Five Unanswered Questions from Trump v. Hawaii

Josh Blackman
FIVE UNANSWERED QUESTIONS FROM 
Trump v. Hawaii

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Trump v. Hawaii upheld President Trump’s travel ban in its entirety. This article explores five questions left open by the majority opinion. First, what will happen on remand with respect to discovery? Second, how should lower courts treat “this President,” as opposed to “the President”? Third, how does the Constitution apply to aliens who are not seeking entry into the United States but have already crossed the border? Fourth, what is the scope of the president’s Article II power to exclude aliens? Lastly, what is the permissible scope of a nationwide injunction? The judiciary will likely have to address these issues in the near future.

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INTRODUCTION

In Trump v. Hawaii, the Supreme Court upheld the third iteration of President Trump’s travel ban in its entirety.1 This outcome should not have been much of a surprise. In December, a majority of the Supreme Court allowed the entirety of that policy to go into effect temporarily.2 Over the past decade, when the Roberts

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Court has stayed a lower court’s ruling, it has almost always reversed its judgment. This case was no exception. Furthermore, the court resolved the legality of the presidential proclamation in its entirety. The justices did not settle on some sort of Solomonic split. For example, the government could deny entry to aliens with non-immigrant visas but must admit aliens with immigrant visas. President Trump prevailed on all claims. The majority opinion, however, leaves open at least five unanswered questions that the judiciary will likely have to address in the near future. This essay will discuss those questions.

I. WHAT HAPPENS ON REMAND WITH RESPECT TO DISCOVERY?

The government appealed Trump v. Hawaii to the Supreme Court after preliminary injunctions were issued by district courts in Hawaii and Maryland. The Hawaii decision concluded only that the plaintiffs were unlikely to succeed on the merits at this preliminary phase. It was not, and could not have been, a final judgment on the merits. The penultimate sentence of the chief justice’s opinion explains that “the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.” On remand, therefore, the plaintiffs are within their rights to seek a summary judgment, and even a trial, about whether the proclamation is unlawful. It is unlikely that additional proceedings would alter the Court’s statutory analysis, which involved pure questions of law. However, further proceedings could shed light on the “animus” question with respect to the Establishment Clause. Noah Feldman, relaying comments from his colleague Owen Fiss, points out that “the standard of proof of bias that the plaintiffs would have to meet could actually be lower at trial than in their

5. Id. at 2406.
6. Id. at 2423.
7. Id.
8. See id. at 2408 (emphasizing the purely statutory and legal discretion of the President’s authority).
9. See id. at 2416-18 (discussing the potential animus arguments based on President Trump’s statements on Muslims that were not considered by the Supreme Court who instead looked at the neutral effect/purpose of the Proclamation).
action seeking a preliminary injunction.”10 They are correct. Even if no further evidence is added to the record, it is entirely foreseeable that the district courts could rule against President Trump once again. But the record is not sealed. Feldman adds that “the plaintiffs could seek discovery to uncover new evidence of Trump’s thinking, including, potentially, drafts of the executive order or memos about it.”11

Without question, the plaintiffs will seek discovery. They always do. And the district courts very well may oblige such requests. Following the lead of Justice Stephen Breyer’s dissent, the district courts could probe whether, in fact, exemptions are being granted under the terms of the proclamation.12 If the government wants to avoid another trip to the Supreme Court, it should implement the waiver policies in a liberal fashion.

Justice Anthony Kennedy’s concurring opinion, however, erects important guardrails for allowing discovery beyond official records, such as waiver requests.13 First, Justice Kennedy questions “[w]hether judicial proceedings may properly continue in this case, in light of the substantial deference that is and must be accorded to the Executive in the conduct of foreign affairs, and in light of today’s decision, is a matter to be addressed in the first instance on remand.”14 It is not a given that any further proceedings would be “proper,” given the Court’s definitive ruling, albeit on a threshold question about the preliminary injunction. Specifically, Justice Kennedy writes that this may be a case wherein the president has “discretion free from judicial scrutiny.”15 Second, Justice Kennedy explains that “even if further proceedings are permitted, it would be necessary to determine that any discovery and other preliminary matters would not themselves intrude on the foreign affairs power of the Executive.”16 Again, he reiterates the deference due to the executive with respect to discovery matters.


11. Id.

12. Trump v. Hawaii, 138 S.Ct. at 2340 (Breyer, J., dissenting) (“On the other hand, if the Government is not applying the system of exemptions and waivers that the Proclamation contains, then its argument for the Proclamation’s lawfulness becomes significantly weaker.”).

13. Id. at 2423-24 (Kennedy, J., concurring).

14. Id. at 2424 (emphasis added).

15. Id.

16. Id.
Indeed, this admonition sheds light on the Supreme Court’s unsigned order from December in In Re United States. In this case, Judge William Alsup of the Northern District of California ordered the government to produce internal documents about its decision to terminate the Deferred Action for Childhood Arrivals (DACA) policy. The Supreme Court, however, issued a writ of mandamus, blocking the discovery request by a vote of 5 to 4. In dissent, Justice Breyer contended that “the Government’s arguments do not come close to carrying the heavy burden that the Government bears in seeking such extraordinary relief.” Based on Justice Kennedy’s concurring opinion in Trump v. Hawaii, the soon-to-be retired jurist likely agreed that the “heavy burden” was satisfied because of the risk of intruding onto the executive’s powers. Additionally, DACA—unlike the travel ban—does not implicate “the foreign affairs power of the Executive.” Yet, a majority of the court still intervened at an early juncture to halt intrusive discovery.

In light of Kennedy’s concurrence and the order in the DACA case, I do not share Feldman and Fiss’s optimism as to the prospects of discovery for the plaintiffs here, beyond the production of official documents concerning the waiver process. The court—with or without Kennedy—will not lightly entertain intrusive discovery orders. And if no meaningful evidence is added to the record, it is difficult to see how the district courts could find the proclamation unlawful on remand.

II. How should the lower courts treat “this President,” as opposed to “the President”?

On the eve of oral arguments, reporter Robert Barnes aptly summarized Trump v. Hawaii in a pithy headline for the Washington Post: “In travel ban case, Supreme Court considers ‘the president’ vs. ‘this president.’” The Court chose the former. “[W]e must consider

20. Id. (Breyer, J., dissenting).
21. See Trump v. Hawaii, 138 S.Ct. at 2424 (Kennedy, J., concurring) (emphasizing the need to not subject government actions to judicial scrutiny in certain instances and that executive discretion may also fall outside judicial scrutiny in some instances).
22. Id.
24. Robert Barnes, In Travel Ban Case, Supreme Court Considers ‘the president’ vs. ‘this president’, WASH. POST (Apr. 22, 2018),
not only the statements of a particular President,” Chief Justice Roberts explained, “but also the authority of the Presidency itself.” Specifically, the court concluded that “[t]he entry suspension is an act that is well within executive authority and could have been taken by any other President—the only question is evaluating the actions of this particular President in promulgating an otherwise valid Proclamation.”

Justice Kennedy made this point explicitly in his concurring opinion. He referenced “the substantial deference that is and must be accorded to the Executive in the conduct of foreign affairs.” He added that “an official”—in this case, the president—“may have broad discretion, discretion free from judicial scrutiny.”

At a minimum, Trump v. Hawaii—coupled with the arrival of a new justice—should further lower the temperature of the judiciary toward President Trump. A ruling against the president, however, would have sent the opposite signal to an emboldened lower-court judiciary. Still, the lower courts will no doubt take notice of the fact that the Supreme Court considered extrinsic evidence, including pre-inauguration campaign-trail statements. Although that evidence did not tip the balance in this case, under the deferential standard of review the court applied, such evidence may yield a different result in cases involving domestic affairs—such as the DACA litigation—with more stringent scrutiny.

III. How does the Constitution apply to aliens who are not seeking entry into the United States but have already crossed the border?

Does Trump v. Hawaii inform other immigration-related litigation, such as cases concerning the rescission of DACA, the rights of asylum seekers and family-separation policies? The short answer is no, not directly. The level of scrutiny in Trump v. Hawaii was


26. Id.
27. Id. at 2423.
28. Id. at 2424 (Kennedy, J., concurring).
29. Id.
30. Id.
extremely deferential, but it was employed in a limited context. Chief
Justice Roberts explained that the “exclusion of foreign nationals is a
‘fundamental sovereign attribute exercised by the Government’s
political departments largely immune from judicial control.”’ 32 The
key word in that sentence is “exclusion.” The pivotal question, then,
is how does Hawaii extend to other pending cases that do not involve
“exclusion?”

The federal government’s power over immigration is often
described as “plenary.” 33 However, this authority applies differently
based on an alien’s connection to the United States. Landon v.
Plasencia recognized that “once an alien gains admission to our
country and begins to develop the ties that go with permanent
residence his constitutional status changes accordingly.” 34 Likewise,
under the rule in United States v. Verdugo-Urquidez, “aliens receive
constitutional protections when they have come within the territory of
the United States and developed substantial connections with this
country.” 35 Congress’s authority in this sphere implicates four
different classes: (1) aliens within the border, (2) aliens who recently
crossed the border into the United States, (3), aliens outside the
United States who are not seeking entry, and (4) aliens seeking entry
into the United States. Trump v. Hawaii directly concerns the final
category, but implicates all four.

The first category considers the constitutional rights of aliens who
are within the United States, yet lack lawful presence. Specifically, do
noncitizens receive the full panoply of constitutional rights? The
answer is complicated. First, aliens are generally afforded the same
criminal procedure protections in the Fifth and Sixth Amendments. 36
Second, aliens are afforded reduced substantive rights. 37 For example,

32. Id. at 2418 (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)).
33. Stephen H. Legomsky, Immigration Law and the Principle of Plenary
(1950)).
36. Wong Wing v. United States, 163 U.S. 228, 238 (1896) (“Applying this
reasoning to the fifth and sixth amendments, it must be concluded that
all persons within the territory of the United States are entitled to the
protection guarantied [sic] by those amendments, and that even aliens
shall not be held to answer for a capital or other infamous crime, unless
on a presentment or indictment of a grand jury, nor be deprived of life,
liberty, or property without due process of law.”).
persons, aliens and citizens alike, are protected by the Due Process
Clause does not lead to the further conclusion that all aliens are entitled
to enjoy all the advantages of citizenship.... For a host of constitutional
and statutory provisions rest on the premise that a legitimate
aliens may have a right to public education, but cannot make contributions or independent expenditures for political campaigns, and are subject to a categorical ban on firearm ownership. Third, the guarantees of the Fifth Amendment’s Due Process Clause also vary for aliens within the United States. In Zadvydas v. Davis, the Supreme Court recognized that “once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” Yet that holding merely raises the question of what process is due. Zadvydas acknowledged “that the Due Process Clause protects an alien subject to a final order of deportation . . . though the nature of that protection may vary depending upon status and circumstance.” The courts still grapple with what sort of procedural protections are required for aliens within the United States.

The second category implicates aliens who recently crossed the border into the United States and lack lawful presence. In some cases, aliens who recently (an ill-defined term) entered the United States may be treated as if they had never entered in the first place. For example, the Third Circuit recently recognized that aliens who are “apprehended within hours of surreptitiously entering the United States . . . cannot invoke the Constitution, including the Suspension Clause,” because they were treated as if they were “alien[s] seeking
initial admission to the United States. Such recent entries may be afforded certain statutory protections—such as asylum laws—but, under this rule, cannot avail themselves of substantive and procedural constitutional protections. There is also an open question of whether the federal government could expand “expedited removal” procedures into the interior of the United States—currently, regulations limit such removals to areas within 100 miles of the border.

The third category concerns something of a legal purgatory: what rights are due to aliens outside the United States who are not seeking entry. These cases arise under tragic circumstances. Consider Hernandez v. Mesa, where a border patrol agent fired two bullets across the border, killing a Mexican national. Here, the alien did not attempt to enter the United States, but was unlawfully seized by a federal agent. In 2017, the Supreme Court declined to answer whether damages were available under the Bivens doctrine. Instead, it remanded the case back to the 5th Circuit, with instructions to reconsider Hernandez in light of Ziglar v. Abassi. On remand, the en banc Fifth Circuit rejected the argument that a Bivens claim can be stated based on application of the Fourth and Fifth Amendments to “foreign citizens on foreign soil.” Hernandez has been appealed to

47. See Zadvydas, 533 U.S. at 693-94 (citing multiple cases wherein deportation of aliens already within the United States must survive Due Process challenge).
49. Though within Cuba’s territorial sovereignty, the United States had complete practical control over the U.S. Naval Station at Guantanamo Bay. Therefore, the framework in Boumediene v. Bush is not relevant to this inquiry. See 553 U.S. 723, 771 (2008) (“The detainees, moreover, are held in a territory that, while technically not part of the United States, is under the complete and total control of our Government.”).
51. Id. at 2005.
52. Id. at 2007; The Bivens doctrine provides that “damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials.” Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395 (1971).
53. Hernandez, 137 S.Ct. at 2006-08.
54. Hernandez v. Mesa, 885 F.3d 811, 816-17 (5th Cir. 2018).
the Supreme Court a second time. In August 2018, the Ninth Circuit reached the opposite conclusion: a Mexican national in Mexico “had a Fourth Amendment right to be free from the unreasonable use of such deadly force” that is initiated by a federal agent “on American soil subject to American law.” The Supreme Court will likely have to resolve this circuit split.

The fourth category implicates the holding of Trump v. Hawaii: how the Constitution applies to aliens seeking entry into the United States. Landon v. Pasencia stated the general rule: “[A]n alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative.” Yet, even this rule has limits. Aliens seeking entry to the United States do not reside in a constitutional desert. In Trump v. Hawaii, Chief Justice Roberts acknowledged that an American “person’s interest in being united with his relatives [outside the United States] is sufficiently concrete and particularized to form the basis of an Article III injury in fact.” In other words, the rights of Americans to be reunited with their family imposes judicial scrutiny on the power to exclude. But here, the Court does not apply its domestic establishment clause and substantive due process precedents. Instead, in Hawaii, the Court applied the most deferential strain of rational basis review. In other words, for “matters of entry and national security,” the Court’s “Establishment Clause precedents concerning laws and policies applied domestically” are simply inapplicable to the context of a foreign exclusion order. Trump v. Hawaii, far from a comprehensive explication of presidential power at the border, leaves these issues unresolved.

60. Cf. Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (“Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.”).
63. Id. at 2417 (emphasis added).
IV. What is the scope of the president’s Article II powers to exclude aliens?

The Hawaii court found that the “Proclamation is squarely within the scope of Presidential authority.”64 Therefore, the majority did not need to address the scope of the president’s Article II powers to exclude aliens. Had the court found that Congress did not delegate this authority to the president, or that we were in Youngstown’s “zone of twilight,” it would have had to answer this question.65 Justice Clarence Thomas’s concurring opinion, however, addressed this question directly. He cited United States ex rel. Knauff v. Shaughnessy (1950) for the proposition that “the President has inherent authority to exclude aliens from the country.”66

Ultimately, the Supreme Court will have to address the scope of the president’s inherent powers to exclude aliens. And that analysis will turn on the vitality of Knauff. This case addressed the interaction between the president’s inherent authority over entry and Congress’s rules concerning naturalization.67 Knauff was a German national married to an American citizen who was stationed in Frankfurt.68 She attempted to enter the United States, but was “detained at Ellis Island.”69 Without a hearing, an immigration official determined “her admission would be prejudicial to the interests of the United States,” and the Attorney General “entered a final order of exclusion.”70 The Southern District of New York dismissed Knauff’s habeas corpus writ and the Second Circuit affirmed.71

64. Id. at 2415.

65. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (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, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.”).


68. Id. at 539.

69. Id.

70. See generally 8 U.S.C. § 1325 (1996) (any alien who attempts to enter at any other place besides that designated by immigration officers is subject to penalties).


72. Id. at 540.
Through a 1941 law, Congress gave the president the power to issue a proclamation, which would have the effect of rendering “unlawful” the “entry into the United States” of certain aliens when “the President shall find that the interests of the United States require that restrictions.” In other words, Congress permitted the president to effectively amend the statutory grounds for inadmissibility. President Roosevelt issued such a proclamation, which ordered that “no alien should be permitted to enter the United States if it were found that such entry would be prejudicial to the interest of the United States.” (This open-ended language is very similar to 8 U.S.C. 1182(f), which would be enacted a decade later.)

Pursuant to this proclamation, the Attorney General promulgated the regulations that denied Knauff’s entry into the United States. On appeal to the Supreme Court, Knauff argued that the “1941 Act and the regulations thereunder are void to the extent that they contain unconstitutional delegations of legislative power.” The Court rejected this argument. The majority explained that the power at issue in the 1941 act was not solely a legislative power; it was an inherent executive power. “The exclusion of aliens is a fundamental act of sovereignty,” Justice Sherman Minton stated. “The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation.” Thus, there cannot be a violation of the non-delegation doctrine, because Congress is not delegating legislative power at all. The Court supported this argument with a citation to United States v. Curtiss-Wright, which also rejected a non-delegation doctrine challenge because the president was exercising his exclusive powers concerning foreign affairs.

What was the 1941 act doing then, if not delegating legislative power? “When Congress prescribes a procedure concerning the admissibility of aliens,” the Court explained, “it is not dealing alone with a legislative power.” Rather, “[i]t is implementing an inherent
executive power." In the normal course, the Court noted, “Congress supplies the conditions of the privilege of entry into the United States.” However, “because the power of exclusion of aliens is also inherent in the executive department of the sovereign, Congress may in broad terms authorize the executive to exercise the power.”

Critically, the threshold decision to exclude—unlike the subsequent decision to deport—is subject to only the slightest form of review: “Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.” (This conclusion sounds in the doctrine of consular nonreviewability.) Though decided two years before *Youngstown Sheet & Tube Co. v. Sawyer*, Knauff’s analysis embodies the characteristics of Justice Jackson’s first tier—because the President is acting with a combination of his own inherent powers, combined with the co-extensive powers delegated from Congress, judicial scrutiny is at a minimum.

There are two possible reasons to hesitate before relying on *Knauff*. First, there was only a four-member majority. Justices William O. Douglas and Tom Clark recused; Justices Felix Frankfurter, Hugo Black, and Robert Jackson dissented. Majority decisions that only garner four votes do not have the same weight as a five-member majority. Yet, the Court has cited *Knauff* favorably over the decades, without any caveats—including the majority opinion in *Trump v. Hawaii*. Second, Justice Jackson—whose

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84. *Id.* at 543.
85. *Id.*
86. *Id.*
88. *See Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) (“A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.”).
89. *Knauff*, 338 U.S. at 537.
90. *Id.* at 547.
91. *Id.* at 550.
wisdom we all turn to when considering the separation of powers—dissented.93 Indeed, his Knauff dissent did not even countenance that such an inherent power exists.95 This silence presaged his derision of the “vagueness and generality” of “inherent” powers in Youngstown two years later.96

Eventually, the Court will have to address the scope of the President’s Article II powers to exclude.

V. WHAT IS THE PERMISSIBLE SCOPE OF A NATIONWIDE INJUNCTION?

Over the past five years, the most powerful litigation tactic to challenge executive actions has been the so-called nationwide injunction.97 Litigants need only shop for a favorable forum, persuade a single district-court judge that they are likely to succeed on the merits, and hope that a higher court does not stay the order.98 Once the injunction is issued, the executive branch ensures that all of its officers around the globe cease enforcing the challenged policy against everyone—not just those plaintiffs who brought the suit.99 There has been a robust debate about whether district courts have the power to issue national or universal injunctions.100 Justice Neil Gorsuch euphemistically labelled them, “cosmic injunctions.”101 Though attorneys general past and present have protested such orders, they have nevertheless complied.102

95. Id. at 551-552.
96. Youngstown, 343 U.S. at 647 (Jackson, J., concurring).
97. See Zayn Siddique, Nationwide Injunctions, 117 COLUM. L. REV. 2095 (2017) (discussing the widespread use and emergence of nationwide injunctions within recent years).
98. Id. at 2125.
100. See id. at 424 (“federal courts should issue injunctions that control a federal defendant’s conduct only with respect to the plaintiff.”); Howard Wasserman, Universal, Not Nationwide, and Never Appropriate: On the Scope of Injunctions in Constitutional Litigation, 22 LEWIS & CLARK L. REV. (2018) (“...broad injunctions are problematic...”).
Because the Supreme Court found that the travel ban was lawful in its entirety, it did not have occasion to address the validity of nationwide injunctions. Justice Thomas thoroughly addressed that issue in his solo concurring opinion:

"I am skeptical that district courts have the authority to enter universal injunctions. These injunctions did not emerge until a century and a half after the founding. And they appear to be inconsistent with longstanding limits on equitable relief and the power of Article III courts. If their popularity continues, this Court must address their legality."104

The lower courts have already taken notice. Earlier this year, a district court found that the attorney general could not deny Chicago certain federal funding because of the city’s “sanctuary” policies. Rather than limiting its relief to Chicago, the court entered a nationwide injunction. A panel of the Seventh Circuit unanimously affirmed the ruling, but split 2-1 on the validity of the nationwide injunction. The attorney general asked the en banc Seventh Circuit to limit the relief to the city of Chicago. The en banc court granted review but postponed ruling on whether the nationwide injunction should be stayed until the Supreme Court’s resolution of Trump v. Hawaii. The U.S. Solicitor General sought an application for a stay from the Supreme Court. Hours after Hawaii was decided, the en banc Seventh Circuit put the nationwide injunction on hold.

General Holder described nationwide injunction halting DAPA as “a decision by one federal district court judge.”; see also Jeff Sessions, U.S. Attorney General, Dep’t of Justice, Remarks at the Federalist Society’s Student Symposium (Mar. 10, 2018), available at https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-federalist-society-s-student-symposium [https://perma.cc/P6SE-UUP4] ("But the Department of Justice—under Democratic and Republican administrations alike—has been consistent over these past several decades that nationwide injunctions gravely threaten the rule of law.").

104. Id. at 2425 (Thomas, J., concurring).
106. Id. at 951.
108. Id. at 277.
So far, the judiciary has been able to avoid the problem of dueling cosmic injunctions where one court orders the government to perform a certain action and another court orders the government to cease performing that action. Assuming one district court has the power to issue a cosmic injunction, do two district courts have the power to issue conflicting cosmic injunctions? This question can be framed in one of two ways. Broadly, should the fact that Court #1 found that it would be unconstitutional to halt a policy, prevent Court #2 from finding that policy itself is constitutional? Most observers would answer of course not: A district court does not bind another district court, even one in the same circuit. The narrower question is much tougher: Should the fact that Court #1 ordered the government to continue implementing a policy prevent Court #2 from ordering the government to halt the policy altogether? If the answer to the first hypothetical is of course not, what principle of federal jurisprudence would compel a different answer to the second hypothetical? The answer lies in the distinction between a precedent and a judgment.

The declarations in the first hypothetical do not give rise to the conflict; rather, only the ensuing injunctions trigger the conflict. Perhaps Court #2 seeks to avoid a conflict. As a result, it decides not to issue the dueling injunction. Instead, it could issue a mere declaration, or it could issue a declaration with a stayed injunction. Alternatively, if Court #2 decides to issue a dueling injunction, then Court #1 could subsequently modify its initial injunction. It is even conceivable that Court #2 could ask the plaintiffs to intervene in Court #1, and challenge the scope of that injunction.

What, then, should be the rule to decide which injunction controls, in the hypothetical situation where a higher court does not intervene? Perhaps the first-in-time injunction ought to prevail. But that regime would perversely reward whichever litigant wins the race to the courthouse, and privilege the judge who rules in the quickest—and most cursory—fashion. Why should one judgment estop all other courts from ruling? Perhaps a different rule should be that injunction that favors the status quo should be preferred over injunctions that disturb the status quo. Yet, the familiar four-factor test for preliminary relief asks courts to consider not only whether the status quo should be maintained, but whether the issuance would likely yield


“irreparable harm” or harm the “public interest.” A status quo based rule would not provide much guidance. Ultimately, the conflict boils down into a game of jurisprudential chicken: which judge decides to back away from issuing a dueling cosmic injunction. Prudential concerns may prevent one judge from stepping on the toes of another judge, but these are not constitutional considerations. Given the insulation and autonomy afforded by life tenure, it is entirely possible that neither side would blink.

There is not necessarily anything wrong with that independence. One district court judge is not supreme over another. It is true that in Cooper v. Aaron, the Supreme Court arrogated for itself the power of judicial supremacy, such that it can determine, with finality, the meaning of the “supreme Law of the land.” But the district courts lack any pretense to this purported supremacy. Call it instead judicial inferiority: the mere fact that dueling cosmic injunctions can even exist highlights the fact that this sort of stalemate is constitutionally proper. Each judge takes the same oath to the Constitution, and has equal authority to rule on the constitutionality of an executive action—regardless of whether he or she is the first or last to do so, and regardless of whether his or her order disrupts or maintains the status quo. Court #1 should not control the declarations of Court #2. Likewise, Court #1 should not control the injunctions of Court #2.

Eventually, the Supreme Court will address the scope of nationwide injunctions in the sanctuary city, or perhaps the DACA litigation.
