

The President's Duty To Obey Court Judgments

President Trump is not above the law. If Trump were to disobey—or direct his subordinates to disobey—a court order, he would be at war with the Constitution's text, history, and most basic values.

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I. Introduction

When the Constitution's Framers wrote our national charter more than two centuries ago, they created the judicial branch of the government to serve as a constitutional check. As John Marshall argued in the Virginia ratifying convention, "[t]o what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection."¹ These vital principles are under attack today. Throughout his presidency, Donald Trump has attacked the judiciary at every turn, ignoring the essential role courts play in our constitutional scheme and threatening the vitality of the rule of law. He has repeatedly attacked judges who have held unconstitutional his Muslim travel ban and sanctuary city policies. He has called them "so-called judge[s],"² lambasted their decisions as "ridiculous rulings,"³ and accused

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¹ 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 554 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter "Elliot's Debates"].

² Donald J. Trump (@realDonaldTrump), Twitter (Feb. 4, 2017, 5:12 AM), <https://twitter.com/realdonaldtrump/status/827867311054974976>.

³ Donald J. Trump (@realDonaldTrump), Twitter (Apr. 26, 2017, 3:20 AM), <https://twitter.com/realdonaldtrump/status/857177434210304001>.

them of “egregious overreach,”⁴ for “putting thousands of innocent lives at risk”⁵ and putting “our country in such peril.”⁶ And these comments are just the tip of the iceberg. There is perhaps no President in U.S. history who has attacked the courts as much as President Trump has.⁷

Trump’s verbal assault on the judiciary has sought to delegitimize judicial decisions he disagrees with, leaving a deep stain on the rule of law. Were he to go a step further and seek to flout court orders—whether in response to the Mueller investigation, or litigation challenging his refusal to comply with the Foreign and Domestic Emoluments Clauses, or litigation challenging other unconstitutional policies of his—he would precipitate a constitutional crisis. Under our constitutional system—as scholars left, right, and center all recognize—“the President is legally bound to execute federal court judgments.”⁸ Even Presidents committed to the idea that each branch has an independent duty to interpret the Constitution in the exercise of their powers—known as departmentalism—have acknowledged “the legally binding force and obligation to execute a judicial judgment with which they disagreed.”⁹ A long list of scholars across the ideological spectrum, including those who take an extremely broad view of the powers of the President, have recognized that the President has a “duty to enforce judgments.”¹⁰ “When the judiciary issues a judgment, others must regard it as the final disposition of a dispute.”¹¹ As Professor William Baude has made the point, “the judicial power forecloses any presidential ability to re-decide the case.”¹²

⁴ Press Release, White House Office of the Press Sec’y, Statement on Sanctuary Cities Ruling (Apr. 16, 2017), <https://www.whitehouse.gov/briefings-statements/statement-sanctuary-cities-ruling/>

⁵ *Id.*

⁶ Donald J. Trump (@realDonaldTrump), Twitter (Feb. 5, 2017, 12:39 PM) <https://twitter.com/realdonaldtrump/status/828342202174668800>.

⁷ Trump’s record of attack judges stretches back a long time. In May 2016, he attacked Indiana-born Judge Gonzalo Curiel for his Mexican heritage, illustrating his disregard for the courts and rule of law. As *National Review* writer Charles C. W. Cooke observed:

But if Trump is the sort of man who will happily attack a judge in order to get ahead; if Trump is the sort of man whose idea of a functioning judiciary is one that acquiesces to his wishes; if Trump is such an unchecked bully that he is prepared to use his considerable public profile to pressure the man presiding over a case in which he is himself involved — well, then the pro-Trump *argumentum ad curiam* is dead in the water, is it not? Over the last few days we have seen public confirmation that if Donald Trump doesn’t like the outcome — or the potential outcome — of a live legal case, he will say anything in order to apply pressure upon its arbiters. And I’m supposed to want that in a president? Well, I don’t.

Charles C. W. Cooke, *Trump’s Attack on Judge Curiel Undermines a Key Case for His Presidency*, *National Review* (June 7, 2016), <https://www.nationalreview.com/corner/trumps-attack-judge-curiel-undermines-argument-hell-protect-court/>. In 2012, Trump attacked Chief Justice John Roberts for his opinion upholding the Affordable Care Act, calling it “stupid,” “unreasonable,” “bullshit.” Donald J. Trump (@realDonaldTrump), Twitter (July 3, 2012, 8:41 AM), <https://twitter.com/realdonaldtrump/status/220180517713223680>; Donald J. Trump (@realDonaldTrump), Twitter (June 29, 2012, 11:24 AM), <https://twitter.com/realdonaldtrump/status/218771840414396416>.

⁸ Steven G. Calabresi, *Caesarism, Departmentalism, and Professor Paulsen*, 83 *Minn. L. Rev.* 1421, 1427 (1999).

⁹ *Id.*

¹⁰ Saikrishna Prakash & John Yoo, *Against Interpretative Supremacy*, 103 *Mich. L. Rev.* 1539, 1563 (2005) (reviewing Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004)).

¹¹ *Id.*

¹² William Baude, *The Judgment Power*, 96 *Geo. L.J.* 1807, 1812 (2008).

If President Trump directed his subordinates to disobey a court order, he would be at war with the Constitution's text, history, and most basic values. A system of government in which the President held an effective veto over court judgments "would be not so much a system of constitutional government as it would be a system of rule by an elected Napoleonic strongman."¹³ The "judiciary would be reduced to an adjunct of the executive branch. Instead of the three-branch system of government created by the Constitution, we would have in effect a two-branch system, with the executive serving as both prosecutor and court of last resort."¹⁴ In place of the rule of law, we would have chaos and instability. That is not the Constitution our Framers designed.

Our nation revolted in opposition to the tyrannical rule of a king, and the Framers took pains to deny the President unchecked power, recognizing that "the accumulation of all powers, legislative, executive and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."¹⁵ Article III vests the federal courts with the "judicial power" of expounding the law in cases and controversies in order to ensure that federal courts could "guard the Constitution and the rights of individuals" and prevent "serious oppressions of the minor party in the community."¹⁶ "The record of history," as Justice Antonin Scalia has written, "shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy—with an understanding, in short, that a 'judgment conclusively resolves the case' because 'a 'judicial power' is one to render dispositive judgments."¹⁷

The Framers knew from experience that "there is no liberty if the power of judging be not separated from the legislative and executive powers."¹⁸ The Framers thus established an independent judiciary "truly distinct from both the legislature and the executive," recognizing that the "complete independence of the courts of justice" is "particularly essential" in enforcing constitutional limits on legislative and executive power.¹⁹ Under this structure, it is the power and responsibility of the independent judiciary to "say what the law is."²⁰ This allows the judicial branch to settle the meaning of the Constitution in the course of deciding cases and controversies and to enforce the rule of law. As James Madison observed, "[i]t is the Judicial Department in which questions of constitutionality as well as of legality, generally find their ultimate discussion & operative decision."²¹ In the Framers' design, "independent tribunals of

¹³ Calabresi, *supra* note 8, at 1431.

¹⁴ Thomas W. Merrill, *Judicial Opinions as Binding Law and As Explanation for Judgments*, 15 *Cardozo L. Rev.* 43, 71 (1993).

¹⁵ *The Federalist No. 47*, at 269 (James Madison) (Clinton Rossiter rev. ed., 1999).

¹⁶ *The Federalist No. 78*, *supra* note 15, at 437 (Alexander Hamilton).

¹⁷ *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995) (quoting Frank H. Easterbrook, *Presidential Review*, 40 *Case W. Res. L. Rev.* 905, 926 (1990)).

¹⁸ *The Federalist No. 78*, *supra* note 15, at 434 (Hamilton) (quoting 1 Montesquieu, *The Spirit of the Laws* 181).

¹⁹ *Id.*

²⁰ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

²¹ Letter from James Madison to Unknown (Dec. 1834), <https://founders.archives.gov/documents/Madison/99-02-02-3067>.

justice” would serve as “an impenetrable bulwark against every assumption of power in the legislative or executive.”²²

From the earliest days of our Republic, permitting a court’s judgment to be “revised and controlled by the legislature” or “by an officer in the executive department” was understood to be “radically inconsistent with the independence of that judicial power which is vested in the courts.”²³ Under these principles, “[j]udgments[] within the power vested in courts” by Article III of the Constitution “may not lawfully be revised, overturned or refused faith and credit by another Department of Government.”²⁴ These principles apply to the President no less than other executive officers.

The judiciary, of course, does not possess a monopoly on constitutional interpretation. Congress necessarily evaluates the constitutionality of proposed legislation in the course of exercising its lawmaking power. The President necessarily does the same in deciding whether to sign into law or veto bills passed by Congress. But once a court issues a final judgment, the President must comply with that judgment, even if he vehemently disagrees. He may criticize the Supreme Court—as many Presidents have—but he lacks the authority to “nullify” or “disregard judgments.”²⁵ Otherwise, the President would be effectively above the law, and our nation would be thrust into a “constitutional crisis any time the Court rules against the government in litigation.”²⁶ That would pervert our Constitution’s structure and values and would be a recipe for utter chaos.

This Issue Brief unfolds as follows. Part II lays out the Constitution’s text, history, and values, explaining why the President must obey court orders directed at him or his subordinates. The Framers created an independent judiciary to enforce the Constitution’s limitations, and denied Congress or the President the power to overturn, undo, or refuse faith and credit to judgments duly entered by the courts. In the Constitution’s structure, courts serve as a constitutional check on the political branches. Part III surveys the overwhelming scholarly consensus across the ideological spectrum that the President has a duty to obey judicial judgments. Even among the most ardent proponents of sweeping executive power, virtually everyone agrees that the President must follow court orders. Part IV shows that, throughout our history, Presidents have respected the role of the courts in our constitutional scheme, and complied with court orders, even those they vociferously disagreed with. Whether one looks at the Constitution’s text and history, Supreme Court doctrine, scholarly writings, or the acts of our Presidents, it is clear that the President must obey judicial judgments. He cannot pick and choose which judicial orders to follow. In short, he is not above the law.

²² 1 Annals of Cong. 457 (1789) (Joseph Gales ed., 1834).

²³ *Hayburn’s Case*, 2 U.S. (2 Dall.) 409, 411 (1792) (opinion of Wilson & Blair, JJ., & Peter, D.J.).

²⁴ *Chi. & S. Airlines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948).

²⁵ Easterbrook, *supra* note 17, at 927.

²⁶ Daniel Farber, *Lincoln’s Constitution* 189 (2003).

II. The Text and History of Article III Vest the Federal Courts with the Power To Enter Final, Binding Judgments

More than two centuries ago, our Constitution's Framers created a new system of government, which sought to preserve liberty and prevent abuse of power by separating and checking the powers of government. Our Constitution creates three co-equal, coordinate branches of government, assigning the lawmaking power to Congress, the power to execute the laws to the President and his subordinates, and the judicial power to say what the law is to the courts. Congress would "prescribe[] the rules by which the duties and rights of every citizen are to be regulated"; the President would hold "the sword of the community"; while the "interpretation of the laws" would be the "proper and peculiar province of the courts."²⁷ But the Framers knew that a "mere demarcation on parchments of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of the government in the same hands."²⁸ The Framers' answer—affirmed time and again during the debates over the Constitution—was to vest the judicial branch with the authority and responsibility to enforce the Constitution's limits in resolving cases and controversies that came before the courts.²⁹ As Professor Martin Redish and Matthew Heins have put it, "[t]he prophylactically insulated judiciary is the beating heart of the structural brilliance that defines American constitutionalism."³⁰

Article III's vesting of judicial power in the federal courts protects the judiciary's inviolable role as "guardian of individual liberty and separation of powers."³¹ To secure the "steady, upright, and impartial administration of the laws,"³² the Framers gave the federal judiciary life tenure, preventing the "Executive from using any power of removal to affect the outcomes of cases and controversies."³³ As Chief Justice Roberts has written, "the Framers sought to ensure that each judicial decision would be rendered, not with an eye toward currying favor with Congress or the Executive, but rather with the '[c]lear heads . . . and honest hearts' deemed 'essential to good judges.'"³⁴

The Framers understood that constitutional "[l]imitations . . . 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."³⁵ As Oliver Ellsworth argued in the Connecticut ratifying convention, "[t]his Constitution defines the extent of the powers of the general government. If the

²⁷ *The Federalist No. 78*, *supra* note 15, at 433, 435 (Hamilton).

²⁸ *The Federalist No. 48*, *supra* note 15, at 281 (Madison).

²⁹ See generally David H. Gans, *The Keystone of the Arch: The Text and History of Article III and the Constitution's Promise of Access to Courts* (2016), https://www.theusconstitution.org/think_tank/the-keystone-of-the-arch-the-text-and-history-of-article-iii-and-the-constitutions-promise-of-access-to-courts/.

³⁰ Martin H. Redish & Matthew Heins, *Premodern Constitutionalism*, 57 *Wm. & Mary L. Rev.* 1825, 1835 (2016).

³¹ *Stern v. Marshall*, 564 U.S. 462, 495 (2011).

³² *The Federalist No. 78*, *supra* note 15, at 433 (Hamilton).

³³ Baude, *supra* note 12, at 1837.

³⁴ *Stern*, 564 U.S. at 484 (quoting 1 James Wilson, *Works of James Wilson* 363 (J. Andrews ed., 1896)).

³⁵ *The Federalist No. 78*, *supra* note 15, at 434 (Hamilton).

general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it to be void.”³⁶ Long before *Marbury v. Madison*, John Marshall insisted to the delegates in the Virginia ratifying convention that judicial review was necessary to enforce the Constitution’s limitations. “To what quarter will you look for protection from an infringement of the Constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection.”³⁷ These arguments carried the day, reflecting the Framers’ “refusal to trust any single government body—particularly any single body of politicians—with complete control over individual rights” and the necessity for “some mechanism for resolving specific clashes involving constitutional issues.”³⁸

The judicial power that the Framers vested in the Article III judiciary includes the power to issue final, binding judgments, including judgments against the President. The courts are not “excused from the duty of giving judgment, that right be done to an injured individual” simply because of the “exalted station of the officer” sued.³⁹ Our Constitution’s promise of “a government of laws, and not of men,”⁴⁰ means that “[n]o man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it.”⁴¹ The President has considerable powers vested in him by Article II, but “it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law.”⁴²

The Constitution gives the President only a very limited power to override a judicial judgment: the pardon power. By granting the President the power to issue pardons, the Constitution gives the President the power to “disagree with a final judicial judgment in a specific case”⁴³ and empowers him to free a defendant duly convicted of violating federal laws. So, if a President believes a federal law is unconstitutional, but the Supreme Court disagrees, the President may pardon any persons convicted of the crime. As President Thomas Jefferson observed in pardoning those convicted of violating the abhorrent Alien and Sedition Act, “[t]he judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment; because the power was placed in their hands by the Constitution. But the executive, believing the law to be unconstitutional, were bound to remit execution of it; because that power has been confided to them by the Constitution.”⁴⁴ But, as Professors Saikrishna Prakash and John Yoo observe, “beyond pardons, the Framers did not explicitly grant the President the right to

³⁶ 2 *Elliot’s Debates*, *supra* note 1, at 196.

³⁷ 3 *id.* at 554.

³⁸ Daniel A. Farber, *Judicial Review and Its Alternatives: An American Tale*, 38 *Wake Forest L. Rev.* 415, 419 (2003).

³⁹ *Marbury*, 5 U.S. at 171, 170.

⁴⁰ *Id.* at 163.

⁴¹ *United States v. Lee*, 106 U.S. 196, 220 (1882).

⁴² *Marbury*, 5 U.S. at 170.

⁴³ Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 *Iowa L. Rev.* 1267, 1303 (1996).

⁴⁴ 11 *The Writings of Thomas Jefferson* 50-51 (Albert Ellery Bergh ed., 1907).

'review' judgments, and instead established the familiar rule of executive enforcement of judgment."⁴⁵ Under the Constitution, "[t]he courts are supreme in resolving cases."⁴⁶ In Jefferson's terms, the power to decide cases "was placed in their hands by the Constitution."⁴⁷

Indeed, as history shows, protecting judicial judgments from being second-guessed by other branches of government was of particular concern to the Framers. Before the Constitution was ratified, judicial judgments had frequently been attacked or reversed by other branches of government. The Framers "lived among the ruins of a system of intermingled legislative and judicial powers,"⁴⁸ in which "cases belonging to the judiciary department frequently [had been] drawn within legislative cognizance and determination."⁴⁹ In its place, the Framers created a judiciary "truly distinct from both the legislative and the executive,"⁵⁰ and gave it the power to "render dispositive judgements"⁵¹ in cases and controversies. Under the Constitution's system of separation of powers, neither the Legislative nor Executive branch would have the authority to "reverse a determination once made in a particular case."⁵² The Framers saw the "great[] absurdity in subjecting the decisions of men, selected for their knowledge of the laws, acquired by long and laborious study, to the revision and control of men who, for want of the same advantage, cannot but be deficient in that knowledge."⁵³ In creating an independent judiciary as a distinct and co-ordinate branch of government, the Framers necessarily denied the President or Congress any veto over the judiciary.

As Professor Baude has shown, "[d]uring the ratification of the Constitution and immediately afterwards, a wide range of constitutional scholars, jurists, and officers explained that the 'judicial' power vested by [Article III] was the power to make authoritative and final judgments in individual cases."⁵⁴ St. George Tucker wrote in his celebrated edition of *Blackstone's Commentaries* that "[i]n America (according to the true theory of our constitution), [the judiciary] is rendered absolutely independent of, and superior to the attempts of both [the Executive and the Legislature] to control, or crush it."⁵⁵ The Article III judiciary's "uncontrollable authority in all cases of litigation," reflected the fact that the federal Constitution was the first "in which this absolute independence of the judiciary has formed one of the fundamental principles of the government."⁵⁶ "In other countries," Tucker observed, the judiciary's

⁴⁵ Prakash & Yoo, *supra* note 10, at 1563-64.

⁴⁶ *Id.* at 1562.

⁴⁷ 11 *The Writings of Thomas Jefferson*, *supra* note 44, at 50-51.

⁴⁸ *Plaut*, 514 U.S. at 219.

⁴⁹ *The Federalist No. 48*, *supra* note 15, at 280 (Madison); *id.* at 279 (quoting Thomas Jefferson's observation that the Virginia legislature had "in many instances, decided rights which should have been left to judiciary controversy" (italics omitted)); *Plaut*, 514 U.S. at 219 ("In the 17th and 18th centuries colonial assemblies and legislatures functioned as courts of equity of last resort, hearing original actions or providing appellate review of judicial judgments.").

⁵⁰ *The Federalist No. 78*, *supra* note 15, at 434 (Hamilton).

⁵¹ Easterbrook, *supra* note 17, at 926.

⁵² *The Federalist No. 81*, *supra* note 15, at 452 (Hamilton).

⁵³ *Id.* at 451.

⁵⁴ Baude, *supra* note 12, at 1815.

⁵⁵ 1 St. George Tucker, *Blackstone's Commentaries*, App., Note D., at 353 (William Young Birch & Abraham Small, 1803).

⁵⁶ *Id.* at 354.

“province [is] to advise the executive, rather than to act independently of it. . . . But in the United States of America, the judicial power is a distinct, separate, independent, and *co-ordinate* branch of the government.”⁵⁷ Others agreed that “mandatory enforcement of judgments was a part of the separation of powers.”⁵⁸ James Wilson wrote that the judicial branch “is sometimes considered as a branch of the executive power; but inaccurately. When the decisions of courts of justice are made, they must, it is true, be executed; but the power of executing them is ministerial, not judicial.”⁵⁹ “This meant that the Executive was required to execute judgments whether he liked them or not.”⁶⁰

In 1792, *Hayburn’s Case* established the principle that “Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch.”⁶¹ As a result, “the Executive can have no role in overturning [judicial] judgments.”⁶²

The case concerned the Pension Act of 1792, which subjected judicial judgments under the Act to review by the Secretary of War. The judges in the circuit courts, which included five sitting Supreme Court Justices, including Justices James Wilson, John Jay, and James Iredell—all of whom had played major roles in the drafting and ratification of the Constitution—each expressed the view that the Act could not be squared with the Constitution’s separation of powers, which vested the judicial power in the courts alone. They reasoned that had the court proceeded to discharge its responsibilities under the Act, “its *judgments* . . . might, under the same act, have been revised and controlled by the legislature, and by an officer in the executive department. Such revision and control we deemed radically inconsistent with the independence of that judicial power which is vested in the courts, and consequently with that important principle which is so strictly observed by the constitution of the United States.”⁶³ Because the Constitution vests the judicial power in the courts, “neither the Secretary at War nor any other executive officer, nor even the legislature are authorized to sit as a court of errors on the judicial acts or opinions of this court.”⁶⁴ “[N]o decision of any court of the United States can under any circumstances . . . be liable to a reversion or even suspension by the legislature itself, in whom no judicial power of any kind appears to be vested.”⁶⁵ In short, judgments duly issued by Article III courts are final, and cannot be revised by the political branches.

The Supreme Court’s cases in this area have hewed closely to the Constitution’s text and history. It is black letter law that Article III vests the “Federal Judiciary” with “the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy.”⁶⁶ The Supreme Court has never wavered from the principle that judgments of Article III courts are “final and

⁵⁷ *Id.*

⁵⁸ Baude, *supra* note 12, at 1816.

⁵⁹ James Wilson, *Of Government*, in 1 James Wilson, *Collected Works of James Wilson* 689, 703 (Kermit L. Hall & Mark David Hall eds., 2007).

⁶⁰ Baude, *supra* note 12, at 1815.

⁶¹ *Plaut*, 514 U.S. at 218.

⁶² Baude, *supra* note 12, at 1818.

⁶³ *Hayburn’s Case*, 2 U.S. at 411 (opinion of Wilson & Blair, JJ., & Peters, D.J.).

⁶⁴ *Id.* at 414 (opinion of Jay, C.J., Cushing, J., & Duane, D.J.)

⁶⁵ *Id.* at 413 (opinion of Iredell, J., & Sitgreaves, D.J.).

⁶⁶ *Plaut*, 514 U.S. at 218-19.

conclusive upon the rights of the parties”⁶⁷ and therefore judicial “judgments . . . may not lawfully be revised, overturned or refused faith and credit by another Department of Government.”⁶⁸ That principle applies, even when a federal court interprets the Constitution “in a manner at variance with the construction given the document by another branch.”⁶⁹ As the Court held in *United States v. Nixon*, “the ‘judicial power of the United States’ vested in the federal courts by Article III, Section I, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto.”⁷⁰ A President cannot set aside and refuse to execute a judgment simply because he disagrees with it.

As the next Section shows, the Constitution’s text, history, and values have commanded wide assent from scholars across the ideological spectrum.

III. The Scholarly Consensus that the President Must Obey Judicial Judgments

Virtually everyone—left, right, and center—agrees that the President must obey judicial judgments. That includes a host of conservative scholars, who otherwise take a very broad view of the President’s powers under Article II and stress that the President—as one of the three co-ordinate and co-equal branches of government—necessarily must interpret the Constitution in exercising his powers. Virtually “every modern departmentalist scholar has maintained that the President has an obligation to enforce specific judgments rendered by federal courts, even when the President believes that the judgments rest on erroneous constitutional reasoning.”⁷¹ While a number of scholars have proposed narrow exceptions, the basic consensus is that the President must obey judgments, even if he disagrees with them.

For example, Professors Saikrishna Prakash and John Yoo have argued that Article III establishes a principle of judgment supremacy. “By granting the ‘judicial power’ to the federal courts, the Constitution gives the judiciary the authority to decide certain cases and controversies. The courts decide cases by issuing a final judgment. Once issued, the final judgment decides the case once and for all. Because the courts have the judicial power and jurisdiction over cases arising under the Constitution, when they issue final judgments in cases that involve constitutional interpretation, other branches must obey and enforce such judgments.”⁷² Professor William Baude has likewise argued that “the doctrine of judgment supremacy is rooted in the Constitution’s text, history, and structure,”⁷³ and thus, “judgments are

⁶⁷ *Gordon v. United States*, 117 U.S. 697, 700-04 (1864) (opinion of Taney, C.J.).

⁶⁸ *Chi. & S. Airlines, Inc.*, 333 U.S. at 113.

⁶⁹ *United States v. Nixon*, 418 U.S. 683, 704 (1974) (quoting *Powell v. McCormack*, 395 U.S. 486, 549 (1969)).

⁷⁰ *Id.*

⁷¹ Lawson & Moore, *supra* note 43, at 1313-14.

⁷² Prakash & Yoo, *supra* note 10, at 1541.

⁷³ Baude, *supra* note 12, at 1841.

constitutionally final where courts have jurisdiction.”⁷⁴ As Baude argues, “the judicial power forecloses any presidential ability to re-decide the case. Because of this, the President is required to execute judgments even if he disagrees with their underlying legal reasoning.”⁷⁵ This is essential to the rule of law. As Professor Daniel Farber has argued, “[i]f every disagreement with judicial interpretation were viewed as an excuse for executive noncompliance, the rule of law could hardly function.”⁷⁶

Further, as Professor John McGinnis has argued, “the Framers’ original understanding of the concept of the judicial power can only be understood against the rise of the English judiciary as a check against arbitrary action by the king—a check that was premised precisely on the understanding that the king was not at liberty to refuse to execute the judiciary’s judgments.”⁷⁷ Baude makes a similar claim, observing that “[j]ust as the King could not revise judgments in England because he . . . had placed his courts beyond his reach, the President could not revise judgments in America because the Constitution placed the courts beyond his.”⁷⁸

Professors across the ideological spectrum have also argued that permitting the President to flout judicial judgments would “represent a radical transformation in the current balance of power among the branches,”⁷⁹ which would “undermine the judiciary’s position as a coordinate department” and “reduce[] [it] to an adjunct of the executive branch”⁸⁰ As Professors Prakash and Yoo observe, “to allow the executive branch to decline to enforce judgments at its own discretion might functionally transfer the authority to decide Article III cases or controversies to the President.”⁸¹ Professor Redish and Matthew Heins make a similar point: “If the Executive can defy [the judiciary’s] pronouncement, the judiciary becomes functionally irrelevant; it is then a mere instrument of the executive designed to offer advisory

⁷⁴ *Id.* at 1849. Baude does argue, however, that the President can refuse to obey a judgment where the court lacked jurisdiction, reasoning that a judgment issued without jurisdiction is a nullity. *Id.* at 1826-31; *see also* Farber, *supra* note 26, at 190 (discussing the issue). Baude does not fully resolve the question who decides the jurisdictional question, *see* Baude, *supra* note 12, at 1846-50, and his theory, if construed to permit the President to override judicial determinations, raises a host of troubling questions. Can a President refuse to obey a judgment in any cases in which he challenges a plaintiff’s standing to sue? Can a President seek dismissal of a case on standing grounds, litigate the case through the courts, and having lost in the courts, refuse to obey the court’s judgment? *Cf. Nixon*, 418 U.S. at 692-97 (rejecting President Nixon’s claim that the matter was simply an intra-branch dispute not proper for judicial resolution). As Farber notes, “[i]t probably goes too far to say that the president can always make his own independent determination of whether a court had jurisdiction. If the jurisdictional issue has been fully litigated between the parties, the loser should not have the right to ‘appeal’ to the president.” Farber, *supra* note 26, at 190. Allowing the President to override a court’s determination of jurisdiction—particularly when a President has litigated those claims and lost—presents what Hamilton called a “great[] absurdity”: “subjecting the decisions of men, selected for their knowledge of the laws, acquired by long and laborious study, to the revision and control of men who, for want of the same advantage, cannot but be deficient in that knowledge.” *The Federalist No. 81*, *supra* note 15, at 451 (Hamilton).

⁷⁵ Baude, *supra* note 12, at 1812.

⁷⁶ Farber, *supra* note 26, at 186.

⁷⁷ John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 *Cardozo L. Rev.* 375, 392 (1993).

⁷⁸ Baude, *supra* note 12, at 1839.

⁷⁹ Merrill, *supra* note 14, at 71.

⁸⁰ Farber, *supra* note 26, at 189; Merrill, *supra* note 14, at 71.

⁸¹ Prakash & Yoo, *supra* note 10, at 1563.

opinions that the President may acknowledge or ignore.”⁸² In other words, the branch Hamilton called “the least dangerous”⁸³ would be stripped of its core function.

The result would be the kind of tyrannical government the Framers wrote the Constitution to prevent. As Professor Steven Calabresi argues, “[n]o one would think it desirable to let the President take an individual’s property in violation of the Takings Clause or to let the President arbitrarily imprison people in violation of the Due Process Clause, and yet exactly the same values would be at stake if we were to let the President unilaterally decide which court judgments he wanted to execute or not. . . . [A] president with that power would be an elected tyrant just as federal courts without the power to execute their judgments would be ciphers.”⁸⁴ To be sure, Calabresi argues, as do others, that in a case of clear, flagrant mistake by the courts, the President could disobey the order.⁸⁵ But, in all of American history, Calabresi thinks that only one judicial ruling—Chief Justice Taney’s ruling in *Ex parte Merryman*⁸⁶ overturning President Abraham Lincoln’s wartime suspension of habeas—met that standard.⁸⁷ There is not much daylight between Professor Calabresi and Professors Prakash and Yoo, who insist that “the Constitution calls upon the President to enforce every judgment.”⁸⁸

The sole exception to this remarkable scholarly consensus is Professor Michael Paulsen, who has argued that “[t]here is no general power of courts to issue direct orders to the President that the President is constitutionally obliged to obey.”⁸⁹ In Paulsen’s view, “the executive may exercise independent interpretive judgment with respect to all questions of law that arise in the course of the exercise of any and all of the executive’s constitutional powers.”⁹⁰ So, in Paulsen’s view, the President can thumb his nose at the courts with impunity: “he may refuse to execute (or, where directed specifically to him, refuse to obey) judicial decrees that he concludes are contrary to law.”⁹¹ Paulsen’s argument would make the President above the law, invest the office with dictatorial powers, and permit him to swallow up the role of the judiciary to say what the law is. As Professor Calabresi writes, under this model, “ours would be at best a system of democratic Caesars. The Executive Branch of our government would not be, as Professor Paulsen calls it, the Most Dangerous Branch—it would be a tyranny.”⁹²

Paulsen ignores virtually everything the Framers said about the role of the courts in our constitutional system, refusing to reckon with the Framers’ decision to give the judiciary a constitutional

⁸² Redish & Heins, *supra* note 30, at 1886.

⁸³ *The Federalist No. 78*, *supra* note 15, at 433 (Hamilton).

⁸⁴ Calabresi, *supra* note 8, at 1432.

⁸⁵ *Id.* at 1433 & n.54; *see also* Lawson & Moore, *supra* note 43, at 1324-26 (arguing that the “President and Congress can refuse to enforce a judgment only in extreme circumstances”).

⁸⁶ 17 F. Cas. 144 (C.C.D. Md. 1861). I discuss *Merryman* at length in Part IV.

⁸⁷ Calabresi, *supra* note 8, at 1433 n.54 (“[T]he only such clear mistake I am aware of is Chief Justice Taney’s in *Ex Parte Merryman*”).

⁸⁸ Prakash & Yoo, *supra* note 10, at 1563.

⁸⁹ Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Geo. L.J. 217, 283 (1994).

⁹⁰ *Id.*

⁹¹ *Id.* at 222.

⁹² Calabresi, *supra* note 8, at 1432.

check on the political branches. Instead, he places his weight on the principle that our fundamental charter creates three co-ordinate, co-equal branches of government. But respecting the constitutional prerogatives of each of the three branches of government doesn't require making the President a law unto himself. Professor Paulsen's basic error is that he expands the power of the executive so vastly that there is little left of the judiciary, which is also a co-ordinate, co-equal branch of government. In Paulsen's view, the power to execute the laws includes the power to interpret the law, and thus the President "has the last word . . . through [his] power to execute or decline to execute judgments rendered by courts."⁹³ As a consequence, Paulsen writes, the judiciary can persuade through the force of its reasoning, but it can never issue orders that bind the President. This cripples the power of the judiciary, reducing it to issuing advisory opinions, and gives the President the kind of unchecked power Madison and Hamilton denounced as tyrannical.⁹⁴

The Constitution's Framers refused to give the President a veto power over the judiciary, and understood that judicial and executive authority needed to be separated in order to preserve liberty. Thus, when James Wilson made the case that the duty to execute judgments was a ministerial one, he described the judicial branch as "the third great division of the powers of government," which is "sometimes considered as a branch of the executive power; but inaccurately."⁹⁵ The Framing generation understood that "[t]o make laws and to execute them are two great operations of government, but they cannot be fully and correctly executed unless there is somewhere resident a power to expound and apply them. This power is auxiliary to the executive authority, and in some degree partakes of its nature. But it is also required at times to control the executive, and what it decides to be unlawful, the executive cannot perform."⁹⁶ The "executive override" Paulsen urges "completely contravenes the Constitution's structural design."⁹⁷

The judicial branch's power to issue binding judgments in the course of deciding cases and controversies—created by the Framers to ensure that there would be a constitutional check on the political branches—is deeply rooted in the Constitution's text, history, and values and has been respected by Presidents and courts alike. For more than two centuries—with a single exception that arose in the heat of a bloody civil war—"the Executive Branch agreed that judgments issued within the jurisdiction of the Judiciary were binding."⁹⁸ The next section discusses this history.

⁹³ Paulsen, *supra* note 89, at 223. Paulsen relies heavily on Hamilton's statement that the judiciary "must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments," *The Federalist No. 78*, *supra* note 15, at 433 (Hamilton). This is of course true, but this is far too thin a reed for the seismic shift in our constitutional system Paulsen urges.

⁹⁴ *The Federalist No. 47*, *supra* note 15, at 269-71 (Madison); *The Federalist No. 78*, *supra* note 15, at 434 (Hamilton); Redish & Heins, *supra* note 30, at 1874-75 ("It is folly to suggest that the separation of powers and the system of checks and balances that the Framers built to advance the goal of coordinacy allow the executive to control the entirety of our legal process . . . This seems to be the very definition of 'a tyrannical concentration of all the powers of government in the same hands'—what James Madison viewed as the primary evil our Constitution would need to guard against.").

⁹⁵ Wilson, *Collected Works*, *supra* note 59, at 703.

⁹⁶ William Rawle, *A View of the Constitution of the United States of America* 199 (Phil., Philip H. Nicklin Law Bookseller 2d ed. 1829).

⁹⁷ Redish & Heins, *supra* note 30, at 1887.

⁹⁸ Baude, *supra* note 12, at 1821.

IV. The Duty To Enforce Judgments: The View from the White House

From the Founding-era to today, Presidents have recognized, time and again, that court judgments are binding, and must be followed. As Professor Steven Calabresi has observed, “the President is legally bound to execute federal court judgments and for two hundred years all American Presidents not engaged in suppressing a Civil War have viewed themselves as being so bound.”⁹⁹ The only possible exception was Lincoln’s refusal to free a suspected traitor during the Civil War, despite Chief Justice Taney’s grant of a writ of habeas corpus, and even in that case, it is not entirely clear that Lincoln disobeyed the court’s order.

The story begins with our earliest Presidents. In 1801, President Jefferson’s Attorney General, Lincoln Levi, recognized the binding force of Supreme Court judgments. The issue arose out of a treaty between the United States and France regarding the return of seized, but not condemned, property. The Supreme Court, in an opinion by Chief Justice John Marshall, applied the treaty in the case *United States v. Schooner Peggy*,¹⁰⁰ holding that the ship in question had to be returned to her owner. Attorney General Levi thought that Marshall’s ruling was incorrect, but he nevertheless advised President Jefferson that the Supreme Court’s judgment was binding. “[H]owever th[e] general principle may be determined, it can have little or no effect on the case of the schooner Peggy. The Supreme Court, who were competent to decide this principle, have determined it in her case. It must, therefore, be considered as binding in this particular instance.”¹⁰¹ In other cases, the executive could urge a different rule, but not this one. “[T]hey have fixed the principle for themselves, and thereby bound others, in reference to the case in which they have adjudicated”¹⁰²

In 1809, Jefferson’s successor, President James Madison, affirmed the President’s duty to enforce court judgments. In *United States v. Peters*,¹⁰³ the U.S. Supreme Court issued a writ of mandamus to federal district judge Richard Peters, ordering him to enforce a federal admiralty judgment despite a state statute that sought to nullify the federal judgment. After losing in the Supreme Court, Pennsylvania’s governor turned to President Madison for assistance, calling on him to help in “resisting the decree of a Judge, founded, as it is conceived in a usurpation of power and jurisdiction.”¹⁰⁴ President Madison rebuffed him, writing back that the “Executive of the U. States, is not only unauthorized to prevent the execution of a Decree sanctioned by the Supreme Court of the U. States, but is expressly enjoined by Statute, to carry into effect any such decree, where opposition may be made to it.”¹⁰⁵ It is

⁹⁹ Calabresi, *supra* note 8, at 1427.

¹⁰⁰ 5 U.S. (1 Cranch.) 103 (1801).

¹⁰¹ *Restitution Under Treaty With France*, 1 Op. Att’y Gen. 119, 122 (1802).

¹⁰² *Id.*

¹⁰³ 9 U.S. (5 Cranch.) 115 (1809).

¹⁰⁴ Letter from Simon Snyder to James Madison (Apr. 6, 1809), <https://founders.archives.gov/documents/Madison/03-01-02-0118>.

¹⁰⁵ Letter from James Madison to Simon Snyder (Apr. 13, 1809), <https://founders.archives.gov/documents/Madison/03-01-02-0132>.

not clear which statute Madison was referring to—possibly the Militia Act or the Judiciary Act¹⁰⁶—but his main point was crystal clear: “the President has no power to interfere with a judgment and some obligation . . . to carry it out.”¹⁰⁷

In 1861, President Abraham Lincoln gave perhaps the most famous affirmation of the executive’s duty to enforce court judgments, explaining why he had to respect the detestable judgment in *Dred Scott v. Sandford*.¹⁰⁸ In his First Inaugural Address, Lincoln told the nation “I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding, in any case, upon the parties to a suit, as to the object of that suit . . . And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect of following it, being limited to that particular case, with the chance that it may be overruled, and never become a precedent for other cases, can better be borne than could the evils of a different practice.”¹⁰⁹ Thus, as Lincoln had promised during the Lincoln-Douglas debates, “[w]e do not propose that when Dred Scott has been decided to be a slave by a court, we, as a mob, will decide him to be free. We do not propose that, when any other one, or one thousand, shall be decided by the court to be slaves, we will in any violent way disturb the rights of property thus settled[.]”¹¹⁰ At the same time, Lincoln did not think that the binding force of *Dred Scott* committed him to applying the decision broadly to govern other cases that could arise. He did not think that he had to interpret the decision in the same manner that advocates for slavery did. He rejected the notion that the Supreme Court’s decision in *Dred Scott* “irrevocably fixed” the “policy of the government, upon vital questions, affecting the whole people.”¹¹¹ Lincoln had to obey the court’s judgment, but he could oppose the precedent set, and seek to have it narrowed or overruled in future cases.

Lincoln’s commitment to these principles was put to the test during the Civil War. On April 27, 1861—with Congress out of session—Lincoln issued an order authorizing military authorities to suspend the writ of habeas corpus. At the time, secessionist mobs in Baltimore were seeking to prevent troops from making their way to our nation’s capital and the safety of the capital itself was under serious threat. As Steven Calabresi puts it, “[t]he crisis President Lincoln faced in the spring of 1861 was the worst we have ever faced.”¹¹²

Lincoln’s order led to the arrest of John Merryman, who was arrested for burning railroad bridges to block troop movements. On May 26, 1861, Merryman’s attorney filed for a writ of habeas corpus, which was granted on May 28 by Chief Justice Roger Taney, producing a conflict between the President and the Chief Justice. In his opinion in *Ex Parte Merryman*, Taney held that Congress, not the

¹⁰⁶ Baude, *supra* note 12, at 1825. As Baude observes, the Militia Act authorized the President to call out the militia to enforce federal law in the face of opposition “too powerful to be suppressed by the ordinary course of judicial proceedings,” Militia Act of 1795, ch. 36, § 2, 1 Stat. 424, 424, while the Judiciary Act called on federal marshals to “execute . . . all lawful precepts directed to [them],” Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87.

¹⁰⁷ Baude, *supra* note 12, at 1825.

¹⁰⁸ 60 U.S. (19 How.) 393 (1857).

¹⁰⁹ Abraham Lincoln, *First Inaugural Address—Final Text* (Mar. 4, 1861), in 4 *The Collected Works of Abraham Lincoln* 262, 268 (Roy P. Basler ed., 1953).

¹¹⁰ Abraham Lincoln, *Sixth Debate with Stephen A. Douglas, at Quincy, Ill.* (Oct. 13, 1858), in 3 *Collected Works of Abraham Lincoln*, *supra* note 109, at 245, 255.

¹¹¹ Lincoln, *First Inaugural Address—Final Text*, in 4 *Collected Work of Abraham Lincoln*, *supra* note 109, at 268.

¹¹² Calabresi, *supra* note 8, at 1430 n.44

President, had the authority to suspend the writ of habeas corpus, but did not specifically order Merryman's release. Rather, the court simply "order[ed] all the proceedings in this case, with my opinion" to be sent "to the president of the United States. It will then remain for that high officer, in fulfilment of his constitutional obligation to 'take care that the laws be faithfully executed,' to determine what measures he will take to cause the civil process of the United States to be respected and enforced."¹¹³

President Lincoln did not release Merryman. His response to Taney's opinion, delivered some months later to a special session of Congress, was that "[t]he whole of the laws which were required to be faithfully executed, were being resisted, and failing of execution, in nearly one-third of the States. . . . [A]re all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?"¹¹⁴ Lincoln stressed that the Suspension Clause is "silent as to which or to who is to exercise the power" and that "as the provision was plainly made for a dangerous emergency, it cannot be believed the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion."¹¹⁵ Ultimately, Congress ratified Lincoln's actions.

Perhaps Lincoln's actions technically complied with the judgment in *Merryman*.¹¹⁶ Still, Lincoln's actions in *Merryman*—though understandable given the grave threat to the Union—are widely viewed as fundamentally inconsistent with the rule of law and seen as aberrational.¹¹⁷ As Professor Farber puts it, "[o]bedience to judgments in specific cases cuts close to our conception of the rule of law[.]"¹¹⁸ Arguments based on military necessity are "dangerous ground given the nature of the threat to the rule of law, though it is not easy to think of times when the peril was more desperate than the threat to Washington at the time."¹¹⁹

Merryman has proved to be a historical anomaly. For the last 150 years, Presidents of all stripes have respected the role of the courts as a constitutional check on executive authority, recognizing the rule of law is a central value that undergirds our entire constitutional system. Despite a long list of modern decisions rejecting sweeping assertions of presidential authority,¹²⁰ no President has sought to

¹¹³ *Merryman*, 17 F. Cas. at 152.

¹¹⁴ Abraham Lincoln, *Message to Congress in Special Session* (July 4, 1861), in 4 *Collected Works of Abraham Lincoln*, *supra* note 109, at 421, 430.

¹¹⁵ *Id.* at 430-31.

¹¹⁶ See Daniel A. Farber, *Lincoln, Presidential Power, and the Rule of Law* 21 (Mar. 19, 2018) https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3144115 (observing that "the question of whether or when the President can disobey a court order has not been tested since *Merryman*, if indeed it was actually involved even in *Merryman*").

¹¹⁷ Farber, *supra* note 26, at 192 ("It is fruitless to argue for a general power of executive nullification. Lincoln himself did not even offer this defense, and history speaks strongly against it."); Merrill, *supra* note 14, at 46-47 ("President Lincoln's action was contrary to his own previously expressed views about judicial supremacy, and is today regarded as an aberration."); Easterbrook, *supra* note 17, at 926 ("President Lincoln once did this . . . , but no other President has followed suit. None should—and the arguments I have been discussing do not allow for disobedience."). The sole exception, not surprisingly, is Professor Paulsen, who calls the power of the President to disobey court orders the "*Merryman* Power." See Paulsen, *supra* note 89, at 223.

¹¹⁸ Farber, *supra* note 116, at 21.

¹¹⁹ *Id.*

¹²⁰ See, e.g. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

flout a judicial order. Every major clash between the President and the courts has ended with a resounding affirmation of the rule of law. President Harry Truman backed down when the Supreme Court held that he could not unilaterally seize steel mills. President George W. Bush backed down from his sweeping claims of executive authority after the Supreme Court held that Guantanamo Bay detainees had a right to go to court to secure relief.

Even President Richard Nixon surrendered the Watergate Tapes. At oral argument in the *Nixon* case, his lawyer claimed, in response to questioning from Justice Thurgood Marshall, that Nixon might not comply because “[t]he President . . . has his [own] obligations under the Constitution.”¹²¹ But within a few hours of the Court’s ruling, Nixon complied. Nixon’s own supporters sent a “stern warning” that “the most dangerous thing you can do is defy a ruling of the Supreme Court.”¹²² As each of these incidents teaches, no official, not even the President, is above the law.

Conclusion

As President, Donald Trump has sought to break one rule after another, and he has attacked the courts at every opportunity. But ours is a government of laws, not men, in which there is no official so high and mighty that he is above the law. Under our Constitution, the President has to obey court judgments. If the President chooses not to and flouts a court order, he will provoke a constitutional crisis that will put him on the wrong side of the Constitution—and on the wrong side of history.

¹²¹ See Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 Harv. L. Rev. 1359, 1364 (1997), quoting Transcript of Oral Argument at 500, *United States v. Nixon*, 418 U.S. 683 (1974) (Nos. 73-1766 & 73-1834) (alterations in original).

¹²² Rowland Evans & Robert Novak, *A Warning to President Nixon*, Wash. Post., July 7, 1974, at B7.