

INTRODUCTION

COURTS UNDER PRESSURE: JUDICIAL INDEPENDENCE AND RULE OF LAW IN THE TRUMP ERA

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Since President Trump first took office, many of his most prominent and divisive policies have landed in, and been blocked by, courts—from the travel ban, to the transgender military ban, to efforts to defund sanctuary cities. The President has responded by attacking the courts, occasionally even taking to Twitter to personally denounce judges who issue opinions that he dislikes.¹ For example, he responded to a district court’s rejection of the first travel ban by suggesting that judges should be blamed in the event the United States experiences a terrorist attack.² He also criticized the Ninth Circuit after its adverse decisions on the travel ban and on his executive order withdrawing funding from so-called “sanctuary cities,” citing the circuit’s “terrible record of being overturned (close to 80%).”³

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* We would like to thank Pichaya Winichakul, Marcelo Triana, and the *New York University Law Review* for their assistance in developing this collection and to the authors for their participation. Copyright © 2018 by Johanna Kalb and Alicia Bannon.

¹ See *In His Own Words: The President’s Attacks on the Courts*, BRENNAN CTR. FOR JUSTICE, <https://www.brennancenter.org/analysis/his-own-words-presidents-attacks-courts> (last visited Mar. 29, 2018) (detailing President Trump’s criticisms, in tweets and speeches, of courts).

² Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 5, 2017, 12:39 PM), <https://twitter.com/realDonaldTrump/status/828342202174668800> (“Just cannot believe a judge would put our country in such peril. If something happens blame him and court system. People pouring in. Bad!”).

³ Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 26, 2017, 3:36 AM), <https://twitter.com/realDonaldTrump/status/857182179469774848>. While it is true that seventy-nine percent of the cases reviewed by the Supreme Court were reversed in the period between 2010 and 2015, when considering the rate of reversal based on all cases decided by the circuit, the reversal rate is below one percent. Lauren Carroll & Miriam Valverde, *Does the Ninth Circuit Have an Overturn Record ‘Close to 80%’?*, POLITIFACT (Apr. 26, 2017, 11:24 AM), <http://www.politifact.com/truth-o-meter/statements/2017/apr/26/donald-trump/does-ninth-circuit-have-overturn-record-close-80/>.

These rhetorical attacks on the courts have been coupled with actions signaling open disrespect for the rule of law. The President's refusal to follow ethical guidance with respect to his business interests,⁴ his cheering of police brutality,⁵ his attempts to discredit the Federal Bureau of Investigation and the Department of Justice,⁶ and his decision to pardon Sheriff Joe Arpaio, who was convicted of contempt for failing to follow court orders,⁷ have sent the message that the rules do not apply to the powerful and that, in fact, our safety and security depend upon our willingness to free our leaders from bothersome legal constraints.

To what extent do Trump's actions truly threaten the independence and legitimacy of our courts—and what can be done to protect them? How can and should judges and other institutional actors respond to a president who flouts the processes and checks that normally constrain executive power? The following essays, which resulted from a conference hosted by the Brennan Center for Justice at New York University School of Law, offer a preliminary response to these questions. Collectively, they begin to identify the structural underpinnings of independent courts and describe strategies for bolstering them, both during the present moment and over time.

As Aziz Huq explains, in the United States judicial independence is supported more by convention than by law.⁸ Our courts lack the formal structural protections that exist in some other national systems, making them more vulnerable to political pressure and interference.⁹ Moreover, Tara Grove argues that many of these conventions, including the expectation of official compliance with federal court orders, are of

⁴ See Jordan Fabian, *Federal Ethics Chief Blasts 'Meaningless' Trump Business Plan*, HILL (Jan. 11, 2017, 4:57 PM), <http://thehill.com/business-a-lobbying/313864-government-ethics-chief-blasts-trump-business-plan> (noting that the head of the Office of Government Ethics considered the future President's plan to separate himself from his business interests as inadequate).

⁵ See Mark Berman, *Trump Tells Police Not to Worry About Injuring Suspects During Arrests*, WASH. POST (July 28, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/07/28/trump-tells-police-not-to-worry-about-injuring-suspects-during-arrests/?utm_term=.4a8b4fe5817b (describing President Trump's request for police officers to refrain from using their hands to prevent the heads of those in custody from hitting police vehicles).

⁶ See Stephen Collinson & Jeremy Diamond, *Trump Again at War with 'Deep State' Justice Department*, CNN (Jan. 2, 2018, 3:30 PM), <https://www.cnn.com/2018/01/02/politics/president-donald-trump-deep-state/index.html> (contextualizing President Trump's open criticism of the FBI and the Department of Justice).

⁷ See, e.g., Ryan Struyk, *This Chart Shows Why Trump's Pardon of Arpaio Was So Unusual*, CNN (Aug. 30, 2017), <http://www.cnn.com/2017/08/29/politics/trump-pardon-arpaio-chart-unusual/index.html>.

⁸ Aziz Z. Huq, *Democratic Erosion and the Courts*, 93 N.Y.U. L. REV. ONLINE 21, 29–31 (2018).

⁹ *Id.*

relatively recent vintage.¹⁰ Grove argues that this norm emerged following and in response to the Civil Rights Movement; as *Brown v. Board of Education* has become entrenched in American law and culture, both the racism of the segregationists and their defiance of the courts were discredited.¹¹ Thus far, the Trump administration has continued to comply with court orders. Grove argues that institutional constraints within the executive branch make this trend likely to continue.¹² By contrast, Shirin Sinnar documents the ways in which many executive branch oversight mechanisms, which help to check and prevent lawlessness in the executive branch, depend on norms that are themselves under attack.¹³ In the meantime, however, the President's flirtation with white nationalist rhetoric and policies¹⁴ raises questions about whether our national commitment to *Brown's* legacy, and, relatedly, our collective rejection of the lawlessness of its opponents, will have the same universal appeal in coming years.

How should judges respond to this adversarial and unpredictable President? At least in the travel ban cases, the lower courts have so far been undeterred by Trump's rhetoric; judges from across the political spectrum have rejected its various incarnations.¹⁵ As Judge Nancy Gertner notes, however, this outcome was far from inevitable, given the many doctrines

¹⁰ Tara Leigh Grove, *The Power of "So-Called" Judges*, 93 N.Y.U. L. REV. ONLINE 14, 15–17 (2018).

¹¹ *Id.* (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

¹² *Id.* at 18–20.

¹³ See Shirin Sinnar, *Internal Oversight and the Tenuous Protection of Norms*, 93 N.Y.U. L. REV. ONLINE 61 (2018).

¹⁴ See, e.g., Josh Dawsey, *Trump Derides Protections for Immigrants from 'Shithole' Countries*, WASH. POST (Jan. 12, 2018), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html?utm_term=.343dd48ea15f (discussing President Trump's stated discontent with immigration from Haiti, El Salvador, and African countries, as opposed to that from Norway and Asian countries); Glenn Thrush & Maggie Haberman, *Trump Gives White Supremacists an Unequivocal Boost*, N.Y. TIMES (Aug. 15, 2017), <https://www.nytimes.com/2017/08/15/us/politics/trump-charlottesville-white-nationalists.html> ("President Trump buoyed the white nationalist movement on Tuesday as no president has done in generations.").

¹⁵ See Dahlia Lithwick & Steve Vladeck, *Resisting the Myth of the Judicial Resistance*, SLATE (Jan. 25, 2018, 4:44 PM), <https://slate.com/news-and-politics/2018/01/the-judges-whove-ruled-against-trump-arent-part-of-some-judicial-resistance.html> (arguing that there is no evidence that judges who have ruled against Trump did so because of political motives); see generally, e.g., Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 605–06 (4th Cir.) (en banc), vacated as moot, 138 S. Ct. 353 (2017) (finding that the plaintiff had plausibly alleged that the travel ban was religiously motivated, but lifting the injunction against President Trump); Washington v. Trump, 847 F.3d 1151, 1156 (9th Cir.), reconsideration en banc denied, 853 F.3d 933 (9th Cir.), and reconsideration en banc denied, 858 F.3d 1168 (9th Cir.), cert. denied sub nom. Golden v. Washington, 138 S. Ct. 448 (2017) (denying an emergency motion for stay of the lower court order enjoining the travel ban); Washington v. Trump, No. C17-0141JLR, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017) (granting a temporary restraining order that the State of Washington and the State of Minnesota filed in response to the travel ban).

that federal courts have developed to avoid conflict with the political branches.¹⁶ She worries that these doctrines, developed during “normal times,” have left the courts poorly equipped for this moment, requiring courts to “duck, avoid, and evade” and thereby undermining their ability to decide cases that protect democratic institutions and the rule of law.¹⁷ But she also suggests that judges may approach their role differently today, in the face of real abuses of power.¹⁸

Stephen Vladeck likewise applauds heightened skepticism by judges of the exercise of government power.¹⁹ He notes, however, that some conservative commentators and academics have routinely characterized judges as joining the “resistance” whenever they rule against the administration; he argues that “skeptical” judging has a political valence, raising difficult questions about whether there are objective standards for determining when a judge has crossed a line.²⁰

Public critiques of “resistance” judges, together with Trump’s more direct attacks, may also pose a threat to public confidence in judicial legitimacy. James Gibson and Michael Nelson’s survey research indicates that Trump’s rhetoric has not diminished judicial legitimacy thus far.²¹ They also found, however, that criticisms leveled by experts, alleging that judges are behaving politically, may negatively impact public perceptions of the courts.²² David Fontana’s essay provides further cause for concern, warning that the large body of research showing strong and durable public support for the U.S. Supreme Court may only be measuring what Americans think about the Court in the abstract, when the actual stakes of its decisions are low.²³ He points out that we know far less about how people respond “in the moment when passions are highest and constitutional structures are most threatened.”²⁴

The next several years are likely to provide ample data through which to explore Fontana’s concerns. The ongoing paralysis and polarization in Congress means that significant policy decisions are increasingly being

¹⁶ Nancy Gertner, *The “Lower” Federal Courts: Judging in a Time of Trump*, 93 N.Y.U. L. REV. ONLINE 7, 10–12 (2018).

¹⁷ *Id.*

¹⁸ *Id.* Notably, however, Huq offers a contrasting view, expressing skepticism that American courts offer a real protection against democratic backsliding. *See* Huq, *supra* note 8, at 28–31.

¹⁹ *See* Stephen I. Vladeck, *The Aggressive Virtues*, 93 N.Y.U. L. REV. ONLINE 66, 67–68 (2018).

²⁰ *Id.*

²¹ *See* Michael J. Nelson & James L. Gibson, *Has Trump Trumped the Courts?*, 93 N.Y.U. L. REV. ONLINE 32, 39 (2018) (“[O]ur results suggest that criticisms of the Court made by President Trump are not associated with changes in support for the Court.”).

²² *Id.*

²³ David Fontana, *How Do People Think About the Supreme Court when They Care?*, 93 N.Y.U. L. REV. ONLINE 50, 53–54 (2018).

²⁴ *Id.* at 54–55.

kicked to the courts for resolution. In addition, Trump's disregard of many of the conventions governing presidential behavior and Congress's apparent inability to set meaningful limits on his conduct mean that the courts will likely be asked to define the boundaries of presidential power in many high stakes political disputes. This is a problem. As Andy Wright explains, our constitutional system is heavily reliant on its actors operating in "good faith."²⁵ As long as the party in power refuses to self-police, that job will fall to the courts, potentially setting them up to be viewed by the public as a partisan obstacle to the Republican agenda.

Over the long term, the best protection for both the independence and legitimacy of the courts is in building their public support. This will mean reminding political and other actors of the importance of their long-term investment in the courts. As Keith Whittington explains, politicians on the right (and left) have a long history of supporting the independent judiciary as a check on majority power and have self-interested reasons to continue doing so.²⁶

But accomplishing this task will also require a commitment to building a judiciary that is more likely to engender public support—one that is more representative, less beholden to special interests, and more capable of providing meaningful access to justice in the matters that impact people's lives. As David Lyle explains, in recent years, powerful special interest groups have invested heavily in state judicial elections to intimidate or replace judges who rule against them, and frustrated legislators have worked to pack or crack courts that present an obstacle to political agendas.²⁷ There is evidence that these pressures are impacting how judges rule in cases—leading to harsher decisions in criminal cases²⁸ and to decisions favoring wealthy special interest groups.²⁹ At the federal level, courts have been hollowed out as Congress has limited their jurisdiction over cases impacting vulnerable populations and as the courts themselves

²⁵ See Andrew McCauley Wright, *Constitutional Good Faith*, 93 N.Y.U. L. REV. ONLINE 41 (2018).

²⁶ See Keith E. Whittington, *The Bounded Independence of the American Courts*, 93 N.Y.U. L. REV. ONLINE 70, 72–74 (2018) (describing the "rise of a bipartisan commitment to judicial independence").

²⁷ See David Lyle, *A Norm No More: Elected Officials' Lack of Deference to State Courts*, 93 N.Y.U. L. REV. ONLINE 55, 56–58 (2018) (discussing state level attacks on the judiciary).

²⁸ See KATE BERRY, BRENNAN CTR. FOR JUSTICE, HOW JUDICIAL ELECTIONS IMPACT CRIMINAL CASES 7–11 (2015), https://www.brennancenter.org/sites/default/files/publications/How_Judicial_Elections_Impact_Criminal_Cases.pdf (discussing studies of judicial decision making in periods preceding elections that conclude state court judges are less likely to rule in favor of criminal defendants when threatened with future attack advertisements).

²⁹ See Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 670–71 (2009) (addressing the statistically significant benefits to interest groups that donated to judges).

have pushed an increasing number of people into private arbitration.³⁰ As a result, courts are less accessible to resolve the judicial claims of everyday litigants.

Put simply, if the public doesn't see the importance of courts in their lives, they will be less likely to object to efforts to undermine them. And if they don't see the importance of courts in their lives, then we have to ask why—and an answer that focuses exclusively, or even primarily, on the Trump administration misses the point.

³⁰ See generally Judith Resnik, *Interdependent Federal Judiciaries: Puzzling About Why & How to Value the Independence of Which Judges*, *DAEDALUS*, Fall 2008, 28, 40–44 (analyzing factors affecting the scope of jurisdiction for federal judges).