the Trump Executive Orders is noteworthy. After all, the subject matter of the four orders is relatively wide-ranging. The transgender military exclusion memorandum has nothing to do with the other three. While the other three all concern immigration to some extent, they address immigration from varying angles: the travel ban order purportedly addresses immigration from the standpoint of security against terrorism; the sanctuary jurisdictions order is addressed to the behavior of United States jurisdictions rather than the immigrants themselves; and the DACA rescission statement addresses persons already with the United States for reasons apart from security against terrorism. Given the variety of the factual circumstances addressed by each order, the consistency of the response of the federal courts has been remarkable.

It is true that the Supreme Court stayed the injunctions against the travel ban order in the context of setting oral argument regarding its review of them. For the moment, however, this stay is defensibly viewed as having a chiefly procedural character, and does not materially reduce the significance of this consistency of approach. Even if the Supreme Court ultimately invalidates the injunctions, the consistent views of the district courts and circuit courts of appeal will have been noteworthy.

III. EXCLUSIONARY EFFECT OF THE TRUMP EXECUTIVE ORDERS

The common effect of the Trump Executive Orders is exclusionary as a whole. The first two travel ban orders excluded—and the third travel ban order continues to exclude—immigrants from the named countries.⁹⁷ The sanctuary jurisdictions order attempts to exclude certain cities and counties from receiving federal grants.⁹⁸ The transgender military exclusion memoranda attempt to exclude, of course, transgender persons from the military.⁹⁹ Finally, the DACA rescission statement attempts

97. First Travel Ban Order, *supra* note 16, § 3(c), 82 Fed. Reg. at 8978; Second Travel Ban Order, *supra* note 27, § 2(c), 82 Fed. Reg. at 13213; Third Travel Ban Order, *supra* note 33, § 2, 82 Fed. Reg. at 45165–67.

98. Enhancing Public Safety in the Interior of the United States, *supra* note 43, § 9(a), 82 Fed. Reg. at 8801.

99. Memorandum on Military Service by Transgender Individuals, *supra* note 60, § 2(a).

to exclude the young people it covers from remaining in the United States.¹⁰⁰

The current litigation environment surrounding the Trump Executive Orders does not detract from their exclusionary character. To the extent any of the current injunctions are invalidated, the corresponding order(s) will, at that point, have the exclusionary effects noted above. The discharge provisions of the original transgender exclusion were supposed to become effective on March 23, 2018.¹⁰¹ Now, if and when the current injunctions are invalidated, the new version of the transgender exclusion memorandum will take effect at that point.

The full effect of the DACA rescission was also not to have been felt until March 2018.¹⁰² The fact that intervening injunctions have suspended the rescission for the moment does not detract from the rescission's intended exclusionary effects. These exclusions seem to advance a policy of stasis, seeking to revert policy to the status quo before the Obama administration took office.

IV. JUDICIAL TREATMENT OF THE TRUMP EXECUTIVE ORDERS

A. *Constitutional Travel Ban Cases Further Develop an Expansive Interpretation of the Establishment Clause*

The courts that have enjoined the travel ban orders have either chosen constitutional or statutory bases for injunction.¹⁰³ This article focuses on the analysis of the courts that have chosen constitutional bases for injunction and their reliance on the Establishment Clause. However, these courts use a type of Establishment Clause application that has been unusual over the years. Accordingly, these cases have the expansive effect of resurrecting a branch of Establishment Clause jurisprudence that had been somewhat dormant.

100. DACA Rescission Statement, *supra* note 85.

101. Memorandum on Military Service by Transgender Individuals, *supra* note 60, § 3.

102. See Presidential Statement on the Deferred Action for Childhood Arrivals Policy, *supra* note 87.

103. See, e.g., *Hawai'i v. Trump*, 241 F. Supp. 3d 1119, 1134–39 (D. Haw. 2017) (justifying injunction under Establishment Clause principles); *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 601, 604–05 (4th Cir. 2017) (citing the Establishment Clause as the constitutional basis for injunction).

The relevant concept in this unusual application is the second element of the *Lemon* test. The test comes from *Lemon v. Kurtzman*,¹⁰⁴ a 1971 Supreme Court case invalidating state-funding for teacher compensation of secular subjects in private schools.¹⁰⁵ In striking down the state program, the Court enunciated the now-familiar *Lemon* test. The test provides that a governmental action (in that case, a state statute) will avoid violation of the Establishment Clause if three circumstances pertain:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; [and] finally, the statute must not foster an “excessive government entanglement with religion.”¹⁰⁶

An interesting aspect of the *Lemon* test is the phrase “nor inhibits” in the second element of the test.¹⁰⁷ It has been observed by at least one expert that this phrase is somewhat confusing in the Establishment Clause context.¹⁰⁸ The Establishment Clause has its roots in the fear of governmental adoption of a particular religion as the state religion, directly or indirectly.¹⁰⁹ Any such governmental adoption is concerned primarily with advancing the chosen religion.

The adoption of one religion can be viewed as the inhibition of others. But the serious inhibition of any religion is most effectively challenged under the Free Exercise Clause, rather than the Establishment Clause. Yet, the second element of the *Lemon* test uses the “inhibition of religion” as an element of an Establishment Clause analysis.¹¹⁰

The Supreme Court has used the *Lemon* test in many of its decisions.¹¹¹ However, the only major Supreme Court case in which

104. 403 U.S. 602 (1971).

105. *See id.* at 614–22.

106. *Id.* at 612–13 (citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968) (quoting *Walz v. Tax Comm.*, 397 U.S. 664, 668 (1970))).

107. *Id.*

108. Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1380–85 (1981) (suggesting that the “inhibits” phrase is a “source of confusion” in attempting to interpret and apply the *Lemon* test).

109. Michael A. Rosenhouse, *Construction and Application of Establishment Clause of First Amendment—U.S. Supreme Court Cases*, 15 A.L.R. FED. 2d 573 (2006).

110. *Lemon*, 403 U.S. at 612.

111. *See, e.g.*, *Van Orden v. Perry*, 545 U.S. 677 (2005); *McCreary Cty., Ky. v. ACLU of Ky.*, 545 U.S. 844 (2005); *Lee v. Weisman*, 505 U.S. 577 (1992); *Wallace v.*

this “nor inhibits religion” aspect of Establishment Clause doctrine was used as part of a holding was *Larson v. Valente*.¹¹² This 1982 case invalidated a Minnesota statute regulating solicitation by some, but not all, religious groups.¹¹³ Other than this sole application, other Supreme Court Establishment Clause cases before and since *Larson* have not relied on the “nor inhibits religion” aspect of the *Lemon* test.

However, those federal decisions that found the various versions of the travel ban order to violate the Establishment Clause necessarily relied on this “nor inhibits religion” aspect of Establishment Clause jurisprudence. To take the most recent example, the October 17, 2017, ruling by the U.S. District Court for the District of Maryland, in framing the Establishment Clause issue, emphasized that the travel ban was “motivated by a desire to ban Muslims as a group from entering the United States.”¹¹⁴ The focus on negative targeting under an Establishment Clause framework (as opposed to a Free Exercise Clause framework) attests to this rarely used “inhibits religion” aspect of Establishment Clause doctrine.

B. Sanctuary Jurisdictions Case Deploys Conventional Constitutional Concepts to Reach Novel Results

When the federal district court in Northern California—in the Santa Clara/San Francisco litigation¹¹⁵—acted against the sanctuary jurisdictions order, both at the preliminary injunction and permanent injunction stages, it relied on the same rationale. It did not rely on the Establishment Clause, the Free Exercise Clause, the Equal Protection Clause, or indeed any portion of the Constitution generally thought to protect individual rights by the Constitution’s terms. Instead, it relied on violations of Separation of Powers

Jaffree, 472 U.S. 38 (1985); *Lynch v. Donnelly*, 465 U.S. 668 (1984).

112. 456 U.S. 228 (1982).

113. Under the statute (as in effect at the time the case was decided), “only those religious organizations that received more than half of their total contributions from members or affiliated organizations would [be] exempt from the registration and reporting requirements” imposed by the statute. *Id.* at 231–32.

114. *Int’l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 619 (D. Md. 2017).

115. See *supra* notes 45–47 and accompanying text.

principles,¹¹⁶ the Spending Clause,¹¹⁷ the Tenth Amendment,¹¹⁸ and the Fifth Amendment vagueness¹¹⁹ and Due Process concerns.¹²⁰

As noted elsewhere, Spending Clause and Tenth Amendment arguments are more characteristically advanced by judges and justices considered to be conservative.¹²¹ They are structural arguments designed to protect local governments from being commandeered as arms of, and to protect local officials from being pressed into service as agents of, the federal government.¹²² In the most prominent Supreme Court cases denouncing these effects of commandeering local government and pressing local officials into federal service, the ultimate result has been in line with policy results often favored by political conservatives. The anti-commandeering imperative was established in *New York v. United States*,¹²³ and resulted in the invalidation of a federal scheme regulating the disposal of low-level radioactive waste.¹²⁴ Particular antagonism against pressing local officials into federal service was cemented in *United States v. Printz*.¹²⁵ The Court in *Printz* held the federal regulatory regime regarding background checks for gun purchases invalid.¹²⁶ Similarly, the Court most recently used a Spending Clause argument to protect state autonomy when invalidating aspects of President Obama's Affordable Care Act.¹²⁷

But the Federal District Court for the Northern District of California used these doctrines, most frequently associated with advancing conservative policies, to invalidate President Trump's

116. *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 530–32 (N.D. Cal. Apr. 25, 2017).

117. *Id.* at 532–33.

118. *Id.* at 533–34.

119. *Id.* at 534–36.

120. *Id.* at 536.

121. Erwin Chemerinsky, *The Constitutionality of Withholding Federal Funds from Sanctuary Cities*, 40 L.A. LAW 60, 60 (2017) (“Ironically, this type of coercion of local governments [deployed in the sanctuary jurisdictions order] violates principles of federalism long advocated by the conservative justices on the Supreme Court.”).

122. *Id.* (“The federal government cannot turn local governments into enforcement arms of the federal government.”).

123. 505 U.S. 144 (1992).

124. *Id.* at 188.

125. 521 U.S. 898 (1997).

126. *See id.* at 935.

127. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 575–85 (2012); *see also* Chemerinsky, *supra* note 121, at 60.

sanctuary jurisdictions order,¹²⁸—thereby halting a measure considered to advance conservative policies. Its reaction to the sanctuary jurisdictions order was therefore another example of the ways the Trump Executive Orders have resulted in judicial rulings that expand upon previous arguments in novel ways.

This tendency continued through to most of the sanctuary jurisdictions cases decided in early 2018. In the Philadelphia case, the federal court in Eastern Pennsylvania determined that the City was likely to succeed on the merits, in substantial part because of Tenth Amendment and Spending Clause concerns.¹²⁹ In the Los Angeles case, the federal court in Central California relied substantially on federalism concerns, including the Tenth Amendment, in granting summary judgment.¹³⁰ And in the Chicago case, the Seventh Circuit cast its analysis in terms of separations of powers, but in doing so expressed substantial sensitivity to federalism concerns.¹³¹

In the federal case brought by the State of California in the Northern District of California, the court denied the State's motion for a preliminary injunction.¹³² Here, the court determined that Spending Clause and Tenth Amendment arguments did not allow the State to prevail.¹³³ But this ruling was in contrast to the other judgments that were issued during this time period. This court's rejection of these assertions arguably accentuates the notable tendency of the other courts to use them to advance the progressive measures of the cities involved in the other cases.

128. *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 533–34 (N.D. Cal. Apr. 25, 2017).

129. *City of Phila. v. Sessions*, No. 17-3894, 2018 WL 1305789, at *4 (E.D. Pa. Mar. 13, 2018).

130. *City of L.A. v. Sessions*, 293 F. Supp. 3d 1087, 1096 (C.D. Cal. Apr. 11, 2018).

131. *See City of Chi. v. Sessions*, 888 F.3d 272, 284 (7th Cir. Apr. 19, 2018) (“None of [the] provisions [of the Byrne JAG Program statute] grant the Attorney General the authority to impose conditions that require states or local governments to assist in immigration enforcement”); *see also id.* at 285 (“[The Attorney General’s interpretation] is inconsistent with the goal of the [Byrne JAG Program] statute to support the needs of law enforcement while providing flexibility to state and local governments.”).

132. *California ex rel. Becerra v. Sessions*, 284 F. Supp. 3d 1015, at 1037 (N.D. Cal. Mar. 5, 2018).

133. *Id.* at 1033–36.

C. *Transgender Exclusion Case Develops a Progressive Interpretation of Equal Protection*

A group of transgender service members, and transgender persons aspiring to become service members, sued the Trump administration shortly after the administration's issuance of the first transgender military exclusion memorandum.¹³⁴ The Federal District Court for the District of Columbia issued a preliminary injunction, with national effect, against both the Accession and Retention Directives stated in the memorandum.¹³⁵

In granting these injunctions, the court determined that the plaintiffs had shown a likelihood to succeed on the merits of their claim based on the application of the Equal Protection Clause.¹³⁶ The court's Equal Protection analysis was notably progressive. The court determined that "discrimination on the basis of someone's transgender identity is a quasi-suspect form of classification that triggers heightened scrutiny."¹³⁷ While other federal district courts have determined that discrimination on the basis of transgender status is evaluated under intermediate scrutiny,¹³⁸ such determinations are still comparatively rare.

Indeed, there is no express determination to this effect at the level of the federal circuit courts of appeal. The Seventh Circuit determined in a recent en banc opinion¹³⁹ that discrimination on the basis of sexual orientation constitutes sex discrimination within the meaning of Title VII of the 1964 Civil Rights Act.¹⁴⁰ But that is solely a statutory ruling, only pertaining within the Seventh Circuit, and applying to sexual orientation rather than explicitly regarding transgender status.¹⁴¹

134. *Doe 1 v. Trump*, No. 17-1597 (CKK), 2017 WL 4873042, at *1 (D.D.C. Oct. 30, 2017) (referring to the plaintiffs as "current and aspiring service members who are transgender").

135. *See id.* at *3-4 (setting forth the terms of the injunctions).

136. *See id.* at *3.

137. *Id.* at *28.

138. *See, e.g., Adkins v. City of New York*, 143 F. Supp. 3d 134, 140 (S.D.N.Y. 2015).

139. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017).

140. 42 U.S.C. § 2000e-2(a).

141. *Hively*, 853 F.3d at 343 (referring to the court's task of determining "what it means to discriminate on the basis of sex," and "whether actions taken on the basis of sexual orientation are a subset of actions taken on the basis of sex" as "a pure question of statutory interpretation").

On November 21, 2017, the Federal District Court for the District of Maryland issued a preliminary injunction against the first transgender military exclusion memorandum.¹⁴² It voiced explicit support for the rationale expressed by the District of Columbia court: “[t]he Court finds persuasive the D.C. Court’s reasons for applying intermediate scrutiny.”¹⁴³ The Maryland court further declared: “The Court also adopts the D.C. Court’s reasoning in the application of intermediate scrutiny to the Directives and finds that the Plaintiffs herein are likely to succeed on their Equal Protection claim.”¹⁴⁴

Although the degree of consensus among all federal circuit courts of appeal regarding discrimination on the basis of transgender status may be unclear, the rationale exhibited by both the Maryland and D.C. federal district courts, in enjoining the Accession and Retention Directives, is a distinctly progressive approach in the area of equal protection doctrine.¹⁴⁵

This tendency was accentuated when the Federal District Court for the Western District of Washington later issued its order partially granting and partially denying the parties’ opposing motions for summary judgment.¹⁴⁶ Because the degree to which the defendants had satisfied their burden under equal protection analysis turned on facts as yet undeveloped in the record, the court denied summary judgment for the plaintiffs’ equal protection claims.¹⁴⁷ However, much more cogently, the court also engaged in a detailed equal protection classification analysis, and determined that “transgender people . . . are a suspect class,”¹⁴⁸ such that “the applicable level of

142. *Stone v. Trump*, No. MJG–17–2459, 2017 WL 5589122, at *1 (D. Md. Nov. 21, 2017).

143. *Id.* at *15.

144. *Id.*

145. The District Court for the District of Columbia also held that the Accession and Retention Directives were subject to intermediate scrutiny because they were rooted in the failure of the current and aspiring service members to conform to gender stereotypes. *Doe 1 v. Trump*, No. 17–1597 (CKK), 2017 WL 4873042, at *27 (D.D.C. Oct. 30, 2017).

146. *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, at *14 (W.D. Wash. Apr. 13, 2018).

147. *Id.* at *13.

148. *Id.* at *9.

scrutiny . . . is strict scrutiny.”¹⁴⁹ On this classification point, the court granted plaintiffs’ motion for summary judgment.¹⁵⁰

This aspect of the court’s order was noteworthy, not least because even government discrimination on the basis of sex warrants only intermediate scrutiny,¹⁵¹ rather than strict scrutiny. This determination by the federal district court in Seattle is thus an apt example of judicial interpretations that are moving progressively, in the face of the administration’s efforts to regress.

D. The Current Litigation Environment for the DACA Rescission Appears to Support DACA

A review of the current state of litigation concerning the DACA rescission appears to support DACA in two ways. First, there is no argument developed in current case law that DACA was initially unconstitutional. Second, the DACA rulings so far support the use of public statements by officials to help support an inference of discriminatory intent.

1. Judicial Precedents for the DAPA Program Do Not Support Constitutional Invalidation of the DACA Program

In rescinding the DACA program, Attorney General Sessions asserted that the DACA program was unconstitutional.¹⁵² There are no federal court decisions holding such. Instead, there are merely cases invalidating the DAPA program.¹⁵³ But these cases made no findings of constitutional violations.

149. *Id.* at *14.

150. *Id.*

151. The Supreme Court’s insistence that government discrimination on the basis of sex be evaluated according to intermediate scrutiny, rather than strict scrutiny, goes back to 1976. *See* *Craig v. Boren*, 429 U.S. 190, 197 (1976) (stating that sex-based classifications “must serve important governmental objectives and must be substantially related to achievement of those objectives”). It is true that the intermediate scrutiny applied to cases of official sex discrimination was tightened somewhat under *United States v. Virginia*, 518 U.S. 515, 533 (1996) (explaining that the burden of justification for official classification based on gender “is demanding . . . , rests entirely on the State . . . , must be genuine . . . , [and] must not rely on overbroad generalizations”). But that case did *not* hold that the intermediate scrutiny test put forward in *Craig v. Boren* was no longer the correct test.

152. DACA Rescission Statement, *supra* note 85.

153. *See* *Texas v. United States*, 136 S. Ct. 2271 (2016); *Texas v. United States*, 787 F.3d 733 (5th Cir. 2015); *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015).

It is true that throughout the life of the DAPA program, objectors asserted that it was an unconstitutional violation of separation of powers principles.¹⁵⁴ After all, it was the codification, in some sense, of a deployment of executive prosecutorial discretion in ways that ran counter to the policy preferences of the congressional majority. However, when the Federal District Court for the Southern District of Texas enjoined the DAPA program in 2015, it did not do so on constitutional grounds. Instead, it determined that the plaintiffs were likely to succeed on their claim that DAPA violated the procedural requirements of the Administrative Procedure Act (APA).¹⁵⁵ On appeal, the Fifth Circuit affirmed the injunction on the basis of a substantial likelihood of success on both the procedural¹⁵⁶ and substantive¹⁵⁷ claims of the plaintiffs under the APA. Thus, the Fifth Circuit ruling also avoided constitutional issues.

It is significant that the Texas federal courts chose violations of the APA, rather than constitutional bases for enjoining the DAPA program. Given the degree of hostility of the detractors of DAPA to the program, and the degree to which constitutional violations were asserted regarding DAPA in public discourse, a decision to avoid legal resolution on those assertions may well reflect timidity or uncertainty as to the legal strength of those constitutional arguments. In any event, the failure of the courts to condemn DAPA on constitutional grounds is certainly more encouraging to proponents of DAPA and DACA than would have been a constitutional invalidation.

By contrast, in his statement announcing rescission of the DACA program, Attorney General Sessions both specifically relied on constitutional precepts and mischaracterized the actions of the Texas federal courts in the DAPA case. He announced that “[o]ur collective wisdom” was that DACA was “vulnerable to the same legal and constitutional challenges that the courts recognized with respect

154. See, e.g., Adam Liptak & Michael D. Shear, *Supreme Court Tie Blocks Obama Immigration Plan*, N.Y. TIMES (June 23, 2016), <https://www.nytimes.com/2016/06/24/us/supreme-court-immigration-obama-dapa.html> [https://perma.cc/MT82-J87Q] (quoting Ken Paxton, Texas Attorney General, stating “[t]his is a major setback to President Obama’s attempts to expand executive power, and a victory for those who believe in the separation of powers and the rule of law”).

155. *Texas*, 86 F. Supp. 3d at 677.

156. *Texas*, 787 F.3d at 762–66.

157. *Id.* at 767–68.

to the DAPA program.”¹⁵⁸ He thus incorrectly asserted that the courts had enjoined DAPA on constitutional bases as well as the APA bases.

He then acknowledged that the APA was the basis of the court DAPA injunctions, by stating that “[t]he Fifth Circuit specifically concluded that DACA had not been implemented in a fashion that allowed sufficient discretion, and that DAPA was ‘foreclosed by Congress’s careful plan.’”¹⁵⁹ But he then mischaracterized the Fifth Circuit conclusion by inaccurately paraphrasing it: “In other words, [DAPA] was inconsistent with the Constitution’s separation of powers.”¹⁶⁰ In fact, there is no specific mention of separation of powers in the Fifth Circuit opinion; the substantial bases of action for both court rulings depend completely on statutory objections based in the APA.¹⁶¹

The Trump administration’s mischaracterization of the DAPA court actions, while still insisting that the rescission is based on constitutional precepts, can be seen to actually weaken the constitutional assertions. Not only do the Texas federal courts *not* address separation of powers issues in their rulings, but the administration’s continued insistence that they *do* can be seen to accentuate the fact that they *do not*.

In the context of the Trump Executive Orders as a grouping of executive actions, this aspect of the DACA rescission statement plays into the progressive notion that the innovations expressed in the DACA program were actually constitutionally unobjectionable. Accordingly, in the example of the DACA rescission statement as well, the administration’s attempt to advance a policy of stasis actually results in judicial opinions that undercut the constitutional arguments supporting the administration’s actions.

2. *DACA Rulings Currently Support Reference to Public Statements by Officials as Bases for Helping to Determine Discriminatory Intent*

For purposes of this review, it is salient to observe the approach toward equal protection arguments taken by the courts addressing

158. DACA Rescission Statement, *supra* note 85, ¶ 14.

159. *Id.* at ¶ 15.

160. *Id.* at ¶16.

161. *See Texas v. United States*, 787 F.3d 733, 762–67 (5th Cir. 2015).

the DACA rescission. The federal courts in California¹⁶² and New York¹⁶³ determined that candidate Trump's pre-election and post-election statements disparaging Latina and Latino immigrants—especially Mexicans—could be an indication of a discriminatory purpose for the DACA rescission. The Maryland court determined that such statements should not be so interpreted.¹⁶⁴ The District of Columbia ruling, although broadly sympathetic to the plaintiffs, was based solely on statutory issues and thus did not address equal protection.¹⁶⁵

The extent to which public statements by governmental figures—before or after election—should be used to indicate intentional discrimination is controversial. The controversy was illustrated perhaps most cogently by the treatment of public statements in the Supreme Court's decision in *Church of the Lukumi*

162. The California court broadly noted that “in analyzing whether a facially-neutral policy was motivated by a discriminatory purpose, district courts must consider factors such as whether the policy creates a disparate impact, the historical background and sequence of events leading up to the decision, and any relevant legislative or administrative history.” *Regents of the Univ. of Cal. v. Dep't of Homeland Sec.*, 298 F. Supp. 3d 1304, 1314 (N.D. Cal. Jan. 12, 2018) (citation omitted). The court went on to note, for example, that the DACA rescission “had a disproportionate impact on Latinos and Mexican nationals,” adding that plaintiffs had alleged “a history of bias leading up to the rescission of DACA in the form of campaign statements and other public comments by President Trump . . .” *Id.*

163. The New York court noted that “[p]laintiffs identify a disheartening number of statements made by President Donald Trump that allegedly suggest that he is prejudiced against Latinos and, in particular Mexicans.” *Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260, 276. After cataloging and reviewing certain statements made by the President, the court concluded that “these allegations are sufficiently racially charged, recurring, and troubling as to raise a plausible inference that the decision to end the DACA program was substantially motivated by discriminatory animus.” *Id.* at 277.

164. For example, the Maryland court rejected what it called “Plaintiffs’ reliance on the President’s misguided, inconsistent, and occasionally irrational comments made to the media to establish an ulterior motive.” *Casa de Md.*, 284 F. Supp. 3d 758, 774 (D. Md. Mar. 5, 2018). The court disparaged “judicial psychoanalysis of a drafter’s heart of hearts,” and asserted that the President’s statements “have frequently shifted but have moderated since his election.” *Id.* at 774–75.

165. The D.C. court concluded that under the Administrative Procedure Act, “DACA’s rescission was arbitrary and capricious . . .” *NAACP v. Trump*, 298 F. Supp. 3d 209, 215–16 (D.D.C. Apr. 24, 2018). The court also noted that, because it had already concluded that DACA’s rescission violated the Administrative Procedure Act, it was not necessary to address constitutional claims at this stage. *Id.* at 246.

Babalu Aye v. City of Hialeah.¹⁶⁶ In that case, one segment of Justice Kennedy's lead opinion used public statements made by individual city council members to show that ordinances and resolutions passed by the city council were impermissibly targeting religion.¹⁶⁷

The practice of consulting public statements of political officials—even during official proceedings—as a means of gauging the intent of the body's official action was evidently viewed by the other justices as so problematic that only one other member of the Court (Justice Stevens) joined in that segment of Justice Kennedy's lead opinion.¹⁶⁸ However, the decision was unanimous as to its judgment, and a majority supported all of the lead opinion except for the segment concerning the public statements.¹⁶⁹ This pattern indicates how controversial the use of such statements can be to judge discriminatory intent. Granted, the *Hialeah* case concerned free exercise of religion rather than equal protection, but there is no obvious principled reason why the desirability of using such statements should vary between the two contexts.

The 2018 court orders addressing the DACA rescission tend to favor the use of public statements by officials to help show discriminatory intent. Two of the three courts explicitly favored doing so,¹⁷⁰ only one explicitly did not,¹⁷¹ and the last favored a result analogous to those that did.¹⁷² Accordingly, the current state of the DACA rescission legislation is further advancing the use of such statements. This is a progressive direction, again at odds with the administration's apparent desire to cut back on progressive approaches.

V. CONCLUSION

The Trump Executive Orders were rooted in a desire to revert to the status quo ante regarding certain aspects of immigration policy and transgender military service—a time before the Obama administration embarked on innovation in those areas. They were

166. 508 U.S. 520 (1993).

167. *Id.* at 540–42 (Part II-A-2 of Justice Kennedy's lead opinion).

168. *Id.* at 522, 540–42.

169. Justice White joined the lead opinion except as to Part II-A, and Chief Justice Rehnquist and Justices Scalia and Thomas joined all of the lead opinion except Part II-A-2. *See id.* at 522.

170. *See supra* notes 162–63 and accompanying text.

171. *See supra* note 164 and accompanying text.

172. *See supra* note 165 and accompanying text.

thus based on a policy of stasis and resistance to certain kinds of change, while focusing on specific exclusion.

Ironically, the judicial reaction to the Trump Executive Orders does not support this posture of stasis. The constitutional travel ban cases and the transgender ban case have used expansive applications of existing doctrine to reach their results. The sanctuary jurisdictions cases used conventional doctrines in novel ways to reach their results. The initial judicial responses to the types of executive actions involved in the DACA controversy failed to acknowledge a constitutional basis for complaint. And those cases that have been brought challenging the DACA rescission have advanced the controversial proposition that officials' public statements can be used to help establish discriminatory intent. Accordingly, while the executive branch is currently pursuing stasis, the judicial reaction seems to be moving in the opposite direction toward expansion and novel applications of doctrine.

Mitchell Hamline Law Review

The Mitchell Hamline Law Review is a student-edited journal. Founded in 1974, the Law Review publishes timely articles of regional, national and international interest for legal practitioners, scholars, and lawmakers. Judges throughout the United States regularly cite the Law Review in their opinions. Academic journals, textbooks, and treatises frequently cite the Law Review as well. It can be found in nearly all U.S. law school libraries and online.

mitchellhamline.edu/lawreview

MH

MITCHELL | HAMLINE

School *of* Law

© Mitchell Hamline School of Law
875 Summit Avenue, Saint Paul, MN 55105
mitchellhamline.edu