
# *Trump and the Judiciary*

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The American constitutional system is characterized by fragmentation, checks-and-balances, and supermajoritarianism. This has often been a point of frustration for reformers and activists who want to make use of the levers of political power to change the status quo, make new policy, and remake social practices. To get something done, it is often necessary to mobilize large, broad, impassioned and persistent coalitions. Blocking government action is often much easier. Defenders of the status quo always have home field advantage.

The judiciary is a particularly visible, if not necessarily a particularly important, check on political action. This was not always the case. The founding generation had learned from Montesquieu that the judiciary needed to be separated from the other branches of government. Observing the experience of the European states, Montesquieu asserted that "there is no liberty, if the judiciary power be not separated from the legislative and executive." The power of "trying the causes of individuals" had to be distinguished for the power "of enacting laws" or "of executing the public resolutions." Uniting those powers would allow the judge to exercise "arbitrary control" over individuals or act with "violence and oppression."[1] Properly separated, Montesquieu thought, "the judiciary is in some measure next to nothing." It could hardly serve as an important "regulating power" on the other parts of government or engage in serious repression itself.[2] Alexander Hamilton echoed these thoughts when declaring that the proposed federal judiciary under the U.S. Constitution would be the "least dangerous branch," possessed of "neither FORCE nor WILL, but merely judgment."[3]

Since "judges are not more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigor," the legislature could still oppress the people by putting in place a draconian legal regime.[4] Thus, the English theorist James Harrington had emphasized that a commonwealth characterized by liberty was laid on the "Foundation of common Right or Interest," thus making it an "Empire of Laws, and not of Men." Liberty was extinguished when government was perverted to serve merely the "privat[e] Interest" of a faction of men, transforming it into an "Empire of Men, and not of Laws," though laws might be the vehicle through which those favored few exercised their will.[5] As John Adams famously glossed Harrington, "where the public interest governs, it is a government of laws, and not of men," but where "the interest of a king, or of a party" predominated, then "private interests governs" and it was no longer a "government of laws" properly understood.[6] It was inviting trouble to marry the courts to either the legislature or the executive, but liberty ultimately depended on having a system of laws oriented to the public good rather than private interests.

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[1] Montesquieu, *The Spirit of Laws*, trans. Thomas Nugent, vol. 1 (London: J. Nourse and P. Vaillant, 1766), 222.
[2] Ibid., 228.
[3] Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, ed. Clinton Rossiter (New York: Signet Classic, 1961), No. 76, 464.
[4] Ibid., 232.
[5] James Harrington, *The Oceana and Other Works*, 3rd ed. (London: A. Millar, 1747), 37.
[6] John Adams, *A Defence of the Constitutions of Government of the United States*, vol. 1, 3rd ed. (Philadelphia: Budd and Bartram, 1797), 126.

Courts had the potential to play a somewhat significant role in the American constitutional system, though this potential was slow to be realized. Chief Justice John Marshall appealed to this possibility in *Marbury v. Madison*. The case has primarily been remembered in the twentieth century for Marshall's invocation of the power of the courts to interpret and apply the terms of the Constitution, and when necessary to declare laws to be void as inconsistent with the Constitution. The system of laws that governed the United States included the Constitution itself, and thus judges had a duty to effectuate the legal commands of the sovereign people who had adopted the constitutional text rather than the inferior commands of the legislature when the latter ran afoul of the former. In the nineteenth century, the Marbury case was more often called forth to emphasize a somewhat different point.[7] Invalidating a law of Congress in *Marbury* was John Marshall's escape hatch to avoid a direct confrontation with the Thomas Jefferson administration. Before he made his escape, however, Marshall lingered over the authority of the courts to examine the workings of the executive branch. "The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right."[8] Some actions of the president and his executive officers were strictly "political" and beyond the scrutiny of the courts, but when Congress had imposed specific duties on an executive officer and the rights of individuals depended on how those duties were conducted, then "he is so far the officer of the law" and "amenable to the laws for his conduct, and cannot at this discretion, sport away the vested rights of others."[9] Government officials were subject to judicial review of how well they executed their legal responsibilities. Judicial scrutiny was sporadic and limited through much of the nineteenth century, but by the twentieth century the courts were asserting that they had a more significant role to play within the constitutional system. First conservatives but later progressives as well embraced the notion that judges should serve as guardians of individual rights and enforcers of constitutional limits on political power. The judiciary was elevated to being an important check on the abuse of power.[10]

The U.S. Supreme Court has come to embrace that authority when reviewing acts of the state and national legislature, but it has been less ambitious about confronting the president. Even in the case of judicial review of legislation, there is reason to question just how strong of a check the judiciary has been in practice. More often than not, the courts have been reluctant to directly confront mobilized political majorities, though the justices have often been vocal about their preeminent role in protecting constitutional commitments from the willful legislature.[11] When it comes to checking the executive branch, the courts have been even less emphatic about their critical role as a special constitutional guardian and have been similarly reluctant to get in the way.

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[7] Keith E. Whittington and Amanda Rinderle, "Making a Mountain Out of a Molehill? Marbury and the Construction of the Constitutional Canon," *Hastings Constitutional Law Quarterly* 39 (2012): 823.

[8] Marbury v. Madison, 5 U.S. 137, 163 (1803).

[9] Marbury, 166.

[10] See Keith E. Whittington, *Political Foundations of Judicial Supremacy* (Princeton: Princeton University Press, 2007).

[11] See Keith E. Whittington, *Repugnant Acts* (Lawrence: University Press of Kansas, forthcoming).

The Court has constructed a multitude of doctrinal frameworks that tend to emphasize deference to decisions made in the executive branch.[12] In *Marbury* itself, the Court said that it was not the role of the judiciary "to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive can never be made in this court."[13] Although the justices have carved away at the scope of the political question doctrine over time, a great deal of presidential action in the international arena is still regarded as beyond the judicial purview. The Court has left itself with a set of flexible doctrines for evaluating presidential exertions of constitutional authority, but has frequently sided with the executive when those exertions are challenged.[14] Presidents have been able to lean not only on their own constitutional authority but also on a vast network of loosely written statutes that further empower the executive. Congress has spent over a century constructing an administrative state with substantial resources and a broad statutory mandate.[15]

In practice, that deferential doctrinal framework has resulted in deferential decisions. The courts do, of course, sometimes push back on executive decisionmaking, but across a broad sweep of presidential administrations, courts, and substantive issue areas the executive often wins. The executive has been particularly successful in court when operating in the foreign policy arena and when backed by the Congress and the public. Wartime presidents can generally expect their decisions to find support from the courts.[16]

## Trump-era Legal Troubles

Almost since the moment of his inauguration, Trump has been beset by legal troubles. His policy initiatives have been tied up courts. He and his associates have been under criminal investigation of their campaign activities. His financial entanglements have been the subject of unprecedented litigation. Whether the courts ultimately rule against Trump in some or all of these various lawsuits, there is no doubt that they have tied up his administration and frustrated its ability to move forward.

It would seem sufficient to simply take note of the range of legal challenges confronting the Trump White House. They can be bundled into three broad categories. First are the lawsuits challenging the policies that have emerged directly from the White House itself. Executive orders relating to the "travel ban," sanctuary cities, DACA, and the transgendered in the military have all been challenged as exceeding the executive's constitutional and statutory authority. Those executive orders have often shown evidence of being quickly and haphazardly

[12] Keith E. Whittington, "Judicial Checks on the Presidency," in *The Oxford Handbook of the American Presidency*, eds. George C. Edwards and William G. Howell (Cambridge, UK: Oxford University Press, 2009).
[13] Marbury, 170.
[14] Louis Fisher, *Supreme Court Expansion of Presidential Power* (Lawrence: University Press of Kansas, 2017).
[15] See also, Keith E. Whittington and Jason Iuliano, "The Myth of the Nondelegation Doctrine," *University of Pennsylvania Law Review* 165 (2017): 379.
[16] See, e.g., William G. Howell and Faisal Z. Ahmed, "Voting for the President: The Supreme Court during War," *Journal of Law, Economics, and Organization* 30 (2014): 39; Jeff Yates, *Popular Justice* (Albany, NY: State University of New York Press, 2002); Kimi Lynn King and James Meernick, "The Sole Organ before the Court: Presidential Power in Foreign Policy Cases, 1790-1996," *Presidential Studies Quarterly* 28 (1998): 666.

drafted. In some cases, they have clearly pushed the boundaries of executive authority. Many lower courts have taken a skeptical stance toward the administration, and in some instances the administration has had to go back to the drawing board to try to adjust its policies to accommodate judicial demands.

The second set of lawsuits are those that have challenged regulatory decisions made by the broader executive branch during the Trump administration. These legal challenges have come later, as the administration has been slower to produce these policy changes. The policies have emerged out of the normal workings of the administrative state, and the litigation that they have provoked raises more familiar questions of administrative law. What is distinctive about the these lawsuits, however, is the extent to which they have emerged out of a comprehensive partisan legal campaign often organized out of the offices of state attorneys general. Such campaigns had begun to ramp up during the late Obama administration, but attorneys general in "blue states" have significantly escalated the tactic and operated with unprecedented speed and coordination.[17] State attorneys general have also played a prominent role in challenging Trump executive orders as well, and have established themselves as an important mechanism for mobilizing the law as a check in the administration.

The third set of legal processes relate to Trump more personally. The special counsel appointed by the Department of Justice has been investigating the 2016 presidential campaign from the early days of the administration, and has often earned the wrath of the president who apparently tried to quash the investigation at an early point by removing FBI director James Comey. For almost as long, Trump has been threatened with litigation arising from his alleged violations of the emoluments clause of the Constitution and from his past personal conduct. These challenges are detached from administration policy and less coordinated in their origins (though the emoluments litigation is rooted in a similar partisan and institutional base as much of the rest of the litigation aimed at the administration).

The various legal troubles that the Trump administration has faced certainly emphasize the fragmented nature of the American state and the extent to which the law and courts can be mobilized to stifle an administration. At the very least, the availability of the courts and the organization of a legal opposition show how presidential initiatives can be tied up and delayed. In some cases, the courts have perhaps stretched too far to challenge the administration, raising concerns that the judiciary has aligned itself in a partisan political battle (or can easily be perceived as having done so).[18] In other cases, the courts have forced the administration to take more care in formulating its policies and to moderate its political objectives. What remains to be seen is the extent to which the courts ultimately become inclined to pare back the web of judicial doctrines that have favored presidential and executive authority. Presidents have long relied on their ability to exercise wide discretion over such issues as the admission of aliens into the United States, the stringency of deportation efforts, or the imposition of punitive tariff duties. Assuming that the constitutional and statutory texts upon which presidents have relied remain unchanged, will the antics of the Trump administration be enough to force judges to reevaluate their own approach to those legal authorities and the traditional deference that they have showed to presidents? Will the judiciary ultimately be inclined to show the Trump

[17] See Paul Nolette, *Federalism on Trial* (Lawrence: University Press of Kansas, 2015).

[18] See, e.g., Josh Blackman, "On the Judicial Resistance," *Lawfare* (February 12, 2018).

administration a similar level of deference as it has shown presidential administrations in the past, will it instead launch a significant reevaluation of its approach to presidential power, or will it devise some sort of one-off stopgap to delimit presidential discretion for the Trump White House alone?[19]

Trump-era Rule of Law Worries

Beyond the question of the extent to which the courts have resisted the actions of the Trump administration, President's Trump rhetoric has also created an unusual degree of concern about the future of the federal judiciary. Few things about the Trump candidacy and now the Trump presidency have been conventional. Trump has positioned himself as a norm buster, a foe of "the establishment" and the usual ways in which American politics work. 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. It is not always easy to tell where the limits of Trump's ambitions for shaking things up might be, and for many the rule of law and the independence of the American judiciary seem unusually vulnerable.

Most worrisome is the possibility that Trump might choose to defy the courts. It has long been recognized the courts are particularly vulnerable to the threat of defiance. As Hamilton pointed out, the courts have only the power of judgment, but not the capacity to deploy force. The courts are reliant on others to effectuate their rulings. In particular, the courts depend on the willingness of executive branch officials to voluntarily accept judicial verdicts and take action to implement them. Chief Justice Marshall hid the Court's vulnerability to presidential defiance by avoiding issuing an order to the Jefferson administration to deliver the withheld commission of judicial office to William Marbury, an order that quite possibly would have been ignored. The somewhat apocryphal story of President Andrew Jackson huffing that John Marshall had rendered a decision against the state of Georgia but could not expect to enforce it rings down through history precisely because Jackson's warning always hovers in the background of the American constitutional system. There is always the possibility – and implied threat – that an unpopular judicial ruling might be rejected by the president and lay inert and unenforced.

Trump gives some reason to worry about how he might react to an adverse judicial ruling. His rhetoric is unconventional and undisciplined. He has relatively few ties to a larger partisan or political establishment that might help give him reason to preserve existing institutions. To an unusual degree for a president, he has little to lose if established institutions and norms are subverted. His deepest commitments are to his own business empire, rather than to the political order. In the past, the threat of presidential defiance seemed most likely to come when the courts challenged their core policy commitments and political fortunes. Abraham Lincoln was willing to take on the courts if doing so meant preserving the Union. Franklin Roosevelt was willing to ignore the courts if doing so meant salvaging the nation from economic calamity. Trump, on the other hand, seems to have few political commitments that

[19] See, e.g., Benjamin Wittes and Quinta Jurecic, "The Revolt of the Judges: What Happens When the Judiciary Doesn't Trust the President's Oath," *Lawfare* (March 16, 2017); Keith E. Whittington, "Departmentalism, Judicial Supremacy, and DACA," *Lawfare* (February 26, 2018)..

might justify such extreme actions.[20] From a purely instrumental perspective, the Trump administration would seem to be better advised to roll with the punches of judicial defeats than to attempt to strike back and escalate the conflict with the courts. Trump does seem to care rather deeply about his personal interests, however, and it is easier to imagine the president making the calculation that taking on the courts is worthwhile if his own financial interests are seriously threatened. Thus, it seems hard to imagine the president choosing to go to war with the judiciary over the fate of DACA or the travel ban, but somewhat easier to imagine Trump throwing caution to the wind in order to fend off the Mueller probe or litigation directed toward his business dealings. If Trump perceives himself as having little at stake in the preservation of the authority of the judiciary, it seems much less likely that other political leaders feel the same. Precisely because Trump's concerns about the judiciary are personal rather than partisan or ideological, they are not likely to be shared by others. Where Jackson or Lincoln or Roosevelt could count on at least an important segment of his own political movement backing a play against the courts, it is not evident that Trump could expect any political support if he were to tilt at the judicial windmill.[21] Both the Democratic Party and the Republican Party have reasons of their own for wanting to see the preservation of the authority of the courts as potential checks on abuses of political power. While other political leaders might object to particular actions taken by the Roberts Court, there are now many decades of bipartisan support for the idea of an independent and powerful court with the capacity to serve as a constitutional check. The president might well find himself isolated were he to test his strength against the Supreme Court.[22]

A second but related concern is that Trump's rhetoric itself has a tendency to undermine the rule of law and confidence in American legal institutions. Public opinion is generally thought to be an important bulwark of judicial authority.[23] Public esteem for the courts helps keep in line political leaders who might otherwise be inclined to attack the courts. Public hostility to the courts might incentivize politicians to go after the courts. When courts came under assault from the political left at the turn of the twentieth century, conservatives rallied to their defense and tried to rebuild public faith in the importance of an independent judiciary in order to beat back that assault and boost their own political fortunes. Similar efforts might be needed today.

Trump's rhetorical volleys aimed at the legitimacy of the courts are potentially damaging and heighten their vulnerability to more substantive attack. It is hardly unusual for presidents to criticize the courts, or even to blame the courts for political and policy failures. Trump's demeaning of "so-called" judges is only a less familiar echo of the New Dealers' denunciation of "activist" judges. The courts have weathered such assaults before.

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[20] The effort to tie Andrew Jackson down with partisan commitments is informative on this front. See James W. Ceaser, *Presidential Selection* (Princeton: Princeton University Press, 1979).

[21] On the historical dynamic, see Keith E. Whittington, "Legislative Sanctions and the Strategic Environment of Judicial Review," *International Journal of Constitutional Law* 1 (2003): 446.

[22] See also, Keith E. Whittington, "The Bounded Independence of American Courts," *New York University Law Review Online* (forthcoming).

[23] See Georg Vanberg, "Establishing and Maintaining Judicial Independence," in *The Oxford Handbook of Law and Politics*, eds. Gregory A. Caldeira, R. Daniel Kelemen, and Keith E. Whittington (Oxford, UK: Oxford University Press, 2008).

Nonetheless, Trump's sustained rhetorical attack on the courts has the possibility of shifting public opinion on the courts. Although unlikely to depress the "diffuse support" for the courts of the mass public generally, Trump's unrelenting attacks (along with those of his surrogates) might well asymmetrically depress support for the courts among his own co-partisans. To the extent that the president has been able to build a public narrative that undermines the legitimacy of the courts and legal institutions like the Department of Justice in the eyes of his most ardent supporters, he might make it difficult for Republican politicians to rally to the support of Robert Mueller or the courts if administration were to attempt to fire the special counsel, end the probe of the presidential campaign, or defy a judicial order. If Republican legislators were willing to allow the president to stand above legal liability or political accountability for clear malfeasance, then the constitutional foundations of the republic would be threatened in a substantial way.[24]

Finally, some have worried that the president is busily "packing" the federal judiciary in an unprecedented way. The president has been able to fill vacancies on the federal bench at an unusually rapid pace. Of course, the president benefited from an obstructionist Republican Senate holding open vacancies on the courts, including the Supreme Court, during a previous Democratic administration (just as an obstructionist Democratic Senate held vacancies open during the GOP administration before that).[25] This particular worry seems significantly overplayed. There is little evidence that the Trump administration has been advancing judicial nominees that are particularly "Trumpist" or loyal to the president's personal agenda. Indeed, there is little evidence that there is much of an organized Trumpist movement from which a significant number of judicial nominees could be drawn. Instead, the administration has largely delegated judicial appointments to the well-organized Federalist Society and has relied on its ability to identify and recruit conventionally conservative lawyers of the same sort that would have been appointed by any Republican administration since Ronald Reagan.[26] The administration has certainly been unusually efficient in moving nominees forward, but it has benefited from a streamlined majoritarian process for Senate confirmations put in place by the Democratic Senate leadership during the Obama administration to actually put those nominees on the bench. If the Senate were to change hands, undoubtedly the partisan obstruction of judicial nominees would return. Meanwhile, the judges appointed by Trump are likely to adhere to a set of constitutional ideals that as often as not would hobble administration initiatives and that are unlikely to be conducive to the kind of authoritarian populism often expressed by the president.

If an independent judiciary is one of the "guardrails" of American democracy, it has so far held up fairly effectively. The courts have been open to litigants seeking to impair the Trump administration. Legal investigations of the president and his associates have gone forward, despite numerous bumps along the road. The administration has grumbled about adverse judicial rulings, but thus far has pursued the normal course of appealing losses up the judicial hierarchy and revising policies to better accommodate judicial objections.

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[24] See also, Keith E. Whittington, "The Coming Constitutional Crisis?," *Lawfare* (July 21, 2017).

[25] See also, Keith E. Whittington, "Partisanship, Norms, and Federal Judicial Appointments," *Balkinization* (November 29, 2o17).

[26] More accurately, I should so members of the Federalist Society since the organization itself is not directly involved in political activities.

Those guardrails could be bolstered. To the extent that the administration has benefitted from expansive statutory delegations of authority over trade and immigration, for example, Congress has within its power the ability to withdraw or curtail that authority. If Congress is unhappy with the policy direction of the Trump presidency, the legislature should not rely on the courts to creatively find ways to hamper the administration. Congress should exercise its own constitutional powers to make public policy and limit the discretion of the White House. To the extent that the administration has obstructed legal investigations of scandals surrounding the president, Congress has the ability to raise the political stakes of defiance and insist that the investigations be able to play themselves out. Although there are constitutional limits to how far Congress could go to insulate a special counsel from presidential supervision, Congress has ample constitutional authority to hold the president accountable for his actions and support independent investigations of the White House. To the extent that the president abuses his constitutional authority, it is ultimately the responsibility of Congress to put an end to those abuses.[27]

[27] Including at the extreme, the use of the impeachment power. See Keith E. Whittington, "Possibly Impeachable Offenses: The Need for Congressional Investigation," Niskanen Center (August 2, 2017).