JUDICIAL INDEPENDENCE IN THE AGE OF ★ ★ ★ ★ ★ TRUMP ★ ★ ★ ★ ★

by Stephen M. Orlofsky

"A bad high school student would understand this." That is what President Donald J. Trump had to say about the Ninth Circuit, which was charged in Feb. 2017 with determining whether a district court's order blocking the president's travel ban should be reversed. Coming less than a month into his presidency, it was just one of many critical comments made by President Trump about the nation's federal Judiciary since he took office. As the tweeting public knows, the president has criticized federal judges for political bias, and has gone so far as to blame them for future terrorist attacks.

As much as these criticisms may seem unprecedented, friction between the judicial and executive branches of the federal government is not new.

In response to the Supreme Court's landmark decision in *McCulloch v. Maryland*,[1] President Thomas Jefferson wrote privately that "the judiciary of the United States is the subtle corps of sappers and miners constantly working under ground to undermine the foundations of our confederated fabric. They are construing our constitution from a co-ordination of a general and special government to a general and supreme one alone."

President Andrew Jackson is reported to have said, "John Marshall has made his decision, now let him enforce it," regarding an opinion by the Supreme Court on Cherokee Indians.

President Franklin Roosevelt is known for having attempted to "pack" the Supreme Court when the justices were not as amenable to his New Deal program as he would have liked.

Even President Barack Obama, a scholar of constitutional law, called out the Supreme Court over its *Citizens United*[2] decision during his 2010 State of the Union Address.

Despite its disputes with presidents, the federal Judiciary has remained independent since its inception—and, in this author's view, it will remain so. It is true, never before has a president so vigorously attacked the Judiciary, alleging political bias, or, in the case of Judge Gonzalo Curiel, the inability to be fair because of his "Mexican heritage." But in the Age of Trump, these types of attacks may be the new normal. While the tone of these attacks on the Judiciary is unprecedented, the U.S. Constitution was designed to ensure that the federal Judiciary remains independent, so it can function, even when under hostile fire by the president or Congress.

The Importance of Judicial Independence

Over two centuries ago, Alexander Hamilton recognized that one of the cornerstones of democracy is an independent Judiciary, meaning a Judiciary that is not subject to the direct influence of the other two branches of government. As Hamilton wrote in the *Federalist Papers*, *No. 78*, "complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."

Hamilton also declared, in *Federalist No. 78*, that an independent Judiciary is an "essential safeguard against the effects of occasional ill humors in the society." James Madison agreed, stating in a 1788 speech: "Were I to select a power which might be given with confidence, it would be judicial power. This power cannot be abused, without raising the indignation of all the people of the states. I cannot conceive that they would encounter this odium."

Hamilton explained that if "the courts of justice are to be considered as the bulwarks of a limited Constitution against

legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty." Not only do federal judges serve for life, but they are appointed—rather than elected—and their salaries cannot be reduced for any reason. These three rules, contained in the Constitution itself, allow federal judges to make decisions based on what they believe is right under the law, rather than the preferences of an autocrat or electors. Independence is vital to the nation's system of adjudicating controversies. As Professor Edward L. Rubin has observed, "it would probably be impossible to satisfy the demands of due process" without an independent Judiciary.[3]

Federal judges, of course, may be impeached and removed from office by Congress, but that has happened less than 10 times in the history of the United States. For example, at the prodding of President Jefferson, Congress impeached Federalist Justice Samuel Chase in 1804 due to his conduct on the bench, including giving politically charged instructions to grand jurors. But Justice Chase was ultimately acquitted by the Senate and, since then, impeachment has typically been reserved for judges who commit crimes.[4]

Judicial Independence Under Attack

Throughout history, presidents have criticized the judges of the federal Judiciary. This is perhaps best exemplified in the nation's early years by the controversy that led to the Supreme Court's decision in *Marbury v. Madison,*[5] and President Jefferson's reaction to that decision. The night before his term was to end, President John Adams, a Federalist, appointed 16 Federalist circuit judges and 42 Federalist justices of the peace. The next day, the Senate approved the appointments. Democratic-Republican Thomas Jefferson was then sworn in as president and directed his acting secretary of state, Levi Lincoln, not to deliver the remaining commissions for the new judges and justices of the peace.

The Democratic-Republican Congress repealed the act creating the new judicial vacancies and cancelled the Supreme Court's June 1802 term in order to delay the Court's review of the repeal. William Marbury, one of the appointed justices of the peace who did not receive his commission, filed suit seeking a *writ of mandamus* compelling Secretary of State James Madison to deliver his commission. Writing for a unanimous Court, Chief Justice John Marshall found that Marbury had a legal remedy in the form of a *writ of mandamus*, but that the Constitution did not give the Court the jurisdictional power to issue the writ. In doing so, Marshall affirmed the principle of judicial review, finding that "[i]t is emphatically the province and duty of the judicial department to say what the law is…If two laws conflict with each other, the courts must decide on the operation of each."

Jefferson pulled no punches in privately lamenting the Court's decision, writing to Abigail Adams the following year that "the opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the Legislature & Executive also, in their spheres, would make the judiciary a despotic branch." His feelings were evidently not mollified over time, as he wrote to Spencer Roane in 1819 that the doctrine of judicial review turns the Constitution into a "mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please."

Chief Justice Marshall also received criticism from one of Jefferson's successors, President Jackson, following the Supreme Court's 1832 decision in *Worcester v. Georgia*.[6]

Worcester was indicted for violating a Georgia law that required "all white persons residing within the limits of the Cherokee nation" to have license to do so. Worcester challenged that the law violated treaties between the United States and the Cherokee nation. The Court found the law unconstitutional because the "treaties and laws of the United States contemplate the Indian territory as completely separated from that of the State, and provide that all intercourse with them shall be carried on exclusively by the government of the Union." Jackson, who was infamously prejudiced against American Indians, criticized Marshall for the opinion. While the quote above—"John Marshall has made his decision, now let him enforce it"—may or may not be apocryphal, Jackson did write to John Coffee that "the decision of the Supreme Court has fell still born, and they cannot coerce Georgia to yield to its mandate."

Abraham Lincoln, just three years before being elected president, spoke critically of the justices who decided *Dred Scott v. Sanford*.[7] In a June 26, 1857, speech, Lincoln implied that the decision was motivated by partisan bias. A year later, in his famous "house divided" speech, Lincoln accused Chief Justice Roger Taney of conspiring with Senator Stephen Douglas and Presidents Franklin Pierce and James Buchanan to perpetuate slavery, saying he found it "impossible not to believe" that they "worked upon a common plan or draft" to effect this goal. Lincoln's lack of respect for Taney continued into his presidency. Lincoln suspended the writ of *habeus corpus* in April 1861. A district court judge in Maryland issued a writ for the benefit of John Merryman nonetheless. When it was not respected, Merryman appealed to Taney as the circuit judge for Maryland. Taney found that only Congress had the power to suspend

the writ of *habeus corpus*, and ruled that Lincoln acted unconstitutionally.[8] Lincoln ignored the order, and in Sept. 1861, expanded the zone of suspension.

Attacks by the executive on the federal Judiciary continued into the 20th century. Beginning in 1933, President Franklin Roosevelt issued many executive orders and pushed many pieces of legislation through Congress that were eventually challenged in the courts. By mid-1935, many of these actions were found to be unconstitutional by the Supreme Court, culminating in the invalidation of the National Industrial Recovery Act in *A.L.A. Schechter Poultry Corp. v. United States*.[9] Roosevelt felt attacked by the Court's decisions, and proposed broad judicial reform in retaliation. Specifically, the proposed Judicial Procedures Reform Bill of 1937 would have allowed the president to appoint up to six new Supreme Court justices for each justice over the age of 70. Many viewed this as a plan to pack the Court with appointees who would be more amenable to upholding the constitutionality of New Deal legislation. The so-called 'court-packing scheme' was widely seen as an attack on the Supreme Court. It was defeated by a combination of public opposition and the "switch in time that saved nine," where Justice Owen Roberts' changed vote in *West Coast Hotel Co. v. Parrish*[10] marked a change in ideology in favor of upholding New Deal legislation.

In 1952, the United Steel Workers of America threatened to strike. President Harry Truman, fearing what would happen to the United States' war effort in Korea and the domestic economy generally if there were to be a strike, seized the steel mills and ran the plants under federal supervision. The Supreme Court found Truman's actions to be unconstitutional, in *Youngstown Sheet & Tube Co. v. Sawyer*.[11] Truman abided by the Court's decision, but harbored a grudge the rest of his life. He lamented in his memoirs that he found it difficult to understand how the Court could review affidavits testifying to the "grave dangers that steel shutdown would bring to the nation…and ignore them entirely." He believed a president must always act in a national emergency, and that it was "not very realistic for the justices to say that comprehensive powers shall be available to the President only when a war has been declared or when the country has been invaded."

The Strength of the Judiciary

There is ample evidence that federal judges, despite the attacks lodged by presidents throughout history, have remained independent. Even today, despite President Trump's drawing comparisons between judges and high school students and tweeting that the author of an opinion he dislikes is nothing more than a "so-called judge," judges at all levels have maintained their independence.

Consider the recent emoluments clause lawsuit filed against the president in the Southern District of New York. In Dec. 2017, Judge George Daniels, an appointee of President Bill Clinton, dismissed the case, holding that the plaintiffs lacked standing to bring suit and that the issue was best left to Congress.[12] Even President Trump's own Supreme Court nominee, Justice Neil Gorsuch, spoke out against the president, explaining to Senator Richard Blumenthal that Trump's attacks on the Ninth Circuit judges were "disheartening" and "demoralizing."

Over the course of 230 years, 44 different men have held the office of president. Many have criticized members of the federal Judiciary. President Trump is just one more in a long line of presidents who have disagreed with and criticized the federal Judiciary. He, and his successors, will likely continue to challenge and question the decisions of federal judges. But at the end of the day, each president will leave office, and, under the nation's governmental structure, the federal Judiciary will remain in place to act independently to uphold the Constitution and maintain the Rule of Law. *Fiat justitia, ruat caelum*—Let justice be done though the heavens fall. ⚖

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Endnotes

1. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).
2. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).
3. Edward L. Rubin, Independence as a Governance Mechanism, in *Judicial Independence at the Crossroads* 56, 71 (Stephen Burbank & Barry Friedman eds., 2002).
4. William H. Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* (1992).
5. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).
6. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).
7. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).
8. *Ex Parte Merryman*, 17 F. Cas. 144 (Taney, Circuit Justice, D. Md. 1861).
9. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).
10. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).
11. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).
12. *Citizens for Responsibility & Ethics in Wash. v. Trump*, 17 Civ. 458 (GBD), ___ F. Supp. 3d ___, 2017 WL 6524851 (S.D.N.Y. Dec. 21, 2017).