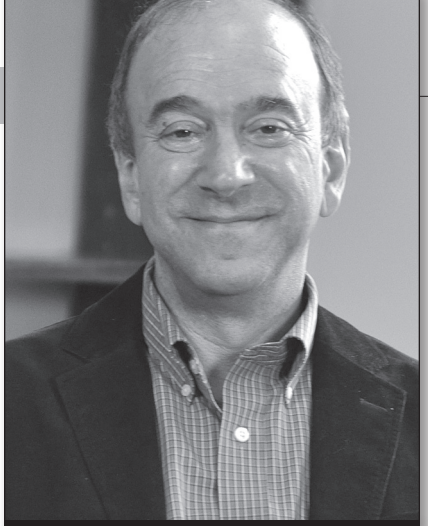
The Prospect for Boring Times Is Becoming Increasingly Attractive



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During the campaign trail, candidate Donald Trump famously said, "We will have so much winning if I get elected that you may get bored with winning." If excessive winning were the touchstone for boredom, the Justice Department attorneys defending Trump environmental policies would be enjoying fascinating lives these days. Too much winning has not been their problem.

Since taking office, the administration has suffered 22 losses in federal environmental court cases, excluding any losses defending Obama policies. That's a remarkable number. The losses cut across several agencies, including the departments of Army, Commerce, Energy, Interior, State, and Transportation. But the biggest loser is EPA, which accounts for a whopping 15 losses.

Also telling is the nature of the losses. Most have resulted from Trump's rush to try to delay or suspend implementation of currently applicable environmental regulations adopted by prior administrations.

By the close of this summer, federal courts in eight cases have ruled that the Trump administration had acted unlawfully in seeking to delay and suspend an environmental rule that the federal agency had previously adopted. And in six additional cases, federal courts held that the administration had acted unlawfully by failing within a reasonable time to promulgate an environmental regulation or make a decision mandated by an environmental statute.

What makes this lopsided record so striking is that the federal government historically wins the vast majority of its cases. That is why when I first arrived at the Justice Department's environment division decades ago, it took me months to appreciate that the federal rules of appellate procedure required the "appellant" brief to be filed with a blue cover and the "appellee" brief to be filed with a red cover. Because the government almost never loses in federal district court, I had only seen red briefs. Only after months there when I noticed an anomalous blue-covered brief in a pile and asked why the color was different, did I learn the reason. It was the rare instance when the government had lost and had to file an appellant's brief.

There are also reasons for why the government normally tends to win most of its cases. The first is that the career Justice Department lawyers and their career counterparts in the client agencies are excellent attorneys. They are careful, rigorous, and expert at knowing how to pitch even the most challenging legal arguments in the best possible way, which includes knowing precisely how much, and not more, to ask of a court and what not to ask.

> Overcoming the formal courtroom assertions "on behalf of the United States."

The second reason is that the federal government enjoys a lot of favorable presumptions in federal litigation. There are presumptions of regularity and reasonableness. Judges are generally inclined to find as credible government attorney assertions about federal practices or the urgency of certain public policy concerns. Those opposing the federal government face a major hurdle in overcoming the government attorney's formal courtroom assertions "on behalf of the United States."

But, of course, that is precisely what makes all the more telling such a high number of litigation losses. The lessons are several and portentous for the Trump administration — for its environmental policies, but with implications beyond environmental law.

The first is that a presidential administration that ignores the advice and expertise of career government personnel, including lawyers, does so at its peril. That is true for career government employees at Justice and no less true for those in their client agencies. You cannot succeed without their assistance to effectuate meaningful change.

But that is reportedly what Trump has sought to do, particularly in the environmental agencies and especially at EPA. The administration has repeatedly made significant decisions without seeking or ignoring the advice of expert career attorneys, economists, and scientists. Whatever one thinks of the Supreme Court's opinion last June in the "travel ban" case, the president was clearly able to claim victory only because career government personnel had the opportunity to address the enormous legal infirmities in Trump's first two executive orders.

The second lesson, however, has even longer term implications. The current administration risks squandering the federal government's essential credibility in the federal courts. So long as the administration's actions in the near term warrant such judicial disrespect, that is as it must be. But the concern is that the lack of deference will, once established, persist in the future when that is no longer so and proper deference is needed for effective government.

The Trump presidency has certainly not been boring. But with its penchant for generating ceaseless breaking news, the prospect of boring times is increasingly attractive.