

THE POWER OF “SO-CALLED JUDGES”

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INTRODUCTION

On January 27, 2017, President Donald Trump issued an executive order—now commonly known as the first “travel ban.” The order suspended the entry of individuals from seven named countries, all with predominantly Muslim populations.¹ Almost immediately, chaos broke out at airports throughout the United States. Countless individuals—among them, green card holders, refugees, and college students—were stranded at airports or sent back to their countries of origin.²

Amidst all the chaos, groups of individuals and states filed suit, challenging the executive order on constitutional and statutory grounds.³ And on February 3, 2017, just six days after President Trump signed the order, a single federal district court judge in Washington issued a nationwide injunction against the travel ban.⁴ The President did not take kindly to this judicial interference. He disparaged the member of the Article III judiciary as a “so-called judge” and denounced the judicial

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¹ Michael D. Shear & Helene Cooper, *Trump Targets Muslim Areas in Refugee Ban*, N.Y. TIMES, Jan. 28, 2017, at A1.

² See Aaron Blake, *Trump’s Travel Ban Is Causing Chaos—And Putting His Unflinching Nationalism to the Test*, WASH. POST (Jan. 29, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/president-trumps-travel-ban-is-causing-chaos-dont-expect-him-to-back-down/?utm_term=.1adaf571d5cf; see also Nicholas Kulish, *Legal Challenge to Trump’s First Travel Ban Is Settled*, N.Y. TIMES, Sept. 1, 2017, at A16 (“Scores of refugees and immigrants found themselves trapped in airports . . .”).

³ See, e.g., Complaint for Declaratory and Injunctive Relief at 8–13, *Washington v. Trump*, No. C17-0141JLR (W.D. Wash. Feb. 3, 2017). See also Scott Malone & Dan Levine, *Challenges to Trump’s Immigration Orders Spread to More U.S. States*, REUTERS (Jan. 31, 2017, 1:21 PM), <https://www.reuters.com/article/us-usa-trump-immigration-sanfrancisco/challenges-to-trumps-immigration-orders-spread-to-more-u-s-states-idUSKBN15F2B1>.

⁴ *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017) (issuing a preliminary nationwide injunction).

decision as “ridiculous.”⁵

Nevertheless, as soon as that federal district judge issued the nationwide injunction, everything stopped. The chaos at the airports, the stranding of individuals—all of it came to a close. The Department of Homeland Security immediately complied with the federal court’s injunction.⁶ With the stroke of a pen, and in defiance of the President, a single federal judge had stopped the federal government in its tracks.

The federal executive’s compliance with that judicial order (and other orders)⁷ enjoining the President’s travel bans is just one illustration of a broader phenomenon. As I detail in separate work,⁸ in our country, there is a convention—a widespread bipartisan norm—requiring compliance with federal court decrees. Under our current convention, political actors assume that they must comply, even if they believe the judge was not only wrong on the merits but also lacked jurisdiction to issue the decision. Moreover, this convention requires compliance with both Supreme Court and, as the travel ban cases illustrate, lower federal court rulings as well. This convention of obedience is one of the most important—and, I will suggest, fragile—symbols of judicial independence today.

In this short essay, I seek to make two general observations. First, the convention requiring compliance with federal court orders is of relatively recent vintage: it dates only from the mid-twentieth century. That fact alone underscores the fragility of this aspect of judicial independence. Second, notwithstanding that fragility, I argue that there are good reasons to expect continued compliance by the federal executive branch, at least for the foreseeable future.

I

THE RECENT VINTAGE OF THE NORM

In the nineteenth and early twentieth centuries, there was no strong

⁵ Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 8:12 AM), <https://twitter.com/realdonaldtrump/status/827867311054974976> (“The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!”).

⁶ See Laura Jarrett, Rene Marsh & Laura Koran, *Homeland Security Suspends Travel Ban*, CNN POL. (Feb. 4, 2017, 6:05 PM), <https://www.cnn.com/2017/02/03/politics/federal-judge-temporarily-halts-trump-travel-ban-nationwide-ag-says/index.html> (noting that, following the nationwide injunction, the Department of Homeland Security “suspended all actions to implement the immigration order”).

⁷ See Richard Pérez-Pena, *Second Federal Judge Blocks the Third Revision of the Travel Ban*, N.Y. TIMES, Oct. 19, 2017, at A19 (noting that the Trump administration would “appeal the rulings” of two other district courts in Maryland and Hawaii, both of which issued similar preliminary injunctions against a previous version of the travel ban).

⁸ See Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 467–70, 488–505 (2018).

bipartisan norm requiring compliance with federal court orders.⁹ When political actors disobeyed the federal judiciary, they were often cheered on by their political supporters. For example, in the 1830s, many Democrats praised the governor of Georgia, when he openly defied two Supreme Court decisions involving the interests of Native Americans.¹⁰ Along the same lines, in the 1860s, many Republicans defended President Abraham Lincoln when his administration declined to release a prisoner—despite a habeas corpus order by a federal judge.¹¹

This trend of executive defiance continued into the civil rights era of the 1950s and 1960s. Following the Supreme Court's 1954 decision in *Brown v. Board of Education*,¹² “[t]hroughout the South, governors and gubernatorial candidates called for defiance of court orders.”¹³ Several followed through on this pledge. Arkansas Governor Orval Faubus, for example, obstructed a federal desegregation decree when he directed state troops to prevent black students from entering Little Rock High School.¹⁴ And Mississippi Governor Ross Barnett followed suit in 1962 when he violated a federal court order by blocking the admission of James Meredith, who was about to become the University of Mississippi's first black student.¹⁵

One might have thought that by the 1960s, such open defiance of the Article III judiciary would be deemed unacceptable. Yet segregationists cheered on the obstruction.¹⁶ For example, following the Ole Miss incident, Senate Majority Leader James Eastland insisted that “Governor Barnett is entitled to the admiration and respect of all Americans.”¹⁷ To defend his State's authority, Barnett had “courageously and boldly pressed himself

⁹ See *id.* at 488, 490–96.

¹⁰ See *id.* at 493–95 (discussing the case of Corn Tassel and describing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), which involved the prosecution of two missionaries under a Georgia state law that “prohibited white men from living in Cherokee territory without a license from the governor”).

¹¹ See *id.* at 492–93 (discussing the political reaction to *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487)).

¹² 347 U.S. 483 (1954).

¹³ GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 78 (2d ed. 2008).

¹⁴ See MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 326 (2004). Governor Faubus later withdrew the state forces (when threatened with a contempt citation), but a mob of private individuals continued to prevent entry to the school, while state officials looked the other way. *Id.*

¹⁵ See CHARLES W. EAGLES, *THE PRICE OF DEFIANCE: JAMES MEREDITH AND THE INTEGRATION OF OLE MISS* 283–84 (2014). Governor Barnett was later found in contempt of court. See *Meredith v. Fair*, 313 F.2d 532, 533 (5th Cir. 1962) (per curiam).

¹⁶ See Grove, *supra* note 8, at 496–97.

¹⁷ 108 CONG. REC. S20,805 (daily ed. Sept. 26, 1962) (statement of Sen. Eastland); see also KLARMAN, *supra* note 14, at 407 (explaining that Alabama's “entire congressional delegation . . . supported Barnett” and a number of prominent state politicians also supported him).

forward, both as Governor and as an individual, and obstructed an order of a U.S. Court.”¹⁸

The convention requiring compliance with federal court orders was not established until after the civil rights movement. Indeed, I argue that the norm arose in large part *because of* the civil rights movement.¹⁹ In subsequent decades, the massive resistance to *Brown* became the paradigmatic example of defiance of the federal courts. And, as *Brown* became “canonical,”²⁰ the resistance to the decision was viewed as one of the most disgraceful moments in American history. Segregationists who openly obstructed federal desegregation orders were transformed from “regional hero[es]” into historical villains.²¹ This civil rights paradigm both helped to establish and serves to reinforce the convention ensuring obedience to the federal courts. Modern political actors do not want to be equated with the segregationists who sought to obstruct *Brown*.

II

THE STRENGTH OF THE NORM AT THE FEDERAL LEVEL

Since the civil rights era, federal executive officials have consistently complied with federal court orders.²² One of the most instructive examples is the George W. Bush administration’s obedience in the wake of the September 11 terrorist attacks. The Bush administration made bold claims about the scope of executive authority in the war on terror—leading some scholars to worry that the administration might not obey a judicial order restricting its power.²³ Yet when the Supreme Court held that Guantanamo Bay detainees could file federal habeas corpus petitions to challenge their confinement,²⁴ President Bush announced: “We’ll abide by the Court’s decision. That doesn’t mean I have to agree with it.”²⁵

¹⁸ 108 CONG. REC. S20,805 (statement of Sen. Eastland).

¹⁹ See Grove, *supra* note 8, at 498–505, 531–32.

²⁰ See J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1018–19 (1998); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 381 (2011) (describing “the constitutional canon” as “the set of decisions whose correctness participants in constitutional argument must always assume. *Brown* . . . is the classic example”).

²¹ Cf. KLARMAN, *supra* note 14, at 398 (noting that, in the 1950s, aggressive defiance of federal authority translated into political gain for southern politicians).

²² See Grove, *supra* note 8, at 488–90, 490 n.131, 498–501, 500 n.201 (describing compliance during the administrations of Presidents Nixon, Reagan, George W. Bush, Obama, and Trump). The norm seems to be somewhat weaker at the state and local level. See *id.* at 502–05. That may be in part because there are fewer institutional structures supporting compliance.

²³ See Richard H. Fallon, Jr., *Executive Power and the Political Constitution*, 2007 UTAH L. REV. 1, 3–4 (2007) (noting that “[t]he immanent logic of the Bush administration’s position” on unilateral executive power could imply that “the President could also, under the Constitution, lawfully refuse to obey a judicial order”).

²⁴ See *Boumediene v. Bush*, 553 U.S. 723, 771 (2008).

²⁵ Nina Totenberg, *Trump’s Criticism of Judges out of Line with Past Presidents*, NPR POL.

Recent episodes, however, raise questions about the continuing adherence to this convention. One cause for concern is President Trump's rhetoric denouncing federal judges that interfere with his travel ban. Although other presidents have criticized the judiciary, most have not mounted seemingly personal attacks against specific judges.²⁶ Another worrisome sign is the pardon of former Arizona Sheriff Joe Arpaio. In 2016, Arpaio was convicted of criminal contempt for violating a federal court order, which restricted his authority to arrest and detain undocumented immigrants.²⁷ On August 25, 2017, President Trump pardoned Arpaio²⁸—a move that could be seen as an endorsement of not only the sheriff's aggressive law enforcement tactics but also his defiance of the federal court.

Nevertheless, I believe there are good reasons to expect continued compliance by the executive branch, at least for the foreseeable future. Several factors serve to reinforce the convention requiring obedience to all federal court orders. The first is the fact that both Republican and Democratic presidential administrations have consistently complied from the 1970s to the present day.²⁹ That historical record alone places some pressure on current executive officials to continue to adhere to federal court decrees.

Another important factor is the institutional role of the Department of Justice (DOJ). The DOJ's primary function is to represent the interests of the United States in federal court.³⁰ In order to perform this function effectively—that is, to win cases in court—the DOJ must maintain a certain level of credibility with the federal judiciary. The DOJ would have difficulty maintaining that credibility if its “client” (the federal government) threatened to violate adverse federal court orders.

(Feb. 11, 2017, 6:19 AM), <http://www.npr.org/2017/02/11/514587731/trumps-criticism-of-judges-out-of-line-with-past-presidents> (quoting President Bush and noting that he refrained from making personal attacks on judges).

²⁶ See *id.* (noting that past presidents avoided berating the judiciary in public and leveling personal attacks against individual judges).

²⁷ See Stephen Lemons, *Joe Arpaio Guilty on Three Counts of Civil Contempt, Criminal Contempt Still Possible*, PHX. NEW TIMES (May 13, 2016, 9:21 PM), <http://www.phoenixnewtimes.com/news/joe-arpaio-guilty-on-three-counts-of-civil-contempt-criminal-contempt-still-possible-8293359>.

²⁸ See Press Release, The White House, Office of the Press Sec'y, President Trump Pardons Sheriff Joe Arpaio (Aug. 25, 2017), <https://www.whitehouse.gov/briefings-statements/president-trump-pardons-sheriff-joe-arpaio/>.

²⁹ See Grove, *supra* note 8, at 488–90, 490 n.131, 498–501, 500 n.201 (describing compliance during the administrations of Presidents Nixon, Reagan, George W. Bush, and Obama).

³⁰ See 28 U.S.C. § 516 (2012) (“Except as otherwise authorized by law, the conduct of litigation in which the United States . . . is interested . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General.”).

Accordingly, the DOJ has a strong institutional incentive to push the rest of the federal executive branch to abide by federal court judgments.³¹ These institutional incentives are bolstered by the culture among the attorneys at the DOJ. These attorneys were trained in a legal community that has long promoted compliance with federal court orders.³² Indeed, it likely does not occur to many lawyers at the DOJ that defiance is a viable, much less legal, option.

Furthermore, the President himself may decide that there are political advantages to adhering to adverse federal court orders. Judicial review can, after all, be useful to politicians.³³ When a federal court invalidates a controversial measure, politicians can claim credit for the measure—and blame “activist” judges for striking it down—while avoiding much of the political fallout from implementation. Thus, President Trump may have decided that compliance with the travel ban rulings offered the best of both worlds: he could claim credit for (what he describes as) a national security measure, while avoiding at least some of the political fallout.³⁴

There are reasons to believe that these political and institutional incentives have been working (at least thus far). Despite the President’s rhetoric denouncing specific judicial decisions, the Trump administration has thus far complied with every nationwide injunction against it—on topics ranging from the travel ban, to funding for sanctuary cities,³⁵ to the rescission of the Deferred Action for Childhood Arrivals (DACA)

³¹ This argument links up with Neal Katyal’s observations about the executive branch’s “internal separation of powers.” Neal Kumar Katyal, *Toward Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2318 (2006) (arguing that the civil service bureaucracy can help “constrain presidential adventurism”).

³² See Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1132–33 (2013) (arguing that a law school education gives executive branch lawyers “a common socialization” in a community with a “shared set of norms”); see also Grove, *supra* note 8, at 528–29, 531–32 (documenting how law school casebooks since the 1960s have reinforced the norm requiring compliance). My own experience as a DOJ attorney supports the argument that there are institutional incentives.

³³ The literature supporting this point is vast. For a few examples, see KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENT, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 155–56* (2007) (arguing that judicial authority provides politicians with a “self-legitimation” tool); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 36 (1993) (asserting that “prominent elected officials consciously invite the judiciary to resolve” contentious issues).

³⁴ Polls suggest that the American public has been split on the travel ban. See Steven Shepard, *Majority of Voters Back Trump Travel Ban*, POLITICO (July 5, 2017, 5:58 AM), <https://www.politico.com/story/2017/07/05/trump-travel-ban-poll-voters-240215> (noting that “[p]olling on the travel restrictions has varied wildly,” although finding majority support in a July 2017 poll).

³⁵ See, e.g., *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 540 (N.D. Cal. 2017) (enjoining an executive order purporting to withdraw federal funds from sanctuary cities).

program.³⁶ These examples not only signal the current administration's acceptance of the convention requiring compliance with federal court orders but also serve to reinforce and solidify that convention going forward.

CONCLUSION

I do not mean to suggest that we should be sanguine about the future of judicial independence. Rhetoric matters, and President Trump's attacks on judges understandably sent a chill throughout the legal community. But actions matter, too. And it is crucial that, each time a federal judge has issued a nationwide injunction against the travel ban (and other executive actions), the Trump administration has quickly complied, promising to challenge the order through the ordinary appellate review process.³⁷ The compliance of the executive branch—perhaps especially given the President's strong rhetoric—itself reinforces the convention. At least for now, it seems, even “so-called judges” have the power to order around the most powerful government in the world.

³⁶ See, e.g., *Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, No. C 17-05211 WHA, 2018 WL 339144, at *27 (N.D. Cal. Jan. 9, 2018) (ordering the defendants to maintain the DACA program on a nationwide basis on the same terms and conditions that were in effect before the September 5, 2017, rescission); see also *Batalla Vidal v. Nielsen*, No. 16-CV-4756 (NGG) (JO), 2018 WL 834074, at *3 (E.D.N.Y. Feb. 13, 2018) (issuing a preliminary nationwide injunction on similar grounds).

³⁷ Notably, President Trump promised to go through the ordinary appellate process in some of the very same comments that denounced federal court rulings. See Trump, *supra* note 5 (“The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous *and will be overturned!*”) (emphasis added).