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The Advocate

IN THIS ISSUE

CA Task Force to Consider Reparations

by Shelby Matsumura

Photo made by The Washington Post

California makes history as the first state to form a task force assigned to study and develop reparation proposals for Black Americans in the state.

On September 30, 2020, Governor Gavin Newsom signed Assembly Bill 3121, which was authored by Assembly woman Shirley Weber (D-San Diego), who also serves as the chairperson of California's Legislative Black Caucus.

Although the reparations are not limited to slavery, the task force will give special consideration to those who are descendants of slaves. Although numerous city councils across the country have passed their own reparations plans, California is the only state Legislature to do so.

However, AB 3121 is not the first attempt at getting such bills passed at a state or federal level. A similar proposal was introduced in Congress in 1989 by former Democratic Representative John Conyers of Michigan. Representative Conyers reintroduced the bill, H.R. 40, every session until he retired in 2017. Despite last year's congressional hearing of the proposal, the bill has not been passed.

Although H.R. 40 has struggled to gain traction with Congress, California's AB 3121 is already in motion. The task force is required to submit its recommendations to the state Legislature no later than June 2022.

Charles P. Henry, Professor Emeritus of African American Studies at the University of California at Berkeley, believes that the timeliness of AB 3121 goes back to the discussions of post-racialism during Barack Obama's presidential election in 2008. Post-racialism is the idea that society has moved beyond racism and that racial prejudice no longer exists.

"I think after the euphoria around Obama's election and the discussion of post-racialism, reality set in with the Tea Party movement and this kind of backlash culminated with Trump in 2016," Henry said. "And that combined with all the murders of Black men and women, and the rise of the Black Lives Matter movement, has shifted public opinion to be polarized, where those on the left support reparations and those on the right are, of course, opposed to it."

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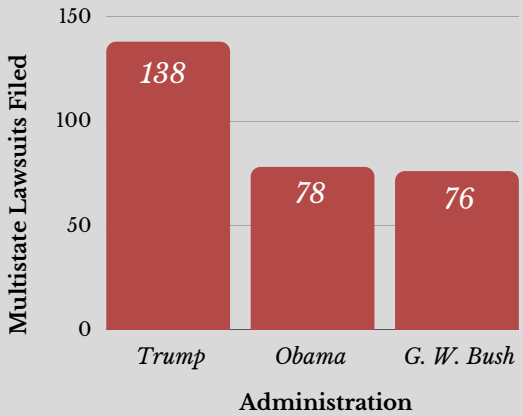
The lawsuits brought against the Trump administration greatly outnumbers those brought against previous presidential administrations.



A Peek Inside California's 100 Lawsuits Against the Trump Administration

by Chris Vu

In an extraordinary feat, California has filed 100 lawsuits against the Trump administration, reaching its milestone on August 28, 2020. California is not alone though, in challenging Trump's administration in the courts. Over 130 multistate lawsuits have been filed against the administration, according to a database compiled by Professor Paul Nolette of Marquette University.

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Staff List

New California Law Provides Support for Pregnancy in Prisons

by Kennedy Meeks

Pregnant inmates may soon have the option for a support person with them during birth and the ability to choose from a midwife, physician, nurse practitioner, or physician's assistant for treatment.

Governor Newsom signed Assembly Bill 732, which was authored by Assemblymember Rob Bonta (D-Oakland), into law this September. This bill will help improve the treatment of pregnant inmates in California state prisons and county jails, as well as provide more services for reproductive health.

"It was about human rights, it was about women's rights, it's about civil rights, and about having the fair, just, compassionate, and humane society that we want," Bonta said.

Some see AB 732 as progress to improve an outdated system to finally reflect current prison demographics."[It] reflects an idea of a system that was built to house single men, never having been rethought for what it looks like to be in a body that menstruates, what does it look like to be a body that might be pregnant," Michelle Oberman, Criminal and Health Law Professor at Santa Clara University, said.

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California Efforts at Police Reform Remain Unsuccessful

by KateMarie Boccone

The California legislature is making efforts to enact police reform laws after Californians took to the streets in the wake of George Floyd's death at the hands of a police officer. Despite the fact that most of the legislative measures intended to address the issue have been stalled or rejected, advocates still say change is on the way.

After a video of Minneapolis Police Officer Derek Chauvin with his knee on George Floyd's neck went viral in June 2020, the nation erupted with protests . Throughout the summer, demonstrations of outrage consumed major California cities, including San Jose, Oakland, and San FranciscoSome of these Bay Area protests produced their own viral videos of police misconduct, amplifying the call for police reform legislation throughout the state.

California State Senator Bob Wieckowski (D-Santa Clara) has been an advocate of the police reform bills proposed.

"Politicians like myself, people who ran, were always embracing police activities and saying they could never do anything wrong. Even if they did something wrong, it was excusable. It's sad, whether it's lethal force or non-lethal force, that [addressing] the mistreatment has taken so long," Wieckowski said.

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The Kobe Bryant Act Aims to Protect Families of Deceased Victims

by Hannah Odekirk

After a Los Angeles Sheriff's Department deputy took personal photos of the January crash that killed Kobe Bryant, his daughter, and nine others, Governor Gavin Newsom signed a unanimously supported bill in September. This bill makes it a misdemeanor for first responders to capture photos of deceased victims on the scene for any purpose not related to official law enforcement business or genuine public interest. Anyone convicted may be subject to a $1,000 fine.

California Assemblyman Mike Gipson penned Assembly Bill 2655—which he called The Kobe Bryant Act of 2020—not because the victim was famous. Regardless of the victim's fame, taking photos of deceased victims for personal use falls outside of first responders' oath of responsibility, he explained.

"We have to make sure [they don't] abuse the rights and privileges they have," Gipson said. "The Kobe Bryant Act is about recognizing and respecting the dignity of human beings, especially after their passing."

Gipson, who also chairs the Select Committee on Police Reform, decided to pursue state legislation on this issue instead of localized department policy because he recognized the challenges of getting police agencies to implement meaningful change internally.

"A lot of departments can create department policies, but those policies are only good as long as they're enforced," Gipson said. "We didn't want some sheriff or chief coming in and doing away with that policy."

Gipson noted that Los Angeles County Sheriff, Alex Villanueva, was a vigorous sponsor of The Kobe Bryant Act because the catalytic infraction happened in his department.

Gipson noted that Los Angeles County Sheriff, Alex Villanueva, was a vigorous sponsor of The Kobe Bryant Act because the catalytic infraction happened in his department.

"[He wanted] to show leadership from the top… to make sure this doesn't happen any longer," Gipson said.

The LA County Sheriff's office did not respond to our requests for comment though, and the Los Angeles Police Department also declined to comment.

While the Santa Clara County Sheriff's Department also declined The Advocate's request for an interview on how this new law will be enforced locally, the Department noted that this had not been an issue for them before.

"None of our deputies have been involved in any type of incident related to or applicable to 'The Kobe Bryant Act 2020' in Santa Clara County. Our deputies strive to maintain the highest level of public trust while conducting their investigations, especially when it comes to death investigations," the Santa Clara County Sheriff's Department said in a statement.

Gipson is confident that The Kobe Bryant Act will encourage further legislation after it goes into effect in January 2021. Indeed, AB 2655 does complement the existing post mortem right of publicity laws that exist now in California and a number of other states.

California law currently regulates the use of a celebrity's "name, voice, signature, photograph, or likeness" to sell goods or services after their passing. Gipson's Kobe Bryant Act expands upon this protection by providing family members of deceased celebrities with a means to prevent first responders from using their loved one's image for shock value.

This is not to say that only celebrities and their families can avail themselves of the protections provided by The Kobe Bryant Act or post mortem right of publicity statutes. In fact, in 2010, California extended post mortem rights of publicity to natural persons whose likeness had value at the time of their death or because of their death. This was in response to anti-war protestors printing the names of soldiers that died in combat on t-shirts and other merchandise.

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Mural of Kobe Bryant in Grand Central Market, Downtown Los Angeles

Photo taken by Cossette Cornwell

CA Task Force to Consider Reparations

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Henry said he hopes the commission is composed of scholars who are not either Democrats or Republicans.

"I think it's important to avoid that kind of politicization of the commission and try to have a variety of objective scholars," Henry said.

Although AB 3121 places emphasis on descendants of slaves, the proposal could also address reparations to correct current racial disparities. Margalynne Armstrong, Associate Professor of Law at Santa Clara University, envisions a reparations plan that could rehabilitate discrepancies in the value of properties that are associated with race. "A home in a Black-majority part of the Bay Area is worth about $164,000 less than an equivalent home—same size, same quality of school system, same access to parks and other neighborhood amenities—in a neighborhood with very few Black people," Armstrong said. Armstrong does not believe land requires money to maintain interest in the property.

"A national act of procrastination is not a justification for eliminating the debt that's owed" - William A. Darity Jr.

"There might have to be something like land transfers and tax reductions for those properties until people can be in a position to really maintain ownership of the property. So, the details would be fairly complex,"Armstrong said.

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CA Task Force to Consider Reparations

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It is worth noting that the U.S. government has provided reparations for past ills before. Most recently, the government compensated victims of Executive Order 9066 through the Civil Liberties Act of 1988, which allocated $20,000 to each survivor of Japanese internment during World War II.

Thomas Oshidari, Co-President of the San Jose Chapter of the Japanese American Citizens League (JACL), was born at the concentration camp of Rohwer, Arkansas. As a survivor, he received a formal apology and $20,000 compensation.

“Monetarily, I don’t think it meant that much. But, it’s really the admission that the government was wrong, it was wrong. Japanese Americans could finally feel like people could recognize that what happened to them was really wrong and the Government was willing to admit that,” Oshidari said.

William A. Darity Jr., a leading expert on slavery reparations and economics professor at Duke University, attempted to estimate what would be an appropriate amount for monetary reparations.

“Black Americans are approximately 13% of the nation’s population, but only possess about 2.5% of the nation’s wealth. So if you were going to bring the Black share in wealth into proportion with the Black share of the population, it would require somewhere in the vicinity of $10-12 trillion. But if you take all of the state and local government budgets and you combine them, this will amount to about $3.1 trillion. So, at best, if you were to appropriate all of those funds and put them towards reparations, which would eliminate the capacity of state and local governments to provide any services whatsoever, you still would fall $7 trillion short of the threshold that would be required to produce a full reparations project,” Darity said.

In addition to determining what forms reparations could take, the task force must also decide who will be eligible for this compensation. In a paper written by Darity Jr. with two other experts, two criteria are set forth to establish eligibility for African American reparations.

“The first criterion is what we refer to as a lineage standard. An individual would have to demonstrate that they have at least one ancestor who was enslaved in the United States,” Darity Jr. said.

""“The second criterion is what we refer to as an identity standard and this means that for at least 12 years before the enactment of a reparations plan in the United States–or the enactment of a study commission for Reparations, whichever comes first–an individual would have to self-identify as Black, Negro, Afro American, or African American,” Darity said.

Darity Jr. said establishing concrete eligibility standards will serve the purpose of ensuring that reparations will actually support Black Californians and descendants of slaves.

In contrast, Armstrong does not think every descendant of slavery would benefit from reparations.

"Should Oprah Winfrey get reparations? No. Certainly she’s overcome an incredibly deprived history, her childhood was awful but she’s not going to benefit from reparations. So, I think people have to really try to not have a blanket reparations policy because we just want to try to help the people who are suffering the most from the continuing discrimination and we're not going to be able to help everyone. That would really take huge changes in our society,” Armstrong said.

In response to these discussions over possible eligibility standards, opponents of AB 3121 argue that too much time has passed to discern the appropriate recipients and effectively distribute reparations to them. Darity Jr. is the fourth generation of his family out of slavery, and he disagrees with that sentiment.

“A national act of procrastination is not a justification for eliminating the debt that’s owed,” Darity Jr. said.

Henry also said he rejects these arguments, saying reparations do not just account for slavery.

“We’re talking about reparations for Jim Crow and we’re talking about reparations for contemporary injustice,” Henry said.

Even if California’s modern society and its current citizens were not directly responsible for the institution of slavery, Henry said these reparations are still needed.

“There are intergenerational institutions that exist today that slavery was an important part of their founding and their beginning, but that’s why we’re not just talking about reparations for slavery,” Henry said.

Another criticism of the bill concerns the concept that California does not need to address reparations because it entered the Union as a free, non slavery state due to the Compromise of 1850. However, Armstrong challenges this idea.

“During the Gold Rush...people brought their slaves to [California]...when it was admitted in 1850; [although] the state constitution prohibited slavery...in reality, people still had slaves and sold slaves within the state,” Armstrong said.

As AB 3121 makes California the first state to assemble a task force to discuss reparations, some wonder what such a bill could inspire on a national level. Darity Jr. said he is concerned that state reparations plans may divert responsibility from the federal government. He referred to state or local level reparations as “low hanging fruit.”

“The federal government is the culpable party for the atrocities that are associated with the full trajectory of American racial injustice. And this is because it’s the federal government that maintains the legal framework that supported slavery, that supported nearly a century of legal segregation in the United States, and that continues to support the conditions that sustain ongoing discrimination in employment, credit, and housing in this country,” Darity Jr. said.

Nevertheless, as California works to construct a reparations proposal for its Black residents, Henry would like to see the task force act as a Truth and Reconciliation Commission that will establish a set of historical facts that a strong majority of people can agree on.

“If half the population is adamantly opposed and is operating from the notion of the lost cause or that it’s great to have Confederate statues around to remind us of the Confederacy, then it’s putting the cart before the horse to talk about how much is this person going to get and how much that person’s going to get,” Henry said.

But Henry said he is hopeful. “California has a different political climate and could serve as a kind of model for states or even local governments that want to address this,” Henry said.

Similarly, Armstrong said she imagines a multitude of forms that reparations could take, but that more will be needed.

“Reparations can only correct problems up to a certain extent. So, the need to eliminate anti-black racism through all strata of society has to accompany reparations,” Armstrong said.

Bill Guaranteeing Right to Return to Work Vetoed

by Devika Sagar

Workers who were laid off during the pandemic do not have the right to return to their jobs after a bill was vetoed by Governor Gavin Newsom.

On September 30, 2020, Governor Newsom vetoed a highly union-favored bill, Assembly Bill 3216. AB 3216 would have created a right of recall for laid-off employees in many industries deeply affected by COVID-19, such as hotels and event venues and those working in building maintenance.

Marshall Anstandig, Professor of Labor Law at Santa Clara University School of Law, said this bill was very pro-employee.

“It [would’ve] create[d] potential liability for an employer who refuse[d] to comply — it [was] quite extreme,” Anstandig said.

"many employees took advantage of the [stimulus package] because they were making more money staying at home than going to work, so they chose to stay home."
- Anil Yadav

Additionally, Anstandig said the bill included certain provisions that are not generally in labor contracts between employers and labor unions.

Anstandig said that one of the most notable aspects of AB 3216 was the requirement of employers to bring back employees they laid off which is not otherwise provided in the law. Any regular employee would not be re-hired after being laid off, unless otherwise indicated in an employment contract or labor union agreement.

Anstandig said another notable aspect of the bill involved the treatment of former employees if the business was sold during the pandemic.

“If an employer has sold this business, the successor employer, under the statute, has to comply with the notice requirements and bring someone back, which is very, very unique,” Anstandig said.

Anstandig said these terms are generally negotiated in a Collective Bargaining Agreement between employers and

Anil Yadav, a local business owner who currently employs about 14,000 employees in the hospitality and restaurant business, said the COVID-19 pandemic has “brought on many different challenges,” such as having to lay off about 35% of the workforce.

Yadav said that if AB 3216 had passed, it would be devastating for business owners because the costs of doing business would greatly increase, in addition to the escalating expenses during the pandemic.

Many businesses would “have been forced to shut down if they were mandated to comply with AB 3216.”

Yadav said within his business, he has seen significantly increased costs to protect his employees, which he refers to as “front-liners” during the pandemic. These costs include compliance with improved sanitation and health requirements, masks, and gloves for all his employees, and providing extra protective measures to keep employees and customers safe.

"It limits an employer's ability to not hire back some of their workers who have gotten raises over the years"
- Sarah McDermott

On the other hand, the union, Unite Here, was one of the supporters for AB 3216 and described the veto as disappointing. Unite Here is based out of San Jose, California, and represents hospitality workers, including food service workers and hotel workers. Unite Here supported the bill to ensure hospitality workers, the majority of which are people of color and immigrants, can return to work after the pandemic.

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The Regulatory State in the Trump Adminstration

by Sami Elamad

Like its predecessors, the Trump Administration has flexed its regulatory muscles to advance its policy agenda. However, acting through the administrative state has not proved to be as successful as previous administrations.

More often than not, litigation brought under the Administrative Procedure Act (APA) has stymied President Trump’s desire to quickly pass legislation and skip the lengthy congressional process. Examples include the administration’s attempts to rescind the DACA program, add a citizenship question to the census, and eliminate funding for teen pregnancy prevention programs—all of which have been halted by judicial review.

Passed in 1946 and signed by then-President Harry Truman, the APA was designed to interpose structure and oversight to agency conduct."

There was a need for a procedural regularization of how agencies operated,” Ronald Krotoszynski, professor of law at the University of Alabama and co-author of an Administrative Law casebook, said.

Krotoszynski said this was particularly important at the time because of New Deal policies that substantially expanded the administrative state.

The APA mandates federal courts to set aside any federal agency’s action or regulation that is “arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law.” This languagehas become virtually weaponized in the context of the Trump administration’s policies.

“We want agencies to behave rationally, whether it’s a Democratic or Republican administration,” Krotoszynski said. “These procedures are meant to ensure transparency and openness, and to create a record that allows judges to keep agencies honest.”

Federal courts have overturned over 80 percent of the President’s efforts to pass new policies or undo existing ones, according to the NYU Institute for Policy Integrity.

William Buzbee, professor of law at Georgetown University, said such legal challenges historically resulted in favorable outcomes for previous administrations around 70 percent of the time. But, the Trump administration success’s rate is closer to 20 percent—drastically lower than the average.

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The Kobe Bryant Act

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Similarly, The Kobe Bryant Act protects families of non-celebrities whose images are wrongfully captured by a first responder. The key difference between existing post mortem right of publicity laws and The Kobe Bryant Act is that the former focuses on a person profiting off their use of the image, while the latter focuses on first responders' duties to the people they serve.

William A. Fenwick, a founding partner of Fenwick & West LLP, argues that AB 2655 may be a step in the right direction, where protecting privacy rights are concerned, but it remains just that: a step. The Kobe Bryant Act reminds Fenwick of how most legislatures have approached privacy issues.

"[Villanueva, L.A. County Sheriff, wanted] to show leadership from the top... to make sure this doesn't happen any longer" - Mike Gipson

"They pick away at little pieces of it," Fenwick said. "But there's still a long way to go."

Gipson said The Kobe Bryant Act of 2020 is about recognizing and respecting the dignity of human beings, especially after their passing. Kobe and Gianna Bryant, John, Keri, and Alyssa Altobelli, Sarah and Payton Chester, Christina Mauser, and Ara Zobayan all lost their lives in that helicopter crash. The Kobe Bryant Act of 2020 is designed to ensure that future families and loved ones are not re-traumatized by the callousness of those who are charged to serve and protect.

CA Law Supporting Pregnancy in Prisons

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AB 732 will give pregnant inmates options when it comes to who will be providing their medical services.

"The thing that...would be most impactful would be that there's a sense of empowerment, a sense of having choices in a situation whereby definition you have so little control," Oberman said.

This bill will also provide pregnant inmates access to prenatal services, an important part of the bill when there are high rates of miscarriage for incarcerated pregnant women. Currently, there is no standardization in California prisons and county jails when it comes to services for pregnant inmates.

"When it came to prenatal care, postpartum care, standards and conditions of appropriate health care during pregnancy we were not doing nearly enough," Bonta said. "These are folks who have no other access to care. If you're not going to give it to them, how else are they going to get it?"

"When it came to prenatal care, postpartum care, standards and conditions of appropriate health care during pregnancy we were not doing nearly enough." - Rob Bonta

An example of this lack of treatment and standards can be seen in the class action suit on behalf of female inmates from the Santa Rita Jail in Alameda County. The lawsuit alleges instances where inmates were forced to have abortions and that in the jail, a female inmate gave birth alone in solitary confinement.

Previous policies addressing pregnant inmates "have been a response to stories of outrageous violations of human rights," Oberman said.

Oberman said that this bill, however, feels different than past reforms. She said lawmakers are thinking about the things pregnant people need and trying to provide more holistic care.

"Overall, [the] concern is that the bill set pretty rigorous treatment schedules and specifications into statute." - Cory Salzillo

"Rather than doing these one-offs... it feels like they're actually trying to build a systemic response that actually poses the possibility of better outcomes for the pregnant people and for their kids," Oberman said.

Some of the other items in AB 732 include appropriate bunk assignments for pregnancy, access to postpartum services up to 12 weeks after giving birth, access to community-based programs, prohibition of the use of tasers, pepper spray, and other chemical weapons on incarcerated pregnant persons, and greater access to menstrual products.

This bill has the support of organizations such as ACLU of California, Riverside Sheriffs' Association, and was sponsored by Women's Policy Institute, The Women's Foundation of California. Another reason why it has garnered so much support could be the fact that the bill is good economic policy.

"[The bill] is fiscally conservative in that... when you don't get prenatal care... you end up running up a huge bill because things go wrong... so prenatal care is the dollar so wisely spent." according to Oberman.

However, the California State Sheriffs Association (CSSA) opposed the final version of the bill.

"The concerns that the sheriffs noted about the bill was that generally, it mandated, without any funding from the state, some pretty specific and inflexible and potentially costly prenatal and postpartum care for pregnant county jail inmates," Cory Salzillo, CSSA Legislative Director, said.

Salzillo said that the CSSA was also worried about the different requirements of the bill. In particular, Salzillo expressed concern about certain procedural changes.

"Overall, [the] concern is that the bill set pretty rigorous treatment schedules and specifications into statute," Salzillo said.

Bonta is confident though, that California will fund these state-mandated changes.

"We spent over a year talking about how this was going to be funded, reducing it so that it was manageable for the state's coffers to pay for these changes," Bonta said.

"[I]t feels like they're actually trying to build a systemic response that actually poses the possibility of better outcomes for the pregnant people and for their kids." - Michelle Oberman

Bonta also said putting procedural specifications into the statute would ensure that they are implemented consistently.

"The most important thing is that we see our incarcerated pregnant Californian inmates. We care and we believe that you deserve a level of respect, dignity, and compassionate humanity," Bonta said.

CA Police Reform Efforts

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California Senate Bill (SB) 776, proposed in January 2020 by State Senator Nancy Skinner (D-Berkeley), garnered support from activists that were shocked by the number of Use of Force complaints contained in Chauvin's record. The bill aims to increase the amount of publicly available records involving police misconduct and allow members of the public to file suit when a police department does not willingly supply them upon request.

Similar bills aiming to increase police accountability include Assembly Bill (AB) 1599, which proposes creating a mandatory third-party investigation process for reports of police misconduct, and SB 629, which would have granted reporters documenting protests additional protections against police.

So far, no bill has been approved. AB 1599 currently remains in committee and SB 776 was sent to the Senate inactive file at the end of the state congressional session of 2020. SB 629 passed Congress, but was vetoed by Governor Gavin Newsom.

In 2018, Senator Skinner proposed SB 1421, which passed in August of that year and increased the scope of police records the public is entitled to access. The bill hit a snag when California Attorney General Xavier Becerra insisted that it only applied to police records created after the date of the bill's passing. However, in nearly all the court battles that have ensued, the legislation was interpreted to allow retroactive access to records as well. SB 776 would have added to SB 1421 by instituting monetary penalties on departments that do not comply.

Transparency is the focus of many of these new police reform bills. To some advocates of police reform, that is a logical first step.

In January of 2020, First Amendment Coalition (FAC), a non-profit dedicated to protecting free speech and holding the government accountable, won a legal victory against Becerra in the First District Court of Appeal in San Francisco. The Executive Director of FAC, David Snyder, said he viewed Becerra's opposition to the bill as very disappointing.

"The state's highest law enforcement officer has in some ways led the charge against producing all the records that we believe the public are entitled to and I think that is indicative of a deep seeded feeling among some law enforcement that misconduct is something that the public is just not entitled to see," Snyder said.

He believes that shining a light in the shadows of police misconduct can start the reform process.

"Before you can have a conversation about accountability there has to really be transparency, the public really has to know what the government is doing to hold them accountable for it," Snyder said.

Eric R. Nuñez, California Police Chiefs Association (CPCA) President and Los Alamitos Police Chief, is certain that more reform is on the way. The CPCA released a platform titled "Leading The Way" in June that outlines some of the measures that have and will be taking. Nuñez also wants the conversation to include how to prevent police from having to interfere in situations they simply are not suited for.

"People end up being [mentally ill and homeless] because of things that weren't done right before in their lives and it's a complex set of factors and we know if we can stop that from happening we can reduce the chances of those interactions in the first place. We understand that by the time they get to us, some of the folks we have to interact with, they've had a hard life," Nuñez said.

The public pressure to increase transparency continued to grow during the summer protests. At the conclusion of the Congressional session, many advocates told reporters in Sacramento that they were disappointed with the small number of reforms that actually passed. Newsom did sign bills limiting the use of deadly force and allowing federal investigations of police shootings. The police unions viewed these reforms as a loss and activists viewed the reforms as not nearly being enough.

Senator Wieckowski has not given up hope. He said that some of the delays in passing these bills, specifically SB 776, are due to the COVID-19 lockdown and the ever-changing protocols coming from the Capitol. He is sure that when the session resumes, the Congress will be able to "work through the process and amendments, the back and forth with the advocates and the people that object" on many of these important measures.

For Santa Clara and the state of California, Wieckowski believes the time has come for police reform.

"I think we owe at a minimum that [transparency] to the public and to the people of Santa Clara," Wieckowski said.

Vetoed Right to Work Bill

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Sarah McDermott, Political Director of Unite Here, said it was essential that AB 3216 passed.

"85% of Unite Here's workers nationally are unemployed right now," McDermott said.

McDermott said Unite Here's official stance is that they "disagree fundamentally" with employers who believe this would place restrictions on businesses and slow down their ability to reopen up.

"It limits an employer's ability to not hire back some of their workers who have gotten raises over the years," McDermott said.

The push from Unite Here has not stopped at the state level, and they are continuing to fight for these employees at the local level.

McDermott said AB 3216 is an opportunity for "people of color to get a chance to get back to work."

McDermott said she is "disappointed with the lack of leadership displayed by Newsom." Anstandig, on the other hand, believes the Governor vetoed the bill because of its "uniqueness."

"One would hope there is a balance between labor and management," Anstandig said. "The Governor, perhaps through lobbyists that influenced him over this bill, decided that there would be too many obligations and burdens for employers coming back from the pandemic to make this a part of the law."

As some California restrictions are lifted, so far, Yadav has lost about 80-90% of business. He has attempted to bring back his employees that have been furloughed, but many have refused to return.

"It is a double-edged sword," Yadav said. "The government put out a stimulus package a few months ago to support business, and the mainstream community to support the loss of jobs and income.But many employees took advantage of the situation because they were making more money staying at home than going to work, so they chose to stay home."

Yadav said that he could rehire 500-750 employees back, but most employees have chosen not to return to work. This creates an operational challenge for many businesses in the hospitality industry.

Though the bill was vetoed at the state level, McDermott said Unite Here remains committed to helping workers at the local level by advocating for local protections. As of right now though, there is no legislative guarantee that laid-off employees in the hospitality industry can return to their jobs.

CA's 100 Lawsuits Against the Trump Administration

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Since 2017, California Attorney General Xavier Becerra has challenged the Trump administration's policies on the environment, immigration, healthcare, education, civil rights, the 2020 Census, and even the U.S. Postal Service for two separate issues.

So far, the state has had more victories than losses. California won 44 cases, either through court orders or because the agencies changed their own decisions that resulted in favorable outcomes - and lost in only eight cases. Six of those wins are currently being appealed by the administration. The remaining 48 lawsuits were either settled, dropped, or are still pending in the courts.

Five of these lawsuits have been summarized below. These were chosen because each involves federal policies - immigration, health care, Title IX rights, Internet access, and the 2020 Census - and could potentially affect federal policies, as well as the lives of people in our communities.

Rescission on D.A.C.A.

Through the DACA program, undocumented individuals brought to the country as children, known as DREAMers, receive a renewable two-year period of deferred action from deportation.

After the Trump administration decided to end the program in September 2017, California brought a suit to challenge that rescission, which eventually reached the U.S. Supreme Court. On June 18, 2020, the Court ruled against the decision to rescind, on the basis the Trump administration had failed to provide an adequate reason as required by the Administrative Procedure Act.

Since then, DREAMers continue to renew their DACA status.

Citizenship Question on 2020 Census

California sued Commerce Secretary Wilbur Ross over the department's decision to include a question about citizenship on the 2020 Census.

The state argued that it violated both the U.S. Constitution and the Administrative Procedure Act. The question would deter noncitizens from responding, thus states with large immigrant populations could risk losing billions in federal funding and some congressional seats.

New York filed a similar lawsuit against Ross where the Supreme Court issued an opinion to block the citizenship question.

As a result, the Trump administration conceded and removed the question from the final version of the 2020 Census.

Repeal of Net Neutrality Upheld, but States Still Allowed to Impose Own Rules

In late 2017, the Federal Communications Commission (FCC) repealed the Open Internet Order, ending federal mandates on net neutrality. The FCC also put a preemptive directive that blocked states' net neutrality laws. In response, California and other states sued the FCC at the D.C. Circuit of the U.S. Court of Appeals.

Additionally, the state introduced and signed into law SB 822 in order to preserve net neutrality for California's consumers. But enforcement of the law was put on hold until the court made its decision.

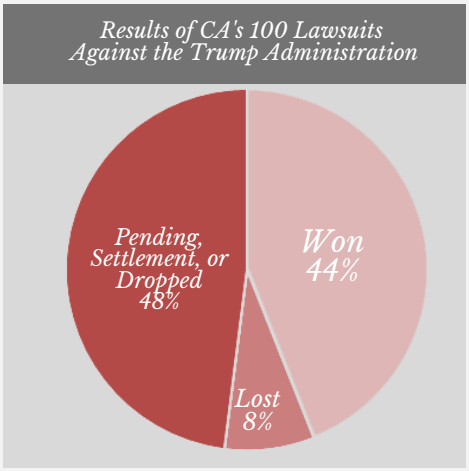
The court largely upheld the FCC's repeal, but it struck down the preemption directive, allowing California's law to go into effect. Yet legal challenges remain.

Just this past September, Becerra's office defended California's law by responding to a motion for preliminary injunction filed by the Trump administration and major broadband providers.

Title IX Rollbacks

Title IX requires schools that receive federal funding to provide students with an educational environment free of discrimination based on sex, including sexual violence and harassment.

In May 2020, the Department of Education finalized a new rule that would essentially provide greater protection for students accused of sexual assault or harassment.



California and other multiple states sued Secretary Betsy DeVos, arguing that it would force survivors to overcome more obstacles to secure protections.

The state's motion for preliminary injunction was denied while the merits of the case are actively pending in court. Briefs for summary judgment are due in late November 2020.

A.C.A. Returns to the Supreme Court

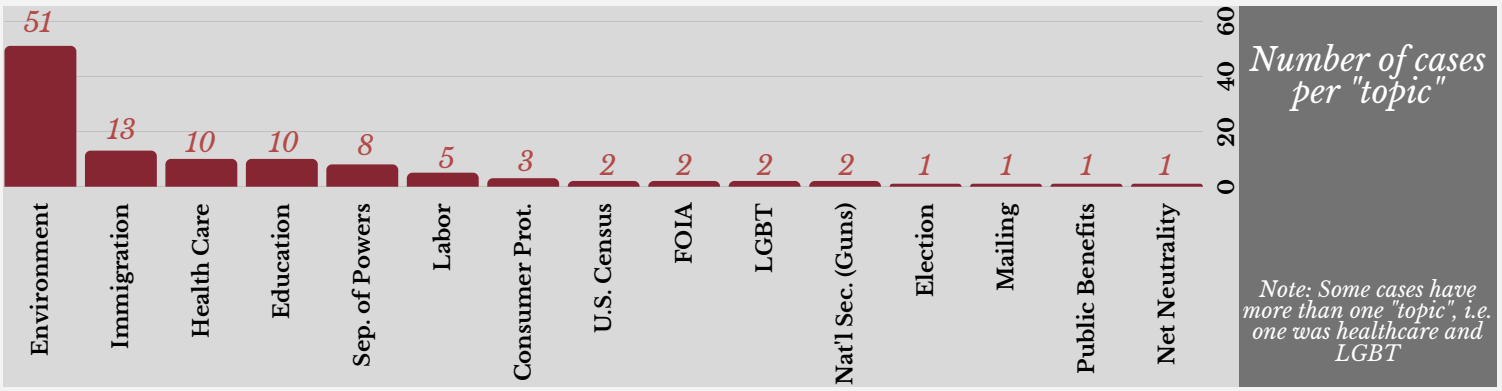
Ten years after Obama's Affordable Care Act (ACA) passed, state and federal governments remain divisive over the act's constitutionality.

Texas challenged the ACA as unconstitutional, arguing that the whole act is no longer valid because Congress had gutted the individual mandate tax penalty provision. The Trump administration sided with Texas, and a federal judge held it was unconstitutional.

In response, California petitioned the Supreme Court to review the decision. The Court granted the petition on March 2, 2020, just as the country was beginning to grapple with COVID-19. Oral arguments that lasted nearly two hours were held on November 10.

Three key issues were argued: whether states like Texas have standing to sue, whether the individual mandate to get health insurance is still constitutional, and whether the mandate itself can be severed, leaving the rest of the ACA intact.

A decision will be made in 2021.



Trump's Regulatory State

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In part, an administration's fate in the courts is tied to their willingness and ability to follow the APA's prescriptive requirements. To be sure, the APA instructs agencies to follow "actual science and actual data," Buzbee said, which "really do matter." Thus, any agency action that overlooks their importance will likely not find much reprieve in the courts.

"In theory, administrative regularity shouldn't just be a function of judicial review," Krotoszynski said. "Congress should have more skin in the game."

In practice, however, members of Congress act as "cheerleaders" when the president is a member of their political party. As a result, our system of government has evolved functionally into a parliamentary system, he said.

"Members of the president's party lead a principal role as being cheerleaders for the president, as opposed to staffing and exercising the constitutional prerogatives of a coequal branch," Krotoszynski said.

Altogether, then, these changes have amounted to an "imperial presidency," illustrated by a "president that rules by decree in the form of executive orders."

Buzbee said part of the administration's low success rate is because of the hyper-politicization of agency action.

When an administration is more concerned about "the claim of victory, rather than the certainty of long-term victory, sometimes they will push agencies and departments to act when they're not ready," Buzbee said.

For example, in March 2018, the U.S. Secretary of Commerce announced the addition of a citizenship question to the decennial census. The Secretary reasoned that the addition was in response to a request by the U.S. Department of Justice (DOJ) to enforce the Voting Rights Act.

In turn, various states and non-governmental groups sued the Secretary, arguing that he violated the APA, among other things. In a nutshell, they asserted that the question would actually discourage minorities from completing the survey. Put differently, noncitizen individuals would likely not participate in the census.

President Harry S. Truman signs the Administrative Procedure Act on June 11, 1946

The district court agreed as much: the Secretary "failed to consider several important aspects," "cherry-picked, or badly misconstrued the evidence," and "acted irrationally," amounting to "a veritable smorgasbord of classic, clear-cut APA violations," Judge Jesse Furman concluded in a 277-page opinion.

The administration appealed the Census case to the U.S. Supreme Court, where it still didn't find much success. Writing for the court, Chief Justice John Roberts concluded that the Secretary "was determined to reinstate a citizenship question from the time he entered office" and "subsequently contacted the Attorney General himself" to influence the DOJ to submit a pretextual request related to citizenship data.

"Altogether, the evidence tells a story that does not match," Roberts wrote, and the Secretary's stated rationale "seems to have been contrived."

Ironically, some of the Trump Administration's frequent losses—some of which occurred at the Supreme Court—"may end up being somewhat enduring precedents that would weaken executive overreach in the long term," Buzbee added. Thus, the administration's current efforts may ultimately be counterintuitive in the long term.

"[The Administrative Act] procedures are meant to ensure transparency and openness, and to create a record that allows judges to keep agencies honest."
- Ronald Krotoszynski

"Systematic failures to observe procedural requirements for agency action ought to be a matter of public concern," Krotoszynski said.

Krotosynzki said the recent election of Joseph Biden as U.S. president signals a return to an "administrative normality and regular process."

"[T]he claim of victory, rather than the certainty of long-term victory, sometimes they will push agencies and departments to act when they're not ready."
- William Buzbee

Krotoszynski suggests that the increasingly progressive use of administrative power since the 1980s signals a deeper problem of American democracy.

"Letting an administrative agency change policies on a whim is a dangerous and problematic thing to do," Krotoszynski said.

Krotoszynski said it is difficult to pinpoint a specific solution to counterbalance the growing weight of the administrative state. Still, he said, one solution may be a more "engaged and organized citizenry." He said the high turnout of the recent presidential election suggests that such a solution isn't necessarily so elusive.

"What the APA does, and does really well, is it forces administrative action into the sunlight, thereby rendering it accountable," Krotoszynski said.

Technology

Covering legal news out of Silicon Valley

Challenges to TikTok Raise Free Speech Questions

by Meg Beeson

The Trump Administration's efforts to force TikTok's Chinese parent company, Bytedance, to sell the popular social media app has resulted in multiple legal challenges across the country. The legal battle continues as Bytedance has been granted an extension until November 27.

On August 6th, President Trump signed an Executive Order forcing ByteDance to sell its US-based TikTok operations to an American company. If the sale could not be made by November 12th, the app would no longer be available in the app store. The potential ban by the Trump Administration raises concerns over users' right to free speech.

The Trump administration claims that the app is a threat to national security, but experts currently only see this threat as a hypothetical one. Currently, TikTok poses no more threat of data mining than any other social media app.

"The argument is that Beijing can bring pressure down on these companies (like TikTok) if they want access to their data," James Griffiths, an international journalist with CNN, said in an interview with NPR.

Photo created by Cossette Cornwell

Despite the threat only being hypothetical, the Trump administration used it to justify the Executive Order through the International Emergency Economic Powers Act (IEEPA). The IEEPA authorizes the President to regulate foreign economic transactions when the President declares a national emergency to deal with any unusual and extraordinary threat to the United States. The use of this Executive Order requires very little if any evidence because Congress gave the President broad discretion to use Executive Orders under the IEEPA, but Executive Orders are not unobjectionable.

"When the President's use of this power infringes impermissibly on an individual right, Congress or a court may invalidate the act," Bradley Joondeph, Professor at Constitutional Law at Santa Clara University School of Law, said.

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Google Suffers "Techlash" from Federal Government

by Steven McKeever

Tech giant Google faces an antitrust lawsuit for allegedly monopolizing and abusing its dominance in online search and advertising.

In a 64 page complaint filed on October 20, 2020, the Department of Justice alleged that Google "is a monopoly gatekeeper for the Internet," using anti-competitive tactics to maintain and extend its monopolies in the markets for general search services, search advertising, and general search text advertising.

Google's initial response countered: "people use Google because they choose to—not because they're forced to or because they can't find alternatives."

... whether consumers are actually being harmed will be one of the central points of contention...

The Justice Department's suit is part of larger efforts encompassing many interrelated issues, such as data privacy, developing against Big Tech in both the public and private sectors. The suit marks the first major use of antitrust litigation since the 1990s when Microsoft was forced to settle a decade-long antitrust suit arising out of its domination of the personal computer market. The outcome will have lasting repercussions not only for other Big Tech companies and Google's enormous consumer base but also for startup tech companies nationwide.

Donald J. Polden, Dean Emeritus, and Professor of Law at Santa Clara University, said the Sherman Act, the set of laws that provides for antitrust enforcement, was designed to prevent the higher prices and lower quality that comes from monopolies. Polden, who has tried five different antitrust cases before juries, notes that the popular crusade against tech companies may parallel the populist movement which gave birth to the Sherman Act, but the Act may be ill-suited to deal with modern issues.

"If you look at the giants, the so-called 'monopolists of today,' they're in completely different industries," Polden said. "[So] how adaptable is the Sherman Act, passed in 1890 to deal with railroads and grains and that sort of thing, at handling information and advertising?" Polden said.

The question of whether consumers are actually being harmed will be one of the central points of contention in the Justice Department's case against Google.

"What we really want to see, regardless of what side of the aisle you're on, is a principled approach to antitrust—we want to make sure policy makers are focused on the impact on consumers and on consumer harm," Jennifer Huddleston, Director of Technology and Innovation Policy at American Action Forum in Washington, D.C., said.

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TikTok Free Speech Concerns

cont'd from p.10

In the months following the Executive Order, this is exactly what happened. TikTok users asserted in multiple suits that this ban infringes on their First Amendment rights, and for some TikTok stars, their ability to make a living.

The Electronic Frontier Foundation (EFF) is a tech advocacy group that filed an amicus curiae brief for the lawsuit brought by the U.S.-based TikTok technical program manager,Patrick S. Ryan, in the U.S. District Court for the Northern District of California.

“A ban on TikTok violates fundamental First Amendment principles by eliminating a specific type of speaking, the unique expression of a TikTok user communicating with others through that platform, without sufficient considerations for the users’ speech,” EFF said in its brief.

“The argument is that Beijing can bring pressure down on these companies (like TikTok) if they want access to their data"
- James Griffiths

Eric Goldman, Professor of Internet Law at Santa Clara University School of Law, said he also believes that the Internet is unequivocally a form of speech. Therefore anything expressed through it is protected.

“Anything that enables users to talk to each other is a speech venue, and removal of that venue is the worst kind of censorship,”Goldman said.

TikTokers Douglas Marland, Cosette Rinab, and Alec Chambers brought suit against the Trump administration in October, alleging that the ban would hinder their ability to make a living. They each have more than a million followers and claimed in their brief that they stood to lose $10 million per video. As a result, Judge Wendy Beetlestone of the Eastern District of Pennsylvania signed an order in favor of the Plaintiffs, which enjoined the Trump administration from enforcing the ban come November 12.

“We are deeply moved by the outpouring of support by our creators,” TikTok’s interim chief Vanessa Pappas said in a statement released on Twitter. “We stand behind our community as they share their voices, and we are committed to providing a home for them to do so.”

Amid talks of its complicated deal to sell it’s US based holdings to potential buyers, Oracle and Walmart, TikTok submitted a request for a 14-day extension of the November 12 deadline. The Trump administration’s Committee on Foreign Investment granted the request, but the two sides have not had any communication since.

It remains to be seen what the Trump Administration will do next in its attempt to ban Chinese apps in the US, and the question of whether this ban is a First Amendment violation remains unanswered.

Google's "Techlash"

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Huddleston’s research calls into question whether Google causes consumers any harm and points to natural tension between a highly successful product and the resulting marketplace dominance. It may be that consumers tend to choose Google not because other options do not exist, but because they find that Google offers superior products that better serve their needs.

“If you’ve got the best mousetrap, you should be able to go out there and exploit it and say ‘I’ve got the best mousetrap,’ and antitrust is supposed to prevent other firms from colluding against you in your efforts to market the best mousetrap,” Polden said.

The legal attacks against Google and other Big Tech companies are strangely bipartisan considering the extremely polarized American political climate. Huddleston said she attributes this bipartisanship to a “techlash,” where both sides of the aisle are questioning the role of tech not only in the marketplace but also in areas like data privacy.

The Justice Department’s Google lawsuit is a Republican-led effort, while the Judiciary Antitrust Subcommittee investigation, which resulted in a 450-page condemnation of Apple, Amazon, Google, and Facebook, was signed only by Democrats in the House of Representatives.

Big Tech suffered especially heightened scrutiny during this last election season. Revelations that Russian actors attempted to influence the 2016 election led Twitter, Facebook, and others to refine efforts at content moderation to prevent undue influence and the spread of disinformation. President Trump has frequently clashed with these “fact-checking” mechanisms, going so far as to issue an executive order in an attempt to prevent platforms from exercising their discretion to control content. It remains to be seen how the newly elected Biden-Harris administration will have on building bipartisan efforts.

Even if consumers suffer no harm from Google and the rest of Big Tech, there may still be concerns about anticompetition. Google drew criticism recently for its $12 billion deal with Apple to be the default search choice on millions of iPhones. A conservative list of the mergers and acquisitions conducted by Alphabet, Inc., Google's parent company, easily tops 200 companies.

Yet, Huddleston said entrepreneurs in Silicon Valley and other tech hubs might be no worse off for Google’s sprawl.

“If my product works with another product, with an existing giant’s product, it may be that my goal is not to replace that product, but to use some element of that product to make it better,” she said.

Huddleston explains that Big Tech companies continue to invest heavily in research and development, which is behavior atypical of a non-competitive market.

Whether antitrust efforts stand to benefit consumers and whether those efforts will even succeed will only be answered in time. It could take upwards of a decade, just as it did for Microsoft, but meanwhile, Big Tech companies may have to adjust their behavior to stay out of the scope of powerful antitrust attacks.

Opinion

Views expressed in this section are exclusively those of the authors and do not necessarily represent the views of The Advocate and its staff as a whole

We Are All Treaty People

by Saagari Coleman

Last Thanksgiving, I was at a friend's house when I made the offhand comment that we live on stolen land. This comment was not meant as divisive or political. I saw it as an incontrovertible historical fact. It caused quite a stir among the other people at dinner, all of whom disagreed with me. Perhaps this is due in large part to the fact that most of my formative years have been in Canada. In high school, the federal government under Conservative Prime Minister Stephen Harper, launched the Truth and Reconciliation Commission. It was an attempt to pay reparations to First Nations people who were placed in residential schools. Most of our high school civics class was devoted to the study of this landmark gesture of apology. I was surprised to discover that so many of my peers in the United States believe that the cultural and actual genocide of First Nations people in North America is a collective fiction. I want to dedicate this opinion to the thought that we are all treaty people, beneficiaries of poorly-honored treaties signed on our behalf by colonial governments.

The United States government has signed over 370 ratified treaties that allowed us to gain sovereignty over native land without military intervention. First Nations people signed these treaties to end the genocide while still preserving some measure of their land. In exchange for relinquishing their external sovereignty, they maintained their inner sovereignty.

They were able to make and enforce laws. In some cases, the federal government promised First Nations people other benefits of U.S. citizenship such as education and housing. In California, none of the eighteen treaties were ratified and they were all placed under an injunction of secrecy. California lawmakers lobbied the U.S. Senate not to ratify these treaties because doing so would cede the gold buried under the land.

In the beginning, these treaties were agreements between two sovereign nations. They mirror treaties made with foreign governments such as the Treaty of Paris which was enacted between the U.S. and Britain at the end of the Revolutionary War. The United States Constitution recognizes their power, allowing the judiciary to preside over them and the president to make them. Importantly, the Constitution calls them "the supreme law of the land." As these treaties were made on our behalf, I will refer to the government using we/us pronouns to emphasize our collective complicity with the ongoing inferior treatment of First Nations people in the United States.

Just one example of the shameful way our government has treated First Nations treaties can be seen in the 1851 treaties of Traverse de Sioux and Mendota.

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Ghosted by the Federal Circuit

by Eugene Dariush Daneshvar

Living with a disability has long inspired me to innovate in a way that improves the lives of others. That is part of why I became a scientist - to understand problems and generate ideas to diagnose, treat, and help people in need. And that is something that, as a biomedical engineer, I have worked to do. During graduate school, I invented a technology that solved significant challenges in connecting the body with implantable electronics for controlling assistive technologies. Implanted devices get encapsulated with scar tissue by the body's immune response which distances them from their targets. My movable devices transform into smaller sizes and get closer to their targets as they enter the body. This helps them both navigate into and integrate with the tissue thereby improving their targeting and efficacy.

Four years after disclosing my invention to my advisor, and only three months before my thesis defense, I was shocked to discover that he had secretly applied for a patent through his company for my very idea. This event occurred before the America Invents Act was implemented, where inventorship was still first to invent and not first to file. His company was subsequently sold for tens of millions of dollars and his triumph left me questioning how and why I was not named the inventor. My commitment to seeking greater equality, in all instances where inequality presents itself, led me to pursue a legal challenge seeking correction of inventorship and to deter others who abuse their power.

After months of discovery, undergoing four eight-hour depositions, multiple motions to compel, and two court-ordered mediations, the defendants offered me hundreds of thousands of dollars to settle, in addition to adding my name to the patent.

Eugene visits the Court of Appeals for the Federal Circuit

Courtesy of Eugene Daneshvar

I declined. In my mind, my case was larger than myself.

With both the law and the facts on my side, I had naïve faith that the judicial process will suffice to bring justice.

Having 'smoking gun' documents supporting my inventorship claim in hand and no corroboration from my advisor predating my disclosure to him, I felt overconfident facing summary judgment. To my disbelief, the District Court relied on false testimony deliberately conflating scientific terms and decided a critical issue of fact against me, returning final judgment in favor of my advisor. The court decided for itself a question for the jury, that my ideas were not a sufficient contribution simply because they did not understand the technology and were tricked by terminology used to describe it. The court neglected to view the facts and draw all inferences in the light most favorable to me, the non-moving party. While it was difficult to accept the delay of justice, I was hopeful that there was a higher tier of court hierarchy to appeal to reason. Enter the U.S. Federal Circuit Court of Appeals, the only appellate court authorized to hear patent cases.

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Opinion

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We Are All Treaty People

. . . cont'd from p. 12

In these treaties, the Dakota gave up their land voluntarily in exchange for money, goods and services. Congress eliminated the portion of the treaty which set up reservation land within Minnesota for the Dakota to live on. We also defaulted on payments to the Dakota nation. This resulted in a famine. When the Dakota people attempted to defend their treaty rights, 400 Dakota men were arrested and hung in the largest mass execution in U.S. history. Later in Dakota history, Congress reneged on yet another treaty and appropriated their sacred Black Hills during the Gold Rush.

In an interview with NPR, Suzan Shown Harjo, a curator of First Nations art at the Smithsonian stated that First Nations people were scattered from their lands and murdered during the Gold Rush. She encourages all U.S. citizens to think of these treaties as our collective obligation, not just First Nations obligation.

This is where the "We Are All Treaty People" movement arose, a succinct line which distills the continuing importance of honoring our treaties to First Nations people. The Fort Laramie Treaty of 1868 remains relevant during a land dispute over the Black Hills. Just last year, Chief John Spotted Tail of the Dakota people stated in the Smithsonian Magazine that the tribe would like to see the land back and the treaty terms honored.

Treaties are akin to statute. As lawyers, we are trained to respect and interpret laws. First Nations people in the United States abide by treaties every day, living on constrained resources and rapidly diminishing land. It is time to honor our end.

After all, we are all treaty people.

Recognizing we are treaty people is an expression of the deepest confidence in our judicial system and our Constitution.

Ghosted by the Federal Circuit

. . . cont'd from p. 12

Another year and set of briefs later led to my personal contact with the injustice of the Federal Circuit's Rule 36, a one-word summary affirmance order - "Affirmed." With no opinion, the Federal Circuit left me wondering, what was the Court thinking? Did they not comprehend the distinction between a genus and a species? Did they disagree about the semantics or physics involved? Did they fall for the defense's specious arguments? Was it them or was it me? Instead of answers, I got silence. **I was ghosted by the Federal Circuit.** This is not a resolution. I lost my right to be named an inventor - a moral truth that even the defense conceded. The finality in the courts brought me no closer to a resolution. Incapable of reasoning the logic of what transpired, I vowed to become an advocate for others. I recorded my emotional reaction upon learning of the silent ruling here.

The Federal Circuit uses their Rule 36 to get rid of cases they do not want to deal with. While appellants submit hundreds of pages seeking clarity, the Court has unchecked power to shrug and issue a one-word response. The Court has broad discretion for when Rule 36 may be applied. Their guidelines say "[t]he court may enter a judgment of affirmance without opinion, citing this rule, when it determines that any of the following conditions exist and an opinion would have no precedential value." A former Federal Circuit clerk, who didn't want to be named for this article, stated that the Court may use this rule even if they come to the same conclusion with different reasoning than described in the briefs. Let that sink in.

Numerous entities track the statistics on the prevalence of Rule 36 affirmances by the Federal Circuit. Jason Rantanen, a Professor of Law at the University of Iowa, authored an article regarding the prevalence of Rule 36. See this link. Over the past five years, an average of 1/3 of cases are issued with no opinion. This practice has been challenged as a violation of due process to the Supreme Court, yet they have so far not granted certiorari.

Our legal system is structured on recursive jurisprudence. It is ubiquitous that we reassess prior determinations, correct mistakes, and consider societal changes that form the bends in the arc of justice. The status quo of appellate practice provides an illusory impression that ultimate justice is achievable if one is persistent. By giving credence to the idea that 1/3 of cases are not frivolous but also not worth opining, the Court undermines the basic principle for which parties come before it. Use of Rule 36 circumvents the judicial process.

"I sought to create precedent for the voiceless students and scientists who are routinely subjected to abuses of power in academia."

Rule 36 serves as a hidden trapdoor to expunge cases that they do not choose to address, and which are afforded no redress. In an interview, Rantanen stated that a justification for the practice is that the judiciary has finite resources and they must use their time with judicial economy. He said judges and clerks work "insane hours" and writing these opinions will take away resources from writing other opinions. If they are so overwhelmed, then allow me to advocate for providing the judiciary with appropriate resources to do their job effectively. Perhaps, it is now time to demand a societal change: "Opinions for all." Let us expand resources for courts, add judges and clerks to augment the court's bandwidth such that they can offer their jurisprudence, and provide both justice and closure to non-moving parties.

The United States Patent and Trademark Office recently created a Legal Experience and Advancement Program (LEAP) that offers additional time in oral hearings for the professional development of practitioners appearing before the Patent Trial and Appeal Board for the first time. This initiative can serve as a model for the Federal Circuit to provide opportunities for the training of newer judicial clerks and having them draft opinions that would otherwise not be written. Most importantly, reduction of a belief to written opinion provides an opportunity to catch a flaw in reasoning, such as in my case wherein the standard of review was patently neglected.

Q &A : Professor Bradley Joondeph on Election Results

Professor Bradley W. Joondeph has been teaching Constitutional Law at Santa Clara University School of Law since 2000 and has clerked for the Honorable Sandra Day O'Connor of the United States Supreme Court and the Honorable Deanell Reece Tacha of the United States Court of Appeals for the Tenth Circuit.

by
Colan Mackenzie

Q: The Trump campaign has initiated over a dozen lawsuits in battleground states like Arizona and Wisconsin. What can you tell us about how those will proceed?

A: I mean they run the gambit. A lot of them have to do with whether the right number of people were permitted to watch the ballot counting process. Some of them have to do with all of the "I's" that need to be dotted and "T's" that need to be crossed before ballot counts are certified. I think some of them have to do with complaints about how the signatures are being matched in various databases and software that was being used to validate signatures on absentee ballots. It kind of is all over the place and I think the basic legal strategy is to try to gum things up. It's not entirely clear that there is a coherent strategy aside from just sowing doubt in the result. If there is a strategy I think it is to try to delay in the hopes that if states got bogged down in these lawsuits such that they couldn't certify their results by December 8th — which is the deadline under the Electoral Count Act for guaranteeing that the electors will be recognized when the votes from the Electoral College are counted. That somehow it would create a window politically for legislatures in Republican controlled states to appoint Republican electors representing those states, despite or in the face of the popular vote.

So you know where could that happen? Potentially Pennsylvania, where I believe Republicans have a majority in the state Legislature, but voted for Biden in the presidential election, so places like that.

Q: Do you think some of these complaints are frivolous enough for the lawyers bringing them on behalf of the Trump campaign to receive section 11 sanctions?

A: So you know, they could. I would need to see what is supported. I've heard some of the colloquies with the judges, like one of them in Pennsylvania, where they went to court and they said basically "we heard from someone who heard from someone else that such-and-such happened" and the judge said "that's all you have? That is absolutely all you have for the basis of claiming that there was fraud?" And then the judge said that's "hearsay within hearsay." And that's borderline, I think.

Rule 11 sanctions are in the eye of the beholder, and it's ultimately up to the discretion of a court. Some of this is proceeding in state court, so it's not governed by Rule 11, though most state court systems have analogs. So if some of [those claims] are frivolous, yes [the lawyers could be subject to sanctions]. More likely though, a lot of them are just going to get dismissed for failure to state a claim under either rule 12(b)(6) or something to the same extent under state law.

Q: OK, so the next question is kind of the polar opposite to that. Do you think that any of these lawsuits could turn into another Bush v. Gore?

A: Sure doesn't look that way. And that's a product of two things: one is, as much as people don't like the Electoral College, one of the nice things about it is that it keeps disputes walled off within one state. So let's say something completely weird happens in Georgia, for instance, and there are 15,000 or 20,000 ballots that are questionable that weren't originally questionable. We might have a question about the result in Georgia, but that in and of itself is not going to be anything close to enough because that doesn't actually question the end result. It might have some effect on the Senate races, but it's not going to affect the presidential race. Even if that were to flip Georgia, Biden still has a wide margin in the Electoral College. There would have to be 2 states in which stuff happened in order to get there, and one of those two states would have to be Pennsylvania. So putting all that aside, nothing seems viable in any single state to question the result of any of the outcomes so far, there doesn't seem to be any "there" there to any of the claims. So, in short, no.

Bush v. Gore was quite different in a couple of ways. One, the result was an awful lot closer. I mean Georgia today is pretty darn close. It's within 14,000 votes, Florida in 2000 was [called for George Bush with a margin of] 537 votes. That's a lot smaller and that gets into the realm where a hand recount could actually potentially change the outcome of the election, particularly in a state as large as Florida.

So one of the reasons Florida dragged on as long as it did is that the margin was so small that very, very small changes in some of the more populous counties could have flipped the result and that one state made the entire difference to the outcome of the election and we don't have either of those things in this case, so. I don't see anything emerging.

Q & A about Election Results

with Bradley Joondeph

Q: Do you think that the Supreme Court will play a role at all?

A: Oh, I sure hope to God not. That would be about the worst possible thing that could happen at this point. I mean, well, I guess we could imagine even worse things happening, but that would be a pretty awful thing to happen. I think they have no appetite for that. And again, I mean having lived through that experience, there's nothing remotely like [Bush v. Gore] right now. And I want to be careful in choosing my words here, but I don't think it's anything more than a rather close-minded fringe of the United States that thinks the outcome of the election is at all in doubt.

That's quite different than in 2000, where I think an awful lot of people had genuine doubts about how many people voted for the other candidate. One of the weird things too, that I think fueled some of the rage that has kind of gotten lost to history is there was a very confusing form of ballot that had been used in Palm Beach County in Florida that year. So somewhere in the neighborhood of 10,000 people very likely voted mistakenly for Pat Buchanan while they were trying to vote for Gore. Because visually on the ballot there was kind of a misalignment of where you checked and where you punched a hole and where the candidate's name was. And we learned from that and people don't design ballots that same way.

But it was immediately obvious the morning after the election that if everyone had actually had their vote registered for the person they intended to vote for, Gore would have won Florida by something like 5 or 10,000 votes. But it turned out he ended up losing by whatever 537 or 457. I can't remember exactly but it was just a small number of votes. So again, there's nothing like that right now where the vast bulk of Americans think that the outcome of the election is at all questionable.

Q: It seems like it would be difficult to undo President Trump's legacy if so much of it consisted of appointments to the courts.

A: Yeah, but that part doesn't concern me as much because that could just mean we have conservative outcomes. Two interpretations of the law, and that happens, right? You lose presidential elections. You're going to get conservative members of the court and they can interpret the Constitution in a conservative way, as long as those judges are committed to the rule of law and playing by the rules and not countenancing the pardoning of cronies, not countenancing purely political ways of choosing to use the machinery of the federal government to go after political opponents, right? I think fair fights over the understanding of the Constitution. That's all fair game and people need to accept losses on things like that.

What I think is enormously destructive is the way in which truth itself and facts have been questioned so that we now have people who think if you go to court, all that matters is the fact that it's a Democratic appointed District Court judge, right? Because it's just going to be a political decision. And over at the Court of Appeals, all that really matters is the draw of the judges is in terms of their party affiliation. When people begin to think that way about the law, then you have effectively undermined the legitimacy of the outcomes of legal decisions in everyone's mind, because they don't seem any different than ideological decisions. And if people can't accept as legitimate, the decisions of courts and of the government and what have you then? Well, I mean, the game is up at that point.

I don't mean to be too apocalyptic about it, but that's what concerns me. I'm a Democrat. I generally favor progressive outcomes, so I would rather have more Democrats in the judiciary than Republicans, but that's not what keeps me up at night. That's not what makes me dispirited. What makes me dispirited is the destruction of long-held norms of respecting truth, respecting fact, not lying, not undermining the legitimacy of perfectly fair elections, I mean that sort of stuff really is dangerous in a way that just having a more conservative judiciary is not.

Q: Do you think there is any way back to normal after this presidency?

A: Oh sure, yeah! Nothing is beyond redemption,nothing. There's no institution, no person and no human institution is beyond redemption. There's always hope that things could change. All it takes is human beings deciding in concert that they want to make that change. It's harder when, when norms are broken. You know norms take a long time to establish. It's much easier to shatter them than it is to rebuild them. A lot of what's happened has been that trust has eroded and trust can't simply be put back into place the way a policy can be through an executive order. So there's an awful lot of work ahead from a lot of people who are willing to commit themselves to the building of those norms, even when, and most importantly, when it is actually against their short-term political interests to do so.

That's what's critical is that people become committed to the long game of preserving democracy, even if preserving democracy in the short term, means they lose an election or they lose a policy fight. We've gotten to a point where people just seem to care about getting what they want. Ideologically, now more than preserving the existence of the entire framework that allows us to have a functioning democracy. There's always hope that things can be different in the future.

But I'm 52 years old. I won't comment on what odds I would give on it happening in my lifetime, but there's always hope.