

THE BOUNDED INDEPENDENCE OF THE AMERICAN COURTS

KEITH E. WHITTINGTON*

President Trump's rhetoric has raised fears that the administration might defy a judicial order or take other steps to subvert the authority and independence of the judiciary. Trump's rhetoric is, to be sure, worrisome. The authority of the American courts to adhere to the rule of law cannot be taken for granted. In moments of extreme conflict between the courts and elected officials, it might be expected that politicians will seek to curb the power of the courts to obstruct their political and policy goals. American courts can now boast hard-won bipartisan support for their authority. Courts can likely weather the storm in a conflict with the President if the broader range of political elites, including those within the Republican Party, continue to see that a powerful and independent judiciary is in their long-term political interest.

There has been an unusual amount of concern that President Donald Trump might invoke what has been called the “Merryman power”—that is, he might refuse to “honor judicial process” or “obey a judicial decree.”¹ Doing so would be quite extraordinary for an American President, though not quite unprecedented in the annals of American history.² It would pose an extreme challenge to judicial authority and the commitment to the rule of law within the American system. It would raise grave concerns about the President’s willingness to comply with constitutional constraints and the ability of the American legal system to control presidential power.

Why should we worry about such things? President Trump has given us some particular reasons to be concerned. The President is a norm-buster. He often appears to have little awareness of how those who occupy the Oval Office should behave, and seems to take some glee in defying expectations.³ When critics complained that his activity on Twitter was not

* Copyright © 2018 by William Nelson Cromwell, Professor of Politics, Princeton University.

¹ Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 83–84 (1993).

² The Lincoln administration tested the boundaries of judicial authority when refusing to recognize writs of habeas corpus in the opening days of the Civil War. *Id.* President Franklin Roosevelt prepared the administration to defy an order from the Supreme Court in the *Gold Clause Cases*. See KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENT, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 35–38 (2007).

³ See Emily Bazelon, *Ground Rules*, N.Y. TIMES MAG., July 16, 2017, at MM9 (discussing President Trump’s “norm-defying calls” to shut down the Russian investigation and describing Trump’s “flouting of norms” as a “defining feature” of his administration); Keith E. Whittington, *The Coming Constitutional Crisis?*, LAWFARE (July 21, 2017, 11:09 AM),

presidential, Trump countered with a tweet roaring that his use of social media is “MODERN DAY PRESIDENTIAL.”⁴ The critics needed to catch up to the new way of doing things. He has shown an unusual willingness to attack the judiciary and even individual judges, from his campaign trail examination of the ethnic heritage of the judge presiding over the lawsuits charging Trump University of fraud,⁵ to his criticism of the “so-called judge” who enjoined his travel ban executive order,⁶ to his complaints that the “courts seem to be so political,” tempting him to denounce them as simply “biased,”⁷ to his claim that a federal district judge “and the court system” were to blame if a terrorist incident were to happen,⁸ to his suggestion that terrorists should not be tried in the federal judiciary because the system is a “joke” and a “laughingstock.”⁹ As these actions suggest, President Trump evinces little respect for the courts and little concern for the presidential obligation to follow the law even when it is inconvenient.

President Trump’s particular attitude toward the courts becomes particularly worrisome, however, because the presidency in general poses a potential threat to the courts. Where the courts are weak, the presidency is powerful. Where the courts are reactive, the presidency is active. President Andrew Jackson probably did not say of a decision of Chief Justice Marshall, “now let him enforce it,” but President Jackson well understood the practical limits to the Court’s authority. President Jackson observed to one correspondent during the Marshall Court’s clash with Georgia over the rights of Native Americans residing within the state, “[t]he decision of the supreme court has fell still born, and they find that it cannot coerce Georgia to yield to its mandate.”¹⁰ The power of the courts rests in the willingness

<https://www.lawfareblog.com/coming-constitutional-crisis>.

⁴ Cleve R. Wootson Jr., *Trump Says His Tweets Are ‘Modern Day Presidential.’ We Checked with Other Modern-Day Leaders*, WASH. POST (July 2, 2017), <https://www.washingtonpost.com/news/worldviews/wp/2017/07/02/trump-says-his-tweets-are-modern-day-presidential-we-checked-with-other-modern-day-presidents/>.

⁵ Kristine Phillips, *All the Times Trump Personally Attacked Judges—and Why His Tirades are ‘Worse than Wrong,’* WASH. POST (Apr. 26, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/04/26/all-the-times-trump-personally-attacked-judges-and-why-his-tirades-are-worse-than-wrong/>.

⁶ *Id.*

⁷ *Id.*

⁸ Philip Rucker, *‘If Something Happens’: Trump Points His Finger in Case of a Terrorist Attack*, WASH. POST (Feb. 6, 2017), https://www.washingtonpost.com/politics/if-something-happens-trump-points-his-finger-in-case-of-a-terror-attack/2017/02/06/8e315b78-eca6-11e6-9662-6eedf1627882_story.html.

⁹ Jennifer Rubin, *Trump’s Mindless Insult to the American Judicial System*, WASH. POST (Nov. 2, 2017), <https://www.washingtonpost.com/blogs/right-turn/wp/2017/11/02/trumps-mindless-insult-to-the-american-judicial-system/>.

¹⁰ Letter from Andrew Jackson to John Coffee (Apr. 7, 1832), in 4 CORRESPONDENCE OF ANDREW JACKSON 429, 430 (John Spencer Bassett ed., 1929); see also WHITTINGTON, *supra* note 2, at 33–34 (discussing the limits on judicial authority and the power of judicial

of others to respect them and voluntarily comply with their judgments.

President Trump might not be well-situated to follow up his harsh rhetoric on the courts with equally harsh action. The President might be unfettered by the nation's norms and traditions and relatively unconcerned with constitutional institutions and restraints, but his coalition partners are unlikely to be so cavalier. Republicans in Congress have a more substantial investment in inherited constitutional commitments and more at stake in the future direction of the political order. They can less afford to subvert the rule of law and undermine the independence of the courts, and as a consequence can be expected to push back against presidential overreach.¹¹

One of the notable developments of the twentieth century in the American judicial system was the rise of a bipartisan commitment to judicial independence and robust constitutional checks on the power of elected officials.¹² Those on the right of the American political spectrum have long supported the power and authority of the courts. When populists railed against “judicial oligarchy” at the end of the Gilded Age, it was conservative politicians and activists who came to the defense of an independent judiciary and denounced those who would “impair the confidence and respect” that the people held in the courts.¹³ The conservatives believed in the importance of the courts in controlling the “tyranny of the popular majority.”¹⁴ The political left was slower to come around to seeing the value of a powerful independent judiciary, but the New Dealers found their own reasons for supporting a “reinvigorated, liberal-minded Judiciary”¹⁵ that could “give voice to the conscience of the country.”¹⁶ For several decades, both ends of the political spectrum have

interpretations of the Constitution under President Jackson).

¹¹ See Keith E. Whittington, *Departmentalism, Judicial Supremacy, and Trump*, BALKINIZATION (Feb. 15, 2017, 7:00 PM), <https://balkin.blogspot.com/2017/02/departmentalism-judicial-supremacy-and.html> (arguing that presidents who have successfully questioned judicial authority have done so in conjunction with a “supportive Congress” and a “mobilized public”).

¹² See Keith E. Whittington, *Preserving the “Dignity and Influence of the Court”*: *Political Supports for Judicial Review in the United States*, in *RETHINKING POLITICAL INSTITUTIONS: THE ART OF THE STATE* 283, 294–98 (Ian Shapiro et al. eds., 2006) (discussing the historical developments leading up to a bipartisan embrace of an activist judiciary in the early twentieth century).

¹³ Sylvester Pennoyer, *The Income Tax Decision, and the Power of the Supreme Court to Nullify Acts of Congress*, 29 AM. L. REV. 550, 558 (1895); *Platform of the National Democratic Party*, N.Y. TIMES, Sept. 4, 1896, at 1.

¹⁴ William Howard Taft, President, Veto Message (Aug. 22, 1911), in 4 THE COLLECTED WORKS OF WILLIAM HOWARD TAFT 149, 150 (David H. Burton ed., 2002).

¹⁵ Franklin D. Roosevelt, The President Presents a Plan for the Reorganization of the Judicial Branch of the Government (Feb. 5, 1937), in 6 PUBLIC PAPERS AND ADDRESS OF FRANKLIN D. ROOSEVELT 133 (Samuel I. Rosenman ed., 1941).

¹⁶ EDWARD S. CORWIN, CONSTITUTIONAL REVOLUTION, LTD. 112 (1941); ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS xiv (1941).

seen benefits from an empowered judiciary and have feared unchecked political majorities. Although President Trump might welcome the chaos that would follow from presidential subversion of the courts, few political elites would likely share that enthusiasm. They might not always approve of the decisions issued by the courts, but they are unlikely to approve of open defiance of a judicial order.

Effective judicial independence has boundaries, and those boundaries depend on how willing political leaders are to tolerate judicial obstruction of particular policy initiatives.¹⁷ It would be a mistake to be complacent about the stature of the courts in the United States. Judicial authority has not been static over time. It has waxed and waned, and grown, as political leaders have found reasons to support, or oppose, the courts. The Jeffersonians in the national government welcomed the Marshall Court's intervention in the dispute over the Bank of the United States. Conservatives in both of the major political parties urged the courts to take a more active role in protecting property and corporations in the Gilded Age. Liberals in both political parties celebrated when the Warren Court took on state-sponsored racial segregation and legislative malapportionment.¹⁸ But the Court has sometimes found itself under siege, as when the Jeffersonians dismantled the judicial stronghold set up by the outgoing Federalists after their electoral losses in 1800 and when the New Dealers threatened to pack the Court if it did not retreat from its opposition to the progressive initiatives.¹⁹

The courts could find themselves losing ground if a more populist sensibility were to become politically ascendant. Presidential defiance of the courts might seem tolerable if political leaders looked only to their short-term interests and discounted the importance of a longer-term horizon. Presidential misbehavior might go unchecked if other elected officials were cowed by the president's popular support. Political criticism of the courts is perfectly consistent with a vigorous judiciary and is a familiar part of the American tradition. But presidential defiance would be far more damaging to the courts and put greater pressure on American constitutional norms. The norm of respect for the courts and deference to their decisions, even when those decisions are controversial or seemingly misguided, can only be sustained if a broad swath of the political leadership of the country continues to play an active role in insisting on the

¹⁷ See Keith E. Whittington, *Legislative Sanctions and the Strategic Environment of Judicial Review*, 1 INT'L J. CONST. L. 446, 446, 448 (2003).

¹⁸ See Keith E. Whittington, "Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court, 99 AM. POL. SCI. REV. 583, 588 (2005).

¹⁹ See WHITTINGTON, *supra* note 2, at 61–64, 94–95.

importance of that norm and presidential conformity to it.²⁰

²⁰ See Tara Leigh Grove, *The Power of "So-Called Judges,"* 93 N.Y.U. L. REV. ONLINE 14, 14–15 (arguing that the Trump administration's conformity with court orders has reinforced the norm of executive compliance with judicial decrees).