Presidential Defiance and the Courts

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Imagine that the president calls a press conference to announce the unveiling of "the best surprise" he has installed in the grand foyer of the White House. Once the press convenes, several White House aides assist the president as he dramatically pulls aside the covering of his surprise, revealing a 5280 pound monument to the Ten Commandments. The president enthusiastically reads what is written on the plaque at the base of the monument: "On December 15, 2017, the President of the United States, Donald J. Trump, celebrated this monument as a commemoration of the Ten Commandments as the source of our Constitution. This monument will serve as a permanent reminder of the basic fact that our most important law was divinely inspired." It is more than likely that the erection of the monument violates the First Amendment's prohibition against the establishment of religion[1] as interpreted by the Supreme Court of the United States.[2] When pressed by the media, the president acknowledges that his actions were inspired by Alabama firebrand Roy Moore,[3] who once erected an identical monument in the Alabama Supreme Court building and who was twice removed from his position as Chief Justice of the Alabama Supreme Court for having defied the orders of federal courts.[4] Citing Mr. Moore as his model, the president vows to defy any court, including the Supreme Court, if it orders him to remove his newly installed monument.

It is easy to image that federal courts might rule against the president in this hypothetical situation, but the question of how far a president may go to defy courts is more difficult to answer. There is general agreement that a president may underenforce a directive of the Court with which he dis-

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[1] *See, e.g.*, Glassroth v. Moore, 335 F.3d 1282, 1298 (11th Cir. 2003) ("[W]e do not believe that *Marsh* saves the Ten Commandments monument in this case from the proscriptions of the Establishment Clause."); *see also* Susanna Dokupil, *"Thou Shalt Not Bear False Witness": "Sham" Secular Purposes in Ten Commandments Displays*, 28 HARV. J.L. & PUB. POL'Y 609, 610–11 (2005).

[2] McCreary Cty. v. American Civil Liberties Union of Kentucky, 545 U.S. 844, 881 (2005).

[3] *See* Jonathan Martin & Alexander Burns, *Roy Moore Wins Senate G.O.P. Runoff in Alabama*, N.Y. TIMES (Sept. 26, 2017), https://www.nytimes.com/2017/09/26/us/politics/roy-moore-alabama-senate.html [https://perma.cc/6UU5-44SX].

[4] *See* Glassroth v. Moore, 275 F. Supp. 2d 1347, 1349 (M.D. Ala. 2003) (mem.) (finding Roy Moore ". . . ENJOINED and RESTRAINED from failing to remove . . . the Ten Commandments monument at issue"); *see also* Strawser v. Strange, 100 F. Supp. 3d 1276 (S.D. Ala. 2015) (clarifying that the preliminary injunction against enforcement of Alabama's marriage laws applies to all probate court judges); Moore v. Ala. Judicial Inquiry Comm'n, No. 1160002, 2017 Ala. LEXIS 36 (Ala. Apr. 19, 2017) (affirming the judgment of the Alabama Court of the Judiciary that suspended Moore for violating a federal district court injunction).

agrees,[5] and there are many scholars and public officials who agree with the point made over thirty years ago by then-Attorney General Edwin Meese that the Constitution and Supreme Court decisions on questions of constitutional law are not synonymous.[6] May a president go further, based on Mr. Meese's or Mr. Moore's reasoning, to defy altogether Supreme Court decisions that he or she thinks were wrongly decided?[7] If courts demand that the president remove the monument honoring the Ten Commandments, must he do what they say, or may he refuse? What if the public, or at least the president's base, enthusiastically supports his refusal to comply with a judicial decision with which he disagrees? What might be the ramifications of such defiance?

These questions have taken on new urgency in the first year of Donald Trump's presidency. The president's conflicts with the judiciary and the rule of law are well-known and well-documented.[8] As a candidate, he berated a judge's heritage and questioned his impartiality because the judge ruled against him in a civil case.[9] Since assuming office, President Trump has berated judges that disagree with him on the constitutionality of his travel ban.[10] He has gone further to denigrate his own Attorney General,[11] dismiss the Director of the Federal Bureau of Investigation,[12] pardon a sheriff con-

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[5] *See generally* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) (writing that when federal courts choose not to enforce constitutional norms, state courts and Congress can enforce said norms).

[6] *See* Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987); *see also* James E. Fleming, *Living Originalism and Living Constitutionalism as Moral Readings of the American Constitution*, 92 B.U. L. REV. 1171 (2012); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO L.J. 217 (1994); Mark Tushnet, *The Supreme Court, The Supreme Law of the Land, and Attorney General Meese: A Comment*, 61 TUL. L. REV. 1017 (1987).

[7] *See* Memorandum by Roy S. Moore, *Re: Sanctity of Marriage ruling* (Feb. 3, 2015), http://media.al.com/news_impact/other/Chief%20Justice%20Moore's%20memorandum.pdf [https://perma.cc/P7V4-F5D6] (invoking separation of powers and federalism as reasons why the injunction did not apply to the probate judges).

[8] *See, e.g.*, Jane Chong, *The Arpaio Pardon Dangerously Accelerates Trump's Assault on the Rule of Law*, NEW YORKER (Aug. 27, 2017), https://www.newyorker.com/news/news-desk/the-arpaio-pardon-dangerously-accelerates-trumps-assault-on-the-rule-of-law [https://perma.cc/PW4Q-MQUB]; Joan Biskupic, *Trump's Disdain for the Rule of Law*, CNN: POL. (July 26, 2017), http://www.cnn.com/2017/07/26/politics/trump-rule-of-law/index.html [https://perma.cc/VQ2R-9LK5].

[9] *See, e.g.*, Brent Kendall, *Trump Says Judge's Mexican Heritage Presents 'Absolute Conflict'*, WALL STREET J. (June 3, 2016), https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442 [https://perma.cc/L4ZJ-F8MT].

[10] *See, e.g.*, Glenn Thrush, *'I'll Criticize Judges,' Trump Says, Hours After a Scolding for Doing Just That*, N.Y. TIMES (Mar. 21, 2017), https://www.nytimes.com/2017/03/21/us/politics/trump-gorsuch-criticizing-judges.html [https://perma.cc/5AJQ-38LZ]; *Trump Ramps Up Criticism of Judge After Travel Ban Setback*, BBC (Feb. 6, 2017), http://www.bbc.com/news/world-us-canada-38876644 [https://perma.cc/5RMD-RBSS].

[11] *See, e.g.*, Michael S. Schmidt & Maggie Haberman, *Trump Humiliated Jeff Sessions After Mueller Appointment*, N.Y. TIMES (Sept. 14, 2017), https://www.nytimes.com/2017/09/14/us/politics/jeff-sessions-trump.html [https://perma.cc/PS2W-VY7Y].

[12] *See* Michael D. Shear & Matt Apuzzo, *F.B.I. Director James Comey Is Fired by Trump*, N.Y. TIMES (May 9, 2017), https://www.nytimes.com/2017/05/09/us/politics/james-comey-fired-fbi.html [https://perma.cc/6SYG-FQVU].

victed of criminal contempt for refusing to comply with a federal court order,[13] reportedly have his staff consider the propriety of his pardoning himself,[14] complain about the failure of federal prosecutors to investigate Hillary Clinton,[15] and denounce any investigation into his administration as a "witch-hunt."[16] These statements and actions have led many to worry about the extent to which the president will adhere to the rule of law, and particularly whether courts can be a safeguard against his belligerence.[17]

In this Essay, I suggest that presidential defiance of courts does not occur in a vacuum. Presidents' inclinations or capacities to defy court directives or rulings turn on the extent to which either the public or the other branches, particularly Congress, support their defiance. The basic framework for analyzing presidents' capacity or propensity to defy courts is a variation on the framework set forth in Justice Robert Jackson's famous concurrence in the *Steel Seizure Case*,[18] in which the Supreme Court (6-3) struck down President Truman's executive order seizing control of the nation's steel mills.[19] In analyzing whether the president has the constitutional authority to take some action, Justice Jackson suggested we consider into which one of three categories the action falls. First, if "the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[20] Second, if "the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress

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[13] *See* Julie Hirschfeld Davis & Maggie Haberman, *Trump Pardons Joe Arpaio, Who Became Face of Crackdown on Illegal Immigration*, N.Y. Times (Aug. 25, 2017), https://www.nytimes.com/2017/08/25/us/politics/joe-arpaio-trump-pardon-sheriff-arizona.html [https://perma.cc/A9GM-CN6L].

[14] *See* Carol D. Leonnig et al., *Trump Team Seeks to Control, Block Mueller's Russia Investigation*, Wash. Post (July 21, 2017), https://www.washingtonpost.com/politics/trumps-lawyers-seek-to-undercut-muellers-russia-investigation/2017/07/20/232ebf2c-6d71-11e7-b9e2-2056e768a7e5_story.html [https://perma.cc/QQ8Q-YGKD].

[15] *See* Louis Nelson, *Trump Asks Why 'Beleaguered' Sessions Isn't Investigating Clinton*, Politico (July 24, 2017), http://www.politico.com/story/2017/07/24/trump-jeff-sessions-beleaguered-240881 [https:/perma.cc/88JD-QUEQ].

[16] *See* Donald J. Trump (@realDonaldTrump), Twitter (July 15, 2017, 6:57 AM), https://twitter.com/realDonaldTrump/status/875321478849363968 [https://perma.cc/T4RZ-L5WC] ("You are witnessing the single greatest WITCH HUNT in American political history - led by some very bad and conflicted people! #MAGA"); *see also* Maggie Haberman & Glenn Thrush, *Trump, Saying He Is Treated 'Unfairly,' Signals a Fight*, N.Y. Times (May 17, 2017), https://www.nytimes.com/2017/05/17/us/politics/trump-saying-he-is-treated-unfairly-signals-a-fight.html [https://perma.cc/EGG5-428Y].

[17] *See, e.g.*, Editorial, *President Trump's Contempt for the Rule of Law*, N.Y. Times (July 20, 2017), https://www.nytimes.com/2017/07/20/opinion/donald-trump-sessions-interview-law.html [https://perma.cc/5HKU-WFCP]; Linda Greenhouse, Opinion, *Will the Supreme Court Stand Up to Trump?*, N.Y. Times (Feb. 4, 2017), https://www.nytimes.com/2017/02/04/opinion/sunday/will-the-supreme-court-stand-up-to-trump.html [https://perma.cc/Y9GP-DQV7].

[18] *See* Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

[19] For more discussion of this concurrence, see *infra* notes 20–21 and accompanying text.

[20] *Steel Seizure*, 343 U.S. at 635.

may have concurrent authority, or in which its distribution is uncertain."[21] Third, if "the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon constitutional powers minus any constitutional powers of Congress over the matter."[22] Presidential defiance of courts may be understood along analogous lines of analysis, but with public approval or disapproval mapped onto the analysis as an important add-on, since public support is critical to a president's relative political strength.[23] If the president's defiance of courts is done with the support or approval of Congress and the public, then it is likelier to endure. But, if Congress—or the public—disapproves or does not support the president's defiance of courts, then it is less likely that the president's action will stand. If Congress—and the public—stand indifferently on the sidelines, neither approving nor disapproving the president's actions, then the contest will likely come down to a contest of wills between the courts and the president, both at the time of their initial conflict and over time. This Essay uses three case studies to examine the extent to which congressional and/or public approval or disapproval affects a president's capacity to defy judicial decisions that he or she disapproves.

Part I focuses on the efforts by President Andrew Jackson to defy or bypass decisions from the Supreme Court led by the great Chief Justice John Marshall that President Jackson opposed. He established a significant precedent on the scope of presidential power by vetoing the re-chartering of the National Bank[24] in spite of the Marshall Court's prior decision upholding the National Bank's constitutionality.[25] President Jackson argued that *McCulloch* did not bar him from vetoing the re-chartering of the National Bank.[26] Subsequent presidents have followed his argument that as president, he was entitled to an independent voice on the constitutionality of the National Bank.[27] In yet another case,[28] President Jackson defied the Court. Because the Court in that case had not asked the president to enforce its latter decision, it appears as if there was nothing he was obliged to enforce,[29] while Congress was in no position to retaliate against President Jackson because he was popular, was en route to re-election as president, and the opposition party did not control enough seats or power in Congress to do him harm.[30] As a result, President Jackson's defiance has become a potentially significant precedent

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[21] *Id.* at 637.
[22] *Id.*
[23] *See* Michael J. Gerhardt, *Constitutional Arrogance*, 165 U. PA. L. REV. 1649, 1670–71 (2016).
[24] *See infra* Part I.
[25] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).
[26] *See* JAMES F. SIMON, LINCOLN AND CHIEF JUSTICE TANEY 20 (2006).
[27] *See id.* (discussing successive presidents who have agreed with President Jackson's position, in particular President Lincoln's analysis of his own suspension of habeas corpus).
[28] *See infra* Part I (discussing Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)).
[29] *See infra* Part I.
[30] *See infra* Part I.

for presidents contemplating whether to comply with judicial decrees or decisions with which they disapprove.

In Part II, I turn to President Abraham Lincoln's well-known defiance of Chief Justice Taney's determination that President Lincoln had violated the Constitution in unilaterally suspending habeas corpus during the Civil War.[31] Although the Chief Justice issued a decision finding President Lincoln's action to be illegal,[32] President Lincoln took no action to comply with the order. Instead, he sought retroactive approval from Congress,[33] a point that the Court has subsequently emphasized as indispensable to the suspension of habeas corpus.[34]

In Part III, I examine President Richard Nixon's ambivalence about complying with judicial decisions with which he disagreed. In spite of his winning re-election by a historic margin,[35] President Nixon faced several charges of impeachable misconduct, including obstruction of justice—actions he undertook to undermine the judicial system, particularly to interfere with investigations into his possible criminal misconduct as president.[36] When confronted by a Supreme Court decision directing him to turn over incriminating taped conversations that could possibly destroy him politically, President Nixon considered defying the order, but he ultimately complied with the decision. He relented because both the public and Congress expected such compliance and he understood defiance would likely subject him to retaliation from Congress in the form of impeachment and possible removal from office.[37]

Part IV reviews the lessons that these case studies can teach us not only about presidential defiance of courts generally but also for President Trump in particular. They demonstrate that the president, even when acting unilaterally, is inevitably connected, by virtue of the Constitution's system of checks and balances, to the actions, or inaction, of the other branches. Their reactions or responses to presidential defiance affect its likelihood of success or endurance. When Congress or the public side with the courts against the president, the president's defiance is likely to be short-lived or unsuccessful. When Congress or the public agree with or take the side of the president, the president's defiance has its best prospects to endure. But, when Congress or the public are indifferent to the conflict between presidents and the courts, the president's defiance still might succeed, at least in the short-term, since courts need support from the other branches to enforce their judgments. Thus, effectively checking presidential defiance of the courts requires coor-

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[31] *See infra* Part II.

[32] *Ex parte* Merryman, 17 F. Cas. 144 (Taney, Circuit Justice, C.C.D. Md. 1861) (No. 9487).

[33] *See* David Gray Adler, *The Framers and Executive Prerogative: A Constitutional and Historical Rebuke*, 42 Presidential Stud. Q. 376, 387 (2012).

[34] *See* I.N.S. v. St. Cyr, 533 U.S. 289, 299 (2001) ("Congress must articulate specific and unambiguous statutory directives to effect a repeal [of habeas corpus jurisdiction].").

[35] *See infra* Part III.

[36] *See infra* Part III.

[37] *See infra* Part III.

dinated efforts of the courts, Congress, and the public to work in concert to stymie such defiance and uphold the rule of law.

I. Andrew Jackson as a Model of Presidential Defiance

When Donald Trump sits at his desk in the Oval Office, a portrait of Andrew Jackson hangs over his shoulder.[38] The president moved the portrait there for a reason: President Trump sees in President Jackson a kindred spirit.[39]

When Andrew Jackson came into office, his belligerence was well-known.[40] Known as Old Hickory because of his toughness,[41] Mr. Jackson is the only president to have killed a man in a duel.[42] He took pride in being tough.[43]

In constitutional law, President Jackson is remembered for his defiance of the Supreme Court. In *Worcester v. Georgia* in March 1832, the Supreme Court invalidated a Georgia criminal statute that prohibited non-Native Americans from being present on Native American lands without a license from the state.[44] Writing for the Court, Chief Justice John Marshall explained that the statute was invalid because the federal government had sole authority to deal with Indian nations.[45] President Jackson is said to have responded, "John Marshall has made the decision, now let him enforce it."[46] Although the comment is probably apocryphal,[47] both the state of Georgia and President Jackson ignored the decision, even though Georgia was holding two missionaries, including Samuel Worcester, in its prisons for having violated the state law.[48] The two missionaries were not released until 1833.[49] The delay in their release, coupled with President Jackson's failure to implement

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[38] *See* Max Greenwood, *Trump Hangs Portrait of Andrew Jackson in Oval Office*, Hill, (Jan. 25, 2017), http://thehill.com/homenews/administration/316115-trump-hangs-portrait-of-andrew-jackson-in-oval-office [https://perma.cc/3U9S-GRPE].

[39] *See id.*

[40] *See* Thomas E. Watson, The Life and Times of Andrew Jackson 255 (1912) ("The popular conception of Andrew Jackson is that he was a bluff soldier, tough and rough . . . .").

[41] *See* Jon Meacham, American Lion: Andrew Jackson in the White House 29 (2008).

[42] *See id.* at 26.

[43] *See Id.* at 25–28 (2008) (discussing Jackson's duels with John Sevier and Charles Dickinson).

[44] *See* 31 U.S. (6 Pet.) 515, 520 (1832).

[45] *See id.* at 518.

[46] *See* Jeffrey Rosen, *Not Even Andrew Jackson Went as Far as Trump in Attacking the Courts*, The Atlantic, (Feb. 9, 2017), https://www.theatlantic.com/politics/archive/2017/02/a-historical-precedent-for-trumps-attack-on-judges/516144 [https://perma.cc/B7BN-PXWR].

[47] *See* Stephen M. Engel, American Politicians Confront the Court: Opposition Politics and Changing Responses to Judicial Power 134 n.9 (2011).

[48] *See* Edwin A. Miles, *After John Marshall's Decision:* Worcester v. Georgia *and the Nullification Crisis*, 39 J.S. Hist. 519, 519, 527–29 (1973).

[49] *Id.* at 541.

the decision, has helped to transform the aftermath of the case into one of the most famous instances of presidential defiance of the Court.

In July of 1832, President Jackson took decisive action on a matter that had long troubled him and in a form that helped to strengthen the presidency as an institution. Throughout much of his presidency up until this time, President Jackson had campaigned against the National Bank, which he believed was corrupt, functioned at the expense of state sovereignty, and had to be stopped.[50] In 1819, Chief Justice Marshall and a unanimous Court upheld the constitutionality of the National Bank in *McCulloch v. Maryland*.[51] The opinion was a blow to ardent states' rights proponents, rejecting a cramped construction of congressional power, which would have restricted Congress solely to the exercise of its express powers.[52] Instead, the Court recognized that Congress had the implicit authority, by way of the Necessary and Proper Clause,[53] to establish a National Bank.[54] The Court ruled that Congress could do whatever it deemed was convenient or appropriate to implement its express authorities.[55]

When Congress passed a law to re-charter the National Bank, President Jackson vetoed it.[56] His veto message became one of the most famous in history.[57] Prior to the veto, presidents, beginning with George Washington, had been reluctant to aggressively exercise the veto power and instead used it sparingly only when they were convinced Congress had enacted a law that was clearly unconstitutional.[58] President Jackson's conception of the veto was considerably more robust. Written in collaboration with then-Attorney General Roger Taney,[59] President Jackson's veto message argued that the president, as duly authorized to sign or veto a law enacted by Congress, could make his own determination about whether a law was necessary or proper to the exercise of other powers.[60] In President Jackson's view, the bank was neither necessary nor proper to the exercise of an enumerated power.[61] As the veto message explained, President Jackson conceived of the president as having a unique, independent voice on the Constitution, for the president is the only official involved in the lawmaking process, set forth in

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[50] *See* MEACHAM, *supra* note 41, at 53.
[51] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 326 (1819).
[52] *See id.* at 411–13.
[53] U.S. CONST. art. I, § 8, cl. 18.
[54] *McCulloch*, 17 U.S. (4 Wheat.) at 326.
[55] *McCulloch*, 17 U.S. (4 Wheat.) at 421–22.
[56] *See* President Andrew Jackson, Veto Message Regarding the Bank of the United States (July 10, 1832) (transcript available at http://avalon.law.yale.edu/19th_century/ajveto01.asp [https://perma.cc/DLN7-YF8Q]).
[57] *See* Trevor Latimer, *Vetoes in the Early Republic: A Defense of Norms*, PRESIDENTIAL STUD. Q. 1, 18 (2017).
[58] *See id.* at 25.
[59] Edwin J. Perkins, *Lost Opportunities for Compromise in the Bank War: A Reassessment of Jackson's Veto Message*, 61 BUS. HIST. REV. 531, 538 (1987).
[60] President Andrew Jackson, *supra* note 56; *see also* JAMES F. SIMON, LINCOLN AND CHIEF JUSTICE TANEY 20–21 (2006).
[61] *See* Jackson, *supra* note 56.

Article I of the Constitution, who is elected by all the people of the nation and thus uniquely represents them in the lawmaking process.[62]

Over the next several years, President Jackson battled different factions within Congress to have the last word on the National Bank.[63] Though the re-chartering of the Bank had failed, a movement within the Senate gained momentum to censure President Jackson for having directed in 1833 the removal of deposits from the National Bank in an effort to kill it.[64] Led by Henry Clay, whom President Jackson defeated in the presidential election of 1832, the Senate formally censured President Jackson for his actions to undermine the National Bank.[65] In response, President Jackson vigorously campaigned during the midterm elections of 1834 to turn out Whigs, who had voted to censure him.[66] He succeeded in restoring Senate control back to a bare majority of Jackson-led Democrats, who voted to expunge the censure resolution in January 1837.[67]

While expunging the censure did not directly involve a president's ability to defy courts, the presidency appeared, as President Jackson was leaving office, to be transcendent in the system of checks and balances. Against Congress, the president appeared to have the power to veto any law on policy or constitutional grounds, thus leaving the president in a position to direct the lawmaking process in the absence of veto-proof majorities.[68] Congress appeared unable to check a president's veto as long as the president remained popular and the president's party was in control of Congress. President Jackson's veto further signaled that merely because the Court had upheld a law did not oblige a president to agree with its constitutionality. The Court, in other words, was not always the last word on the Constitution.[69] President Jackson demonstrated that a judicial decision on federal authority or rights required enforcement in order to be meaningful. The lessons would not be lost on the man who would be the first, after Mr. Jackson, to be re-elected president.

II. Lincoln Against Taney

By the time Abraham Lincoln became president in 1861, he and the Chief Justice of the United States, Roger Taney, were already in conflict.[70] In his 1858 Senate campaign against Stephen Douglas, Mr. Lincoln harshly

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[62] *See id.*
[63] *See* Meacham, *supra* note 41, at 267–71.
[64] *See id.* at 278–85.
[65] *See id.*
[66] *See id.* at 289.
[67] *See id.* at 335.
[68] *See* Terry M. Moe & William G. Howell, *Unilateral Action and Presidential Power: A Theory*, 29 Presidential Stud. Q. 850, 863 (1999).
[69] *Cf. id.* at 868 ("There is no higher executive authority than the [P]resident, so no other executive is going to come riding to the Court's rescue to force the [P]resident into action.").
[70] *See* Simon, *supra* note 26.

criticized the Supreme Court's decision by Chief Jusice Taney in *Dred Scott v. Sandford*.[71] In *Dred Scott*, the Court struck down the Missouri Compromise for violating the Fifth Amendment to the Constitution.[72] The Missouri Compromise forbade slavery within the federally-owned Missouri Territory.[73] Dred Scott argued that, even though he was a slave before he entered the territory, entering into it made him a free man.[74] The Court ruled, however, that, by attempting to strip away people's ownership rights over their slaves, the Missouri Compromise violated the owners' Fifth Amendment right to own slaves free from federal interference.[75] President Lincoln believed not only that the decision was wrongly decided, but also that it did not deserve the same degree of respect or fidelity as Supreme Court precedents, which:

> [H]ad been made by the unanimous concurrence of the judges, and without any apparent partisan bias, and in accordance with legal and public expectation, and with the steady practice of the departments throughout our history, and had been, in no part based on assumed historical facts, which are really not true; or, if wanting in some of these, it had been before the [C]ourt more than once, and had there been affirmed and re-affirmed through a course of years, it might then be, perhaps would be, factious, nay, even revolutionary to not acquiesce in it as precedent.[76]

As President Lincoln saw it, the decision had none of these attributes and thus was unworthy of being regarded as a "genuine" precedent of the Court, that is, as deserving respect and compliance from other constitutional authorities.[77] Later, in 1863, President Lincoln disregarded the *Dred Scott* decision and claimed the exigencies of war to justify his Emancipation Proclamation,[78] freeing African Americans who had been enslaved within the ten Southern States that had rebelled against the Union. In doing so, the Emancipation Proclamation was in conflict with *Dred Scott*, indeed fundamentally at odds with it. It entailed federal action, which stripped away the rights recognized in *Dred Scott* of the people who called themselves masters over those people they deemed to be slaves. In *Dred Scott*, the Court had struck

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[71] *See, e.g.*, President Abraham Lincoln, Remarks at the First Debate, Lincoln-Douglas Debates (Aug. 21, 1858) (transcript available at https://www.nps.gov/liho/learn/historyculture/debate1.htm [https://perma.cc/7GTM-GRD5]).

[72] *See* Dred Scott v. Sanford, 60 U.S. 393, 450 (1857).

[73] *See id.* at 519.

[74] *See id.* at 406.

[75] *See id.* at 452.

[76] President Abraham Lincoln, Speech on the Dred Scott Decision (June 26, 1857) (transcript available at http://teachingamericanhistory.org/library/document/speech-on-the-dred-scott-decision/ [https://perma.cc/8BRR-F24E]).

[77] *See* MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 170, 177 (2008) (discussing President Lincoln's disdain for the decision).

[78] Emancipation Proclamation, Jan. 1, 1863, (transcript available at https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation/transcript.html [https://perma.cc/M6UL-YD22]).

down a federal law that had, in the majority's estimation, abrogated the rights of slave owners.[79] President Lincoln's Emancipation Proclamation also abrogated the perceived rights of slave owners, yet he acted unilaterally as president and with no congressional involvement.[80] The fate of the Proclamation was not decided in the courts, but on the battlefield, and eventually the ratification of the three Reconstruction Amendments overturned *Dred Scott* and all its vestiges in constitutional law.[81]

In the meantime, President Lincoln defied Chief Justice Taney in another, dramatic confrontation. On April 15, President Lincoln issued a Proclamation declaring a draft and calling for a special war session of Congress.[82] Two weeks later, with Congress not yet in session, the president unilaterally suspended habeas corpus in the area between Philadelphia and Washington, D.C.[83] Particularly in Maryland, there were many Confederate sympathizers, who impeded federal troops and operations.[84] Federal authorities, led by General George Cadwallader, promptly imprisoned John Merryman for recruiting, leading, and training a drill company in service of the Confederacy.[85] Merryman's lawyer quickly appealed to Chief Justice Taney, who was sitting as a trial judge, for a writ of habeas corpus.[86] The writ would have required Merryman's jailer to come before a court to explain the conditions of his confinement.[87] Taney initially ordered the writ to be delivered to General Cadwallader.[88] The General refused to respond.[89] Faced with such insolence, the Chief Justice granted the writ in *Ex Parte Merryman*.[90] In his opinion as a trial judge in the matter, then-Judge Taney ruled that only Congress had the power to suspend "the privilege of the writ of habeas corpus"[91] and rejected the president's argument that he had the authority to suspend habeas corpus while Congress was in recess and therefore unable to do so itself.[92] Judge Taney's opinion did not directly order President Lincoln or his

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[79] *See Dred Scott*, 60 U.S. at 450.

[80] *See* ERIC FONER, THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY 242 (2010).

[81] *See* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 580–83 (1978) (describing how *Dred Scott* was overturned by the Thirteenth, Fourteenth, and Fifteenth Amendments).

[82] Proclamation No. 80, Calling Forth the Militia and Convening an Extra Session of Congress (Apr. 15, 1861), (transcript available at http://www.presidency.ucsb.edu/ws/index.php?pid=70077 [https://perma.cc/86VA-TDN2]).

[83] *See* James A. Dueholm, *Lincoln's Suspension of the Writ of Habeas Corpus: An Historical and Constitutional Analysis*, 29 J. ABRAHAM LINCOLN ASSOC. 47, 48 (2008).

[84] *See id.*

[85] *See id.*

[86] *See id.*

[87] *See id.* at 48-49.

[88] *See id.* at 49.

[89] *See id.*

[90] *Ex parte* Merryman, 17 F. Cas. 144 (Taney, Circuit Justice, C.C.D. Md. 1861) (No. 9487).

[91] U.S. CONST. art. I, § 9, cl. 2.

[92] *Ex parte Merryman*, 17 F. Cas. at 152.

administration to release the petitioner John Merryman. In response, President Lincoln and his administration simply ignored the opinion.[93]

Once in a Special Message in July to Congress[94] and again in his Annual Message in December 1861,[95] Lincoln defended his actions to Congress. In his July 21 address, the President posed the rhetorical question, "Are all the laws but one to go unexecuted, and the Government itself go to pieces lest that one be violated?"[96] Throughout 1861, Congress could not reach any consensus on the necessity of or the conditions required for suspending habeas corpus, and President Lincoln felt the necessity to further suspend the writ on the Florida coast as well as in the area between Philadelphia and New York.[97] In the meantime, Henry May, who had been elected as a Democratic Representative to the House from Maryland in the 1850s, returned to the House in 1861 as a member of the newly formed Unionist Party, which was made up of former Whigs who wanted to avoid secession over the issue of slavery.[98] After the special session of Congress, Representative May was taken into custody, without charges or recourse to habeas, on suspicion of treason.[99] He was eventually released and returned to his House seat in December 1861.[100] He is remembered mostly for what he did after his return to the House—his sponsorship of a bill to require federal indictment rather than direct imprisonment for federal crimes.[101] Such indictment would have required a grand jury indictment and actual legal process prior to any incarceration, all of which Representative May had been denied.[102] In 1863, the Senate approved a law incorporating Representative May's bill, which became known as the 1863 Habeas Corpus Suspension Act.[103] It was understood at the time and later as effectively ratifying the Lincoln administration's actions.[104]

Chief Justice Taney died just before President Lincoln's reelection in 1864.[105] Later that year, the president replaced him with his Treasury Secretary Salmon Chase, who, like President Lincoln's four other appointments to

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[93] *See* Dueholm, *supra* note 84, at 49.

[94] President Abraham Lincoln, Address to Special Session of Congress (July 4, 1861), (transcript available at http://www.presidency.ucsb.edu/ws/?pid=69802 [https://perma.cc/T4N8-SDGQ]).

[95] *See* President Abraham Lincoln, First Annual Message to Congress (Dec. 3, 1861) (transcript available at http://www.presidency.ucsb.edu/ws/?pid=29502 [https://perma.cc/6VRQ-W2E7]).

[96] *Id.*

[97] *See* Dueholm, *supra* note 83, at 49.

[98] *See* 4 States at War: A Reference Guide for Delaware, Maryland, and New Jersey in the Civil War 472 (Richard F. Miller ed., 2015).

[99] *See id.* at 332.

[100] 4 States at War: A Reference Guide for Delaware, Maryland, and New Jersey in the Civil War 470 (Richard F. Miller ed., 2015).

[101] *See* Jonathan W. White, Abraham Lincoln and Treason in the Civil War: The Trials of John Merryman 65–70 (2011).

[102] *See id.* at 332.

[103] An Act relating to Habeas Corpus, and regulating Judicial Proceedings in Certain Cases (Habeas Corpus Suspension Act), ch. 81, 12 Stat. 755 (1863).

[104] *See* Dueholm, *supra* note 83, at 53.

[105] *See id.*

the Court, was a staunch Republican firmly committed to the Union, the power of the federal government, and the Constitution.[106]

In the years since President Lincoln's death and the end of the Civil War, the weight of authority has turned against the legality of President Lincoln's unilateral suspension of habeas corpus.[107] The Supreme Court, in more than one decision, has indicated that Congress has an important, indispensable constitutional role in suspending habeas corpus.[108]

III. President Nixon and the Limits of Presidential Defiance of the Court

Like Presidents Jackson and Lincoln, President Richard Nixon was a lawyer for whom the Supreme Court was a major concern. A hallmark of President Nixon's career had been his criticism of the Supreme Court for overly protecting the rights of criminal defendants at the expense of state policies and practices favored by popular majorities during the 1950s and 1960s and his efforts to steer the Court, which had been led by Chief Justice Earl Warren, towards a more conservative, principled interpretation of the Constitution.[109] As a presidential candidate in 1968, Mr. Nixon promised to appoint "law and order" judges who would return the Court to "strict construction" of the Constitution.[110] These were code words, along with more candid declarations, signaling that Mr. Nixon did not expect his Court appointees to coddle criminal defendants or favor the civil rights of minorities over the traditional powers of popular majorities.[111] Mr. Nixon supported the filibuster of President Johnson's nomination of Abe Fortas as Chief Justice, driven in large part by backlash against the Warren Court's liberal activism; and then, early in his presidency, Nixon supported the successful effort to force Justice Fortas off the Court.[112]

By the time President Nixon's own legal troubles were making their way to the Supreme Court, he had transformed it with four appointments,

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[106] Henry J. Abraham, Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Bush II 93–98 (5th ed. 2008) (discussing Lincoln's appointments to the Supreme Court).

[107] *See* Dueholm, *supra* note 83, at 58.

[108] *See, e.g.*, Boumediene v. Bush, 553 U.S. 723 (2008).

[109] *See generally* Abraham, *supra* note 106, at 233–35 (noting Nixon's desire to appoint Supreme Court justices with a more conservative judicial philosophy).

[110] *See* Abraham, *supra* note 106, at 235 (citation omitted) ("Nixon's repeatedly stated criteria were to select 'strict constructions' who would see 'their duty as interpreting law and not making law'; would would follow a 'properly conservative' course of judging that would, in particular, protect society's 'peace forces' against the 'criminal forces' . . . .").

[111] *Tracing The 'Rise Of The Judicial Right' To Warren Burger's Supreme Court*, NPR: Fresh Air (July 6, 2016), http://www.npr.org/2016/07/06/484939647/tracing-the-rise-of-the-judicial-right-to-warren-burgers-supreme-court [https://perma.cc/YC85-MGNR].

[112] *See* John Dean, *Nixon's Uses, Abuses and Muses on the Supreme Court*, Justia: Verdict (July 25, 2014), https://verdict.justia.com/2014/07/25/nixons-uses-abuses-muses-supreme-court [https://perma.cc/JH92-QTA4].

including Warren Burger to take Justice Warren's place as Chief Justice.[113] Though reelected by a historic margin, President Nixon found himself the subject of a special prosecutor and congressional investigations.[114] President Nixon had become implicated in a burglary of the Democratic headquarters in the Watergate Hotel during the 1972 presidential election.[115] It appeared several of the burglars had connections to the White House; and the public, the press, and members of Congress were becoming increasingly concerned that the president might have been involved with, or perhaps even sanctioned, the break-in.[116] Congressional investigators and special prosecutors learned that, during this period, President Nixon had taped conversations in the Oval Office.[117] They subpoenaed the tapes, but President Nixon resisted the subpoenas and engaged in a series of actions to hide evidence, pay off witnesses, and obstruct the special prosecutor's investigation, which was an attack on the integrity and effectiveness of the courts.[118] Obstruction of justice frustrates the administration of justice. It entails the malicious effort to undermine the reliability or trustworthiness of the judiciary's ability to do its job. (Later, during Bill Clinton's impeachment proceedings, those seeking his ouster from office argued that he had engaged in similar attacks on the courts through his efforts to obstruct the independent counsel's investigation and thus a majority of the House approved an impeachment article based on obstruction of justice.[119])

Hearings in both the House and the Senate produced evidence of President Nixon's obstruction of justice, among other things.[120] The House approved three impeachment articles against the president.[121] One charged that President Nixon had abused his powers by ordering the FBI and CIA to harass his political enemies, another that he had obstructed justice, and the third charged that his refusal to comply with a legislative subpoena (to obtain the tapes of White House conversations) was an impeachable offense.[122] As the Supreme Court considered President Nixon's prerogatives to refuse to

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[113] *See* ABRAHAM, *supra* note 106, at 233–56 (discussing how Nixon's appointed justices affected the Court).

[114] *See* John Herbers, *In Three Decades, Nixon Tasted Crisis and Defeat, Victory, Ruin and Revival*, N.Y. TIMES (Apr. 24, 1994), http://www.nytimes.com/books/98/06/14/specials/nixon-obit2.html [https://perma.cc/VD53-JTYS].

[115] *See id.*

[116] *See id.*

[117] *See id.*

[118] *See* MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 27, 29, 32, 54–55 (2d ed. 2000).

[119] *See id.* at 177–91.

[120] *See generally* STANLEY I. KUTLER, THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON (1990) (discussing the Watergate Scandal, President Nixon's response, and the associated hearings prior to his resignation).

[121] *See* Valerie Strauss, *History Lesson: Richard Nixon Was Not Impeached*, WASH. POST (May 29, 2017), https://www.washingtonpost.com/news/answer-sheet/wp/2017/05/29/richard-nixon-was-not-impeached-despite-what-hillary-clinton-and-others-say [https://perma.cc/9N7E-7LVU].

[122] *See id.*

comply with a judicial subpoena requesting the tapes and to maintain an absolute privilege, or control, over information produced for the president, President Nixon began considering defying the Supreme Court's opinion if it went against him.[123] On July 24, 1974, it did.[124]

As the congressional hearings wore on, President Nixon's popularity plummeted. The more unpopular he became, the more members of Congress, even from President Nixon's own Republican Party, increased their efforts to get to the bottom of the Watergate affair.[125] By the time the Supreme Court ruled against him, President Nixon's popularity was at the lowest it had ever been.[126] Even so, President Nixon briefly considered defiance; indeed, he did not produce the tapes until two weeks after the Court had ordered him to do so.[127] He complied only after it had become clear that he could not survive politically if he defied the Court.[128] On August 7, a small delegation of Republican congressional leaders, including Senator Barry Goldwater, came to the White House to tell President Nixon that he barely had any support left in the Senate.[129] They suggested he consider resignation, since it was likely, in their view, that if he remained in office the House would impeach him and the Senate would convict and remove him from office.[130] On August 9, Nixon officially resigned from office.[131]

In retrospect, President Nixon had hoped in vain that the Court might not rule against him, since he had appointed four of its justices.[132] While William Rehnquist, President Nixon's last appointee to the Court, recused himself in the case, his three other appointees all joined the Court's unanimous opinion.[133] Ironically, President Nixon's appointees turned out to be the tough law and order judges that he had promised to put on the Court—so tough, in fact, that they all agreed with Chief Justice Burger that it had been long-settled that the President of the United States was not "above the law."[134] Accordingly, the Court ordered the president to comply with the judicial subpoena to turn over the tapes in his possession.[135]

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[123] *See* Dean, *supra* note 112.

[124] *See* United States v. Nixon, 418 U.S. 683, 714–15 (1974).

[125] *See* Herbers, *supra* note 114.

[126] *See Presidential Approval Ratings–Richard Nixon*, GALLUP NEWS, http://news.gallup.com/interactives/185273/presidential-job-approval-center.aspx [https://perma.cc/UCT7-P2HU].

[127] *See* James M. Naughton, *Nixon Slide From Power: Backers Gave Final Push*, N.Y. TIMES (Aug. 12, 1974), http://www.nytimes.com/1974/08/12/archives/nixon-slide-from-power-backers-gave-final-push-former-defenders.html [https://perma.cc/F7VS-BAW6].

[128] *See id.*

[129] *See id.*

[130] *See id.* ("One by one, [Goldwater] named inveterate supporters of Mr. Nixon—Republicans, and Southern Democrats—who were prepared to vote to [c]onvict him.").

[131] *See id.*

[132] *See* Dean, *supra* note 112.

[133] *See* United States v. Nixon, 418 U.S. 683, 715 (1974).

[134] *See id.* at 715 ("[Chief Justice] Marshall's statement cannot be read to mean in any sense that a President is above the law . . . .").

[135] *See id.* at 716.

By the time President Nixon resigned, his power was at its "lowest" conceivable "ebb," to borrow terms from Justice Jackson's concurrence in the *Steel Seizure Case*.[136] Whereas Justice Jackson had indicated that a president was at his "lowest ebb" when he acted contrary to Congress, President Nixon was faced with more than just the disapproval of Congress.[137] The Court's ruling was not only directed at him but also was an enduring rebuke, given that the Court's constitutional rulings can only be overturned by the Court or a constitutional amendment unlike statutory rulings that can be addressed by subsequent legislative actions.[138] Facing a seemingly perfect storm of disapproval from Congress, the Court, and the public, defiance was no longer a realistic option for President Nixon. The question, which I consider in the next Part, is whether only a perfect storm—or some things that fall short of it—can constrain or stop a president from defying the Court.

IV. Placing Presidential Defiance of Courts in Perspective

The three case studies are not, of course, the only instances of presidential defiance or resistance to the courts, but they do introduce and provide a useful overview of the different factors, which have come into play when there has been such defiance or resistance in the past. These factors include, but are not limited to, Congress' composition and views about the president and the Court, public opinion, the relative strength or weakness of a president including his popularity, and the relative strength or weakness of pertinent Supreme Court precedent. From these case studies and other well-known instances of presidents' defying or complying with judicial directives, we can identify both easy and hard cases, depending on how these factors come together.

President Nixon is a classic example of an easy case. With the Congress, the Court, and the public aligned against him, defiance was not a viable option.[139] The threat of impeachment and removal was quite real, and Nixon had no other choice but to resign.

Similarly, President Truman's response to the Court's order in the *Steel Seizure Case* was an easy choice, as each was the party to or the direct

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[136] *See* Carroll Kilpatrick, *Nixon Resigns*, Wash. Post (Aug. 9, 1974), http://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/080974-3.htm [https://perma.cc/K7SS-VFB2] ("Mr. Nixon said he decided he must resign when he concluded that he no longer had 'a strong enough political base in the Congress' to make it possible for him to complete his term of office.").

[137] *See* Philip Bump, *How America Viewed the Watergate Scandal, as It Was Unfolding*, Wash. Post (May 15, 2017), https://www.washingtonpost.com/news/politics/wp/2017/05/15/how-america-viewed-the-watergate-scandal-as-it-was-unfolding [https://perma.cc/XF6B-M7B8] ("Nixon's approval rating by the time he left office was at 24 percent, down from 67 percent at the time of his second inauguration.").

[138] *The Court and Constitutional Interpretation*, Sup. Ct. of the U.S.: Sup. Ct. at Work., https://www.supremecourt.gov/about/constitutional.aspx [https://perma.cc/LMU4-SFZP].

[139] *See* Gerhardt, *supra* note 23 and accompanying text.

subject of the case before the Court and as both the Court and Congress aligned against President Truman.[140] Had they defied the Court and thus publicly flaunted the rule of law, Presidents Nixon and Truman would have further diminished their already weak standing with the public as well.

President Bill Clinton's is also an easy case, though his popularity remained relatively stable during his contests with the Court and Congress.[141] In *Clinton v. Jones*, the Court rejected President Clinton's argument that the Court should grant him immunity from any lawsuits based on pre-presidential conduct.[142] Paula Jones sued Clinton for sexual harassment.[143] After the Court determined that discovery may proceed in Ms. Jones' sexual hassment lawsuit against the president, President Clinton's subsequent lying under oath gave the Republican-led Congress the chance to take action against him.[144] Subsequently, the House impeached President Clinton on several grounds,[145] including obstruction of justice, but the Senate's acquittal allowed him to remain in office.[146] The District Judge in Jones' sexual harassment case found President Clinton, who had by then left office, in contempt of court because he had lied under oath.[147] He complied with her sanction,[148] perhaps based in part on concerns about history's judgment of his misconduct and impeachment.

It appears that when a president stands alone against the other two branches, as Presidents Truman and Nixon did, they tend to lose. One of President Jackson's most significant actions was his veto of the re-chartering of the National Bank, which Congress did not override and therefore effectively upheld. President Lincoln recognized astutely that working with Congress' approval strengthened his constitutional position, while President Nixon's conflicts with the Court were sharpened because he did not have congressional approval or support. In each of these cases, presidents have

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[140] *See, e.g.*, Edwin S. Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53, 56 (1953) (explaining that Congress had spoken to the issue specifically already, along with the Court).

[141] *See Presidential Approval Ratings—Bill Clinton,* GALLUP NEWS, http://news.gallup.com/poll/116584/presidential-approval-ratings-bill-clinton.aspx [https://perma.cc/XB73-ECT2].

[142] *See* 520 U.S. 681, 684 (1997).

[143] *See id.*

[144] *See id.* at 684–85.

[145] *See, e.g.*, Alison Mitchell, *Impeachment: The Overview—Clinton Impeached; He Faces a Senate Trial, 2d in History; Vows to do Job Till Term's 'Last Hour,'* N.Y. TIMES (Dec. 20, 1998), http://www.nytimes.com/1998/12/20/us/impeachment-overview-clinton-impeached-he-faces-senate-trial-2d-history-vows-job.html [https://perma.cc/P5YS-N26T].

[146] *See, e.g.*, Alison Mitchell, *The President's Acquittal: The Overview; Clinton Acquitted Decisively: No Majority for Either Charge*, N.Y. TIMES (Feb. 13, 1999), http://www.nytimes.com/1999/02/13/us/president-s-acquittal-overview-clinton-acquitted-decisively-no-majority-for.html [https://perma.cc/M6VQ-F85J].

[147] *See* Jones v. Clinton, 36 F. Supp. 2d 1118, 1131 (E.D. Ark. 1999).

[148] *See, e.g.*, Robert L. Jackson, *Clinton Fined $90,686 for Lying in Paula Jones Case*, L.A. TIMES (July 30, 1999), http://articles.latimes.com/1999/jul/30/news/mn-61021 [https://perma.cc/T8UU-U9HN] (reporting that President Clinton would not challenge the fine and would comply with it).

found strategic, institutional, and constitutional advantage by working with another branch, particularly Congress.

Another relatively easy case is Martin Van Buren's acquiescence to the Supreme Court's rejection of his administration's position in the *Amistad Case*[149] on the legitimacy of a slave rebellion on a Spanish ship in American waters.[150] The Van Buren administration had taken custody of the ship, which it wanted to return to Spanish authorities, but the Supreme Court upheld the lower court's determination that the Africans, who had been enslaved, were entitled to take whatever legal measures were necessary to secure their freedom and ordered the Van Buren administration to release the former slaves.[151] Van Buren might have endeared himself to the South in defying the Court, but the defiance would undoubtedly not have played well in the North, from where much of his political support had come.[152]

In contrast, President Jackson's defiance of *Worcester v. Georgia* and *McCulloch v. Maryland* is a harder case. To begin with, President Jackson was not a party in either case, so he never was the subject of a direct order or ruling of a court. Moreover, he was a popular president, so his failure to follow the Court's lead did not undermine or dilute his standing with the American people. At the same time, President Jackson's response to these two Supreme Court decisions is a dramatic reminder of the dependency of the courts on the federal executive or Congress for the implementation of their orders. In the twentieth century, *Brown v. Board of Education* is perhaps the best-known instance of a constitutional case whose full potential as the rule of law was never realized.[153] Not until federal political authorities—presidents and members of Congress—begrudgingly began to fall behind its ruling was its enforcement more fully implemented, but by then it was too late and other factors, such as the persistent resistance of Southern leaders and white flight, had prevented the full dismantlement of segregated regimes or full implementation of integration in public schooling.[154]

A related consideration evident in these cases is the way in which conflicts between presidents and courts have played out over "political time,"

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[149] United States v. Libellants & Claimants of the Schooner Amistad (*Amistad Case*), 40 U.S. (15 Pet.) 518 (1841).

[150] *See* MICHAEL J. GERHARDT, THE FORGOTTEN PRESIDENTS: THEIR UNTOLD CONSTITUTIONAL LEGACY 13–15 (2013).

[151] *See Amistad Case*, 40 U.S. at 597.

[152] *See, e.g.*, YONATAN EYAL, THE YOUNG AMERICA MOVEMENT AND THE TRANSFORMATION OF THE DEMOCRATIC PARTY, 207 (2007) ("Texas annexation seemed a proslavery gambit that Van Buren could not abide while still maintaining northern support"); *see also* Michael A. Morrison, *Martin Van Buren, the Democracy, and the Partisan Politics of Texas Annexation*, 61 J. S. HIST. 695, 710 (1995) ("Northern Democrats . . . who opposed the annexation of Texas because [they] saw it as a southern initiative, applauded Van Buren's position.").

[153] *See generally* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 459 (2004) ("Congress and the [P]resident ultimately got behind *Brown*, not because of *Brown*, but because the civil rights movement had altered public opinion on school segregation.").

[154] *See generally id.* at 389–421 (analyzing the radicalization of Southern politics after *Brown*).

the historical pattern of the American presidency that has worked itself out over two hundred years.[155] While President Nixon's conflict was worked out in the short-term, its significance in constitutional law and the significance of each of the other conflicts turns on how constitutional authorities—the Court, Congress, and later presidents—understand them, particularly on their status as precedent, which other presidents are asked to follow or choose to challenge.

Examining the broader canvas of "political time" helps to show how courts have protected their own interests in the long term when they have had conflicts with presidents. In time, the courts, at least in the cases of Presidents Lincoln and Nixon, came down squarely on the side of the rule of law. In spite of Presidents Jackson and Lincoln's non-compliance, the Court later made clear that, when other constitutional actors defy the Court's directives, the Court should win, because its rulings are synonymous with the supreme law of the land and are therefore controlling under the Supremacy Clause.[156] Hence, the Court rejected President Lincoln's reasoning and ruled that congressional authorization of habeas suspension is constitutionally required,[157] and *McCulloch* has become a landmark decision of the Court. It has become a bedrock precedent for the growth of national power, albeit at the expense of state sovereignty.[158] Because the justices have life tenure and are insulated from direct pressure from the political branches and the public, they have time on their side. Once the defiant presidents leave office, the justices still occupy theirs, and thus, when the issues come back before the Court, they can come down clearly on the side of their own institutional authority, which had been previouasly threatened by a defiant president.

Last but not least, all three presidents—Jackson, Lincoln, and Nixon—had the power to shape the Court, if not in their own cases, for the future. Presidents Jackson and Nixon each made four appointments to the Supreme Court, while President Lincoln made five. President Nixon's appointments did not work to his advantage, nor to the advantage of the presidency in the longer run.[159] But the number of appointments made by these presidents is a reminder of the president's power to shape the direction of the Supreme Court, perhaps even the doctrine on executive power.

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[155] *See generally* Stephen Skowronek, Presidential Leadership in Political Time: Reprise and Reappraisal 18 (2011) ("Political time is the medium through which presidents encounter received commitments of ideology and interest and claim authority to intervene in their development.").

[156] *See generally* Cooper v. Aaron, 358 U.S. 1 (1958) (holding that Arkansas officials were bound by federal court orders).

[157] *See* Simon, *supra* note 26.

[158] *See, e.g.*, Martin S. Flaherty, *John Marshall,* McCulloch v. Maryland*, and "We the People": Revisions in Need of Revising*, 43 Wm. & Mary L. Rev. 1339, 1341 (2002) ("The usual–and critical– corollary that follows holds that the national populace erred on the side of according power to the national government at the expense of the states, as *McCulloch* appears to indicate.").

[159] *See supra* notes 114–125.

Making appointments to the Court can make it harder for presidents to deny the Court's legitimacy. On the one hand, there is no guarantee that a president's appointees will side with the president in a dispute before the Court. Three of President Nixon's appointees did not uphold his claim on executive privilege,[160] while two of President Truman's four Supreme Court appointments joined the majority opinion overturning his executive order seizing control of the nation's steel mills.[161] On the other hand, a president's Supreme Court appointments are investments in the Court's legitimacy. The three Court vacancies President Lincoln faced in the months after taking office gave him the chance to reshape the composition of the Supreme Court,[162] and the Court upheld the constitutionality of President Lincoln's blockade of Southern ports during the first couple years of the Civil War,[163] with all three of the appointments he had made up until then joining the majority opinion.[164] Once the Court was more aligned with his constitutional views, President Lincoln had a strong incentive to encourage, rather than undermine, respect for the Court. President Nixon also found that, at the end, respect for the Court—or at least acquiescence to judicial review—won out. After years of expressing disdain for the direction of the Court, he had to take the bitter with the sweet and eventually accept the legitimacy of the Court, especially if he wanted others to respect the Court he had helped to construct.

Making appointments to the Court are reminders that both it and other federal courts are institutionally designed to take the long-term view. Presidents come and go and the current average tenure of members of Congress is barely more than a decade,[165] but judges tend to serve for decades.[166] More importantly, the justices of the Supreme Court decide particular cases or controversies, but they do so on the basis of enduring principles of constitutional law, which they are uniquely situated to identify and articulate long after the presidents who appointed them have left office.

Put differently, if a president chooses to defy the courts, he or she is at an institutional disadvantage. Both the Constitution, designed by a generation of Americans rebelling against a tyrant, and over two hundred years of

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[160] *See* United States v. Nixon, 418 U.S. 683, 714–15 (1974).

[161] *See* Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 588–89 (1952).

[162] *See* Brian McGinty, LINCOLN AND THE COURT 103 (2008) ("[H]e sought men who would support the Union in its great struggle with the South.").

[163] *See* The Prize Cases, 67 U.S. (2 Black) 635 (1863).

[164] *See id.* at 699 (listing dissenters, not among them are Lincoln's appointees, Justices Swayne, Miller, and Davis).

[165] *See* MATTHEW ERIC GLASSMAN & AMBER HOPE WILHELM, CONG. RES. SERV., CONGRESSIONAL CAREERS: SERVICE TENURE & PATTERNS OF MEMBER SERVICE, 1789–2017 2 (2017), https://fas.org/sgp/crs/misc/R41545.pdf [https://perma.cc/BMC7-FDW2].

[166] *See, e.g.*, Linda Greenhouse, *How Long is Too Long for the Court's Justices?*, N.Y. TIMES (Jan. 16, 2005), http://www.nytimes.com/2005/01/16/weekinreview/how-long-is-too-long-for-the-courts-justices.html [https://perma.cc/65Q7-DT9N] ("[S]ince 1970, the average tenure has risen to 25.5 years.").

democratic norms speak to the same conclusion: presidents are not above the law. And even if one president chooses to defy the judiciary at a particular time, his term will end, but our democratic system of checks and balances will live on.

Conclusion

These three case studies illustrate several important trends and principles that may be observed when presidents attempt to defy or undermine courts. Perhaps most importantly, presidents can defy courts for a moment, but the moment rarely lasts. Presidents function in political time, but particular presidents operate only in the short-term. Even within the short-term, the defiance can last as long as at least one other branch sides with the president. As a practical matter, presidents have difficulty standing against the other two branches when they are united against his or her defiance. President Nixon found it more than a little ironic that, in promising judges who would respect "law and order," he too would have to do the same—promising to restore "law and order" meant that a president, at the end, cannot stand above or apart from the law.

The challenge for President Trump will be figuring out which historical precedent his defiance, when and if it comes, most closely resembles. Berating or demeaning courts is not the same thing as defying them. At the very least, the Constitution protects a president in criticizing the Court,[167] and there are many precedents for presidents doing so.[168]

But requiring a president to comply with a judicial subpoena is not a hard case, either. On October 16, 2017, President Trump was subpoenaed for any documents he had concerning a woman who has sued him for sexual harassment. Although the president described the legal action as "disgraceful" and "fake,"[169] it is well settled that, even though he is president, he is legally obliged to comply with its directive.[170] If, however, the president chooses to defy the subpoena, then other considerations may come into play besides the likelihood that a court will stand by the well-settled law obliging him to comply. If the president's party continues to control Congress and his base sticks with him, he might perceive that he is in as strong a position as

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[167] *See* Douglas E. Edlin, *"It's Not What You Said, It's How You Said It": Criticizing the Supreme Court in the State of the Union*, 28 Yale L. & Pol'y Rev. Inter Alia 27, 36 (2010) ("The President and Congress have ample institutional avenues to question rulings of the Supreme Court.").

[168] *Here and Now: Trump Isn't The First President To Challenge The Judiciary*, WBUR (Feb. 17, 2017), http://www.wbur.org/hereandnow/2017/02/17/president-challenge-judiciary-trump [https://perma.cc/FX2H-J575] (discussing historical examples of presidents criticizing the judicary).

[169] *Trumps Slams 'Disgraceful' and 'Fake' Subpoena from Gloria Allred, Ex-'Apprentice' Contestant*, Fox News (Oct. 16, 2017), http://www.foxnews.com/politics/2017/10/16/trump-says-subpoena-filed-against-him-for-sexual-assault-is-fake-news.html [https://perma.cc/AET8-9VZH].

[170] *See* United States v. Nixon, 418 U.S. 683 (1974).

President Jackson, his idol, was when he did not follow the Supreme Court in either *McCulloch* or *Worcester*, though President Jackson was not a party to either of those decisions. If, however, Congress, the courts, and the general public align against him, as they would likely do if he refused compliance with a legitimate subpoena, his base would seem to be the only thing left as a possible support for him. After all, the voters of Alabama elected Roy Moore to be Chief Justice of the Alabama Court, and they elected him as Republican nominee to the Senate, in spite of, or perhaps because of, his defiance of the courts. If President Trump's base remains large or vigorous enough, perhaps defiance of a court order directed at him might seem to be a viable, even appealing option. Even so, a victory by the president might be short-lived. For in any contest between the president and the Court, the courts will have many opportunities after the president has left office to even the score.