

TRUMP AND THE ATTACK ON THE RULE OF LAW

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I. INTRODUCTION

No conversation about public trust in the rule of law today can ignore Donald Trump. To my mind, President Trump should be not only a part of the analysis—he should be the centerpiece. As candidate and president, he has subjected the rule of law and the legal system to unprecedented, concerted attacks. Not only has Trump called upon the American public to distrust and devalue our justice system, he acts as if he himself is above the law. This imperils the foundation of the rule of law and its most important function.

II. HISTORY OF THE RULE OF LAW

One must begin with what is meant by the “rule of law.” Its frequent usage may have diluted its significance, though it remains an essential governing and political concept. The rule of law is far more than the US Supreme Court, and even the court system in general. The rule of law is simply a society’s commitment that no man or woman is above the democratically created laws or the systems put in place to enforce them.

The rule of law in America traces its roots through the Constitution, the Articles of Confederation, the Declaration of Independence, and the Mayflower Compact. In fact, the American rule of law is a direct descendant of Magna Carta in 1215. Although drafted and

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executed at the point of a sword at Runnymede, Magna Carta has enshrined for centuries a number of enduring legal principles, like trial by jury of one's peers and fundamental notions of due process. However, no concept of the Great Charter is more important than no man—including the king, president, or prime minister—is above the law. Indeed, that singular and fragile principle is the centerpiece of democracies, both here and around the world.

From the beginning, the principle that no man is above the law faced real opposition; it was even the subject of a papal bull issued by Pope Innocent III in 1215, holding that Magna Carta was void as contrary to God's law and the divine right of kings. Three and a half centuries later, the bull—having been ignored—was mooted when King Henry VIII left the Roman Catholic Church and founded the Church of England. The rule of law was then christened by blood with the execution of Thomas More, King Henry's friend and chancellor, for his refusal to put Henry's personal interest above that of the kingdom and the law.

A century after that, the first English colonists arrived in North America and the great American experiment began. The Mayflower Compact in 1620, and later the charters of the various colonies, established basic principles of governance and the first local judiciary, based on the rule of law as embodied in the English common law.

The rebellion of the colonies in 1776, the Declaration of Independence, and the wartime Articles of Confederation took the principles of governance, political cooperation, and the American experiment into perilous and uncertain times. The victory at Yorktown by Washington's army—invaluably assisted by the French with money, arms, men, and ships—set the stage for true governing independence, culminating in 1787 with the adoption of the Constitution based on the principles of the Enlightenment and Rousseau's social contract. Later, in 1791, the Bill of Rights was added based on Madison's incorporation of what had been

adopted by the House of Burgesses of the Commonwealth of Virginia. And within the Constitution, a tripartite system of coequal branches of government checking and balancing one another was established, first at the federal level and later to be modeled by the states.

From the beginning, tension existed between those favoring a strong federal government (Hamilton, Washington, and Madison) and those favoring strong state and local government (Jefferson and Patrick Henry, among others). The Federalists (not to be confused with the modern legal society of the same name) ultimately prevailed, but the divisions in philosophy remain to this day (i.e., is the Constitution fixed in the “original intent” of the drafters, or was it intended to be an organic document with flexibility to account for social change). It has been left to our independent judiciary to resolve these differences, maintain the checks and balances, and, since *Marbury v. Madison*, be the final word.²

Marbury remains the keystone of judicial independence and checks and balances. Nevertheless, judicial independence and the legitimacy of judicial opinions have been called into question at various points in the country’s history, including by the executive branch. I supply only a handful of notable examples here where presidents ignored and adhered to the rule of law as applied by courts.

During the Civil War, President Lincoln saw fit to suspend habeas corpus. John Merryman, a Southern sympathizer and suspected spy, was imprisoned in a Union garrison. He sought habeas corpus, which was issued by US Supreme Court Chief Justice Roger B. Taney.³ Lincoln and the commander of the Union garrison simply ignored the order, which the Court, of

² *Marbury v. Madison*, 5 U.S. 137 (1803).

³ *Ex Parte Merryman*, 17 Fed. Cas. No. 9487 (1861).

course, had no power to enforce. A full-blown constitutional crisis was avoided shortly thereafter when Merryman was simply released from jail.

As Professor Benjamin Barton's companion article further details, President Franklin Roosevelt, frustrated over the Supreme Court rejection of several New Deal programs as unconstitutional, chose not to ignore the Court but rather to "pack" its membership. A bipartisan Congress and public opinion rebuffed this plan, and when a change in position by a swing justice, Owen Roberts, later saved the day for the New Deal, Roosevelt abandoned his court-packing scheme.

President Truman, claiming war powers during the Korean conflict, ordered the government seizure of major US steel mills. The Court struck this down as unconstitutional and Truman complied.⁴

During the Watergate crisis, President Nixon defied a subpoena of the independent counsel for relevant tapes and evidence. The lower courts ordered Nixon to comply with the subpoena, which the Supreme Court upheld 9-0, again affirming the principle that even the president is not above the law.⁵ Nixon complied, and the tapes' disclosure led to his resignation.

President Clinton, facing claims of sexual assault and harassment, sought to avoid deposition testimony during his term of office. The courts, however, required Clinton's compliance, applying *United States v. Nixon* to hold that a sitting president is not immune from civil litigation against him.⁶

Where the law has thus far been able to keep America's president—arguably the most powerful person in the world—in check, why should there be any cause for concern now?

⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁵ *United States v. Nixon*, 418 U.S. 683 (1974).

⁶ *Clinton v. Jones*, 520 U.S. 681 (1997).

III. DONALD TRUMP'S DIRECT ATTACKS ON THE RULE OF LAW

Donald Trump is on an unprecedented, self-guided quest to be the exception to the longstanding principle that no man is above the law. First, Trump has repeatedly and directly attacked the legitimacy of the courts. As he has generally lobbed these insults after receiving unfavorable judicial decisions, it is obvious that he was trying to punish judges who decided against him or coerce judges in future cases to not act independently and rule against him. For example, after Judge James L. Robart temporarily enjoined Trump's travel ban, Trump called Robart a "so-called judge," expressly questioning the legitimacy of Robart's office simply because Robart had reached a conclusion Trump did not like.⁷ Notably, a panel of three appellate judges upheld Robart's decision.⁸ Trump has also made problematic comments about other judges,⁹ including referring to Judge John Tigar as an "Obama judge" and his court as a "disgrace" when Tigar overturned Trump's attempt to limit immigrants' eligibility for asylum.¹⁰ When Chief Justice John Roberts publicly refuted Trump's characterization of judges as political actors,¹¹ Trump doubled down, reasserting that "Obama judges" do indeed have different "points

⁷ Donald Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 6:12 AM) ("The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!").

⁸ *Washington v. Trump*, Case No. 17-35105 (9th Cir., Feb. 9, 2017).

⁹ *See, e.g.*, Donald Trump (@realDonaldTrump), TWITTER (Jul 13, 2016, 10:54 PM) ("Justice Ginsburg of the U.S. Supreme Court has embarrassed all by making very dumb political statements about me. Her mind is shot – resign!"); Donald Trump (@realDonaldTrump), TWITTER (May 30, 2016, 3:55 PM) ("I should have easily won the Trump University case on summary judgment but have a judge, Gonzalo Curiel, who is totally biased against me.").

¹⁰ Adam Liptak, *Trump Takes Aim at Appeals Court, Calling It a 'Disgrace'*, N.Y. TIMES (Nov. 20, 2018).

¹¹ Robert Barnes, *Rebuking Trump's Criticism of 'Obama Judge,' Chief Justice John Roberts Defends Judiciary as 'Independent'*, WASH. POST (Nov. 21, 2018) ("We do not have Obama judges or Trump judges, Bush judges or Clinton judges. . . . What we have is an extraordinary

of view” and alleging that the Ninth Circuit falls short of being an “independent judiciary.”¹²

Trump went on to call the Ninth Circuit judges “a disaster,” “out of control,” and “judicial activi[sts].”¹³ Trump has even claimed the entire court system is “broken and unfair,”¹⁴ and the timing of his critiques strongly suggests they grow out of his bitterness at a long history of losing his own cases.

Even more alarmingly, Trump is actively attempting to hold himself out of the law’s reach. With the investigations into his 2016 campaign ongoing,¹⁵ making a definitive judgement

group of dedicated judges doing their level best to do equal right to those appearing before them.”)

¹² Donald Trump (@realDonaldTrump), TWITTER (Nov. 21, 2018, 1:51 PM and 2:09 PM) (“Sorry Chief Justice John Roberts, but you do indeed have ‘Obama judges,’ and they have a much different point of view than the people we are charged with the safety of our country. It would be great if the 9th Circuit was indeed an ‘independent judiciary,’ but if it is why..... are so many opposing view (on Border and Safety) cases filed there, and why are a vast number of those cases overturned. Please study the numbers, they are shocking. We need protection and security – these rulings are making our country unsafe! Very dangerous and unwise!” (ellipses in original)).

¹³ Donald Trump (@realDonaldTrump), TWITTER (Nov. 22, 2018, 5:21 AM and 5:30 AM) (“Justice Roberts can say what he wants, but the 9th Circuit is a complete & total disaster. It is out of control, has a horrible reputation, is overturned more than any Circuit in the Country, 79%, & is used to get an almost guaranteed result. Judges must not legislate securityand Safety at the Border, or anywhere else. They know nothing about it and are making our Country unsafe. Our great Law Enforcement professionals MUST BE ALLOWED TO DO THEIR JOB! If not there will be not only bedlam, injury and death. We want the Constitution as written!” (ellipses in original)); Donald Trump (@realDonaldTrump), TWITTER (Nov. 22, 2018, 4:07 PM) (“Our highly trained security professionals are not allowed to do their job on the Border because of Judicial Activism and Interference by the 9th Circuit. Nevertheless, they are working hard to make America a safer place, though hard to do when anybody filing a lawsuit wins!”).

¹⁴ Donald Trump (@realDonaldTrump), TWITTER (Jan. 10, 2018, 7:11 AM) (“It just shows everyone how broken and unfair our Court System is when the opposing side in a case (such as DACA) always runs to the 9th Circuit and almost always wins before being reversed by higher courts.”); *see also* Donald Trump (@realDonaldTrump), TWITTER (Feb. 11, 2017, 5:12 AM) (“Our legal system is broken! ‘77% of refugees allowed into U.S. since travel reprieve hail from seven suspect countries (WT) SO DANGEROUS!’”).

¹⁵ Although Robert Mueller’s report is now complete at the time of this printing, Congress continues its inquiry. *See, e.g.,* Olivia Beavers, *Judiciary Democrats Announce Series of Hearings on Mueller Report*, THE HILL (June 3, 2019).

is premature; but, to say the least, hackles rise when Trump refers to those investigations—which have already led to numerous indictments, guilty pleas, and convictions¹⁶—as a “witch hunt.”¹⁷ Indeed, he has fired¹⁸ or investigated¹⁹ the investigators, publicly pressured witnesses to refuse to

¹⁶ Specifically, Trump campaign adviser George Papadopoulos pled guilty in September 2017 for lying to the FBI about his contacts with Russian officials; Trump’s former national security advisor Michael Flynn pled guilty in December 2017, confessing he lied to the FBI about contacts with Russia; Trump’s deputy campaign chairman Rick Gates pled guilty in February 2018 to a conspiracy against the United States and lying to the FBI; Trump’s campaign chairman Paul Manafort pled guilty in September 2018 to attempts to tamper with witnesses, lobbying violations related to his contact with Ukrainian officials, and other crimes; Trump’s attorney Michael Cohen pled guilty in November 2018 to lying to Congress about Trump’s business affairs in Russia; Trump’s campaign worker and advisor Roger Stone was arrested in January 2019 for his alleged contact with WikiLeaks, which allegedly hacked the Democrat campaign servers. This summary leaves out those inditees not formally affiliated with Trump, including the Russian intelligence officers indicted for hacking the Democratic Party’s computers during the 2016 campaign and other Russians indicted for tampering with the election through money laundering, social media advertising, and other means.

¹⁷ Donald Trump (@realDonaldTrump), TWITTER (Jan. 25, 2019, 9:16 AM) (“Greatest Witch Hunt in the History of our Country! NO COLLUSION! Border Coyotes, Drug Dealers and Human Traffickers are treated better. Who alerted CNN to be there?”); Donald Trump (@realDonaldTrump), TWITTER (May 17, 2018, 5:28 AM) (“Congratulations America, we are now into the second year of the greatest Witch Hunt in American History...and there is still No Collusion and No Obstruction. The only Collusion was that done by Democrats who were unable to win an Election despite the spending of far more money!”).

¹⁸ While the Trump administration never fully explained its decision to fire Jeff Sessions, Trump certainly frowned upon Sessions’ required decision to recuse himself from the Russia investigation. Trump then appointed Matt Whitaker, a vociferous critic of the investigation, as Sessions’ successor. Additionally, Trump fired FBI Director James Comey, which, according to Trump’s press secretary, was supposed to truncate the Russia investigation, a statement Trump later disputed. Kevin Liptak, *Trump Contradicts Spokeswoman on Effect of Comey Firing, Says It May ‘Lengthen out the Investigation,’* CNN (May 11, 2017), www.cnn.com/2017/05/11/politics/comey-fbi-investigation-russia-sarah-huckabee-sanders/index.html. Comey then leaked a confidential memorandum identifying that Trump had asked him to end the FBI’s investigation into former National Security Advisor Michael Flynn, who later pled guilty to lying to the FBI about his contacts with Russia.

¹⁹ In May 2018, Trump ordered the Department of Justice to investigate the FBI’s investigation of Trump. Charlie Savage, *By Demanding an Investigation, Trump Challenged a Constraint on His Power*, N.Y. TIMES (May 21, 2018).

testify against him,²⁰ and called former associates who do testify “rat[s],”²¹ a term reminiscent of organized crime bosses. Many have gone as far as categorizing Trump’s statements as witness tampering and obstruction of justice²² (an issue on which Robert Mueller’s report was infamously inconclusive²³). But Trump’s personal lawyers have taken the position that a president’s constitutional authority is so sweeping that no action he takes, no matter how extreme, can be construed as interfering in any way with a federal criminal investigation.²⁴ Trump even went so far as to say he has “the absolute right” to “pardon [him]self for any crime.”²⁵ Then, at the 2019 State of the Union Address, Trump devoted an entire section to

²⁰ Donald Trump (@realDonaldTrump), TWITTER (Dec. 3, 2018, 8:48 AM) (“I will never testify against Trump.’ This statement was recently made by Roger Stone, essentially stating that he will not be forced by a rogue and out of control prosecutor to make up lies and stories about “President Trump.” Nice to know that some people still have ‘guts!’”); Donald Trump (@realDonaldTrump), TWITTER (Aug. 22, 2018, 7:21 AM) (“I feel very badly for Paul Manafort and his wonderful family. ‘Justice’ took a 12 year old tax case, among other things, applied tremendous pressure on him and, unlike Michael Cohen, he refused to ‘break’ - make up stories in order to get a ‘deal.’ Such respect for a brave man!”).

²¹ Donald Trump (@realDonaldTrump), TWITTER (Dec. 16, 2018, 7:39 AM) (“Remember, Michael Cohen only became a ‘Rat’ after the FBI did something which was absolutely unthinkable & unheard of until the Witch Hunt was illegally started. They BROKE INTO AN ATTORNEY’S OFFICE! Why didn’t they break into the DNC to get the Server, or Crooked’s office?”).

²² See e.g., Deanna Paul, *Trump’s Latest Tweets Cross Clear Lines, Experts Say: Obstruction of Justice and Witness Tampering*, WASH. POST (Dec. 3, 2018) (quoting a number of commentators, including Norman Eisen, senior fellow at the Brookings Institution, and Neal Katyal, former acting solicitor general, among others, saying Trumps behavior is close to or looks like witness tampering).

²³ Carrie Jonson et al., *Mueller Report Doesn’t Find Russian Collusion, But Can’t ‘Exonerate’ On Obstruction*, NPR (Mar. 24, 2019); see also Emily Stewart, *These Are the 10 Episodes Mueller Investigated for Obstruction of Justice*, VOX (Apr. 18, 2019).

²⁴ Letter from Marc E. Kasowitz, Counsel to the President, to Robert S. Mueller, Special Counsel, U.S. Dept. of Justice (June 23, 2017), www.nytimes.com/interactive/2018/06/02/us/politics/trump-legal-documents.html?module=inline#june-23-2017.

²⁵ Donald Trump (@realDonaldTrump), TWITTER (June 4, 2018, 6:35 AM) (“As has been stated by numerous legal scholars, I have the absolute right to PARDON myself, but why would I do

threatening to thwart Congress' agenda if they chose to investigate him.²⁶ In the end, it is difficult to argue that Trump is doing anything other than attempting to leverage his political platform to secure special treatment in the legal system—or circumvent it all together.

IV. TRUMP'S ATTEMPTED EXPANSION OF EXECUTIVE POWER AND ITS IMPACT ON THE JUDICIARY

Furthermore, Trump is crossing the boundaries of executive power. Though another form of direct attack on the rule of law, it nonetheless requires the judiciary to take on the precarious and often unpopular job of defining and defending the border between executive and legislative authority. This is particularly so where the constitutional oversight power of Congress is being systematically thwarted by the executive branch by their ignoring legitimate subpoenas and invoking dubious claims of executive and other privileges.

The Constitution limits the executive branch's unilateral power to acting as "commander in chief" of the military, "tak[ing] care that the laws be faithfully executed," "[c]ommission[ing] all the Officers of the United States," "grant[ing] Reprieves and Pardons for Offenses against the United States," and "fill[ing] up all Vacancies that may happen during the Recess of the Senate."²⁷ Other past presidents have been accused of exceeding this authority in unprecedented manners. In 2008, Congressman Bob Barr of Georgia accused President George W. Bush of taking "to new heights" the truism that "no matter how much power government has, it always

that when I have done nothing wrong? In the meantime, the never ending Witch Hunt, led by 13 very Angry and Conflicted Democrats (& others) continues into the mid-terms!").

²⁶ *State of the Union 2019: Read the full transcript*, CNN (Feb. 6, 2019), www.cnn.com/2019/02/05/politics/donald-trump-state-of-the-union-2019-transcript/index.html.

²⁷ U.S. CONST. art II, §§ 2-3 (also identifying other acts the president may take subject to congressional approval or consent).

wants more.”²⁸ *The New York Times* wrote that President Barack Obama, who was “[o]nce a presidential candidate with deep misgivings about executive power,” soon became one of the most prolific executives in history, launching “a sweeping assertion of executive authority and a canon of regulations that have inserted the United States government more deeply into American life.”²⁹ In short, “Presidents, both Democrat[] and Republican, have asserted greater power in recent decades to dictate the shape of regulations, while Congress has become less specific in its instructions.”³⁰ Accordingly, when Trump began making campaign promises about unilaterally suspending immigration from certain countries, defying treaty obligations to NATO allies, and building a wall across the United States’ southern border, one commentator wrote:

. . . [S]cholars of the presidency say that Barack Obama, George W. Bush and their predecessors have added so many powers to the White House toolbox that a President Trump could fulfill many of his promises legally—and virtually unchecked by a Congress that has proven incapable of mustering much pushback for decades.³¹

Trump is indeed living up to that prediction. After his first one hundred days in office, the White House proudly announced that he had issued the most executive orders since Franklin Roosevelt, which, according to his team, meant he had “accomplished more in office” than his predecessors.³² For instance, days after assuming office, Trump signed an executive order to

²⁸ *Executive Power and Its Constitutional Limitations: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 85 (2008) (statement of Bob Barr, former U.S. House Representative from Georgia and 2008 Libertarian Nominee for President).

²⁹ Binyamin Appelbaum & Michael D. Shear, *Once Skeptical of Executive Power, Obama Has Come to Embrace It*, N.Y. TIMES (Aug. 13, 2016).

³⁰ *Id.*

³¹ Marc Fisher, *Donald Trump and the Expanding Power of the Presidency*, WASH. POST (July 30, 2016).

³² Andrew Rudalevige, *Trump May Have the ‘Most Executive Orders’ Since Truman. But What Did They Accomplish?*, WASH. POST (Apr. 28, 2017).

suspend refugee admissions and ban travelers from seven countries with Muslim majorities.³³ Though the Constitution does not empower the executive to control immigration, Trump argued that Congress had delegated power to the president that was sweeping enough to support this significant change in policy. Unsurprisingly, the travel ban incited an uproar. Not only did commentators prolifically write about the issue, protests raged at airports around the country for weeks.³⁴ A number of local courts enjoined the travel ban, and courts of appeals split over its enforceability. The US Supreme Court, however, held the third and narrow version of the ban is a lawful exercise of the authority granted to the president by the Immigration and Nationality Act of 1952, which “exudes deference to the President in every clause. It entrusts to the President the decisions whether and when to suspend entry, whose entry to suspend, for how long, and on what conditions.”³⁵ The Court’s decision reignited the protests, this time with the Court in the crosshairs.³⁶

Then, when the clock ran out for Congress to repeal and replace the Affordable Care Act, Trump promised by tweet in October 2017 that he would solve its problems himself.³⁷ He issued an executive order directing the Labor Department to move forward to allow small businesses and perhaps individuals to buy association plans and short-term policies that would not fall under

³³ Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017); Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017).

³⁴ *Protests Against Executive Order 13769*, WIKIPEDIA, en.wikipedia.org/wiki/Protests_against_Executive_Order_13769 (last updated August 1, 2019) (collecting articles from local news outlets around the country).

³⁵ *Trump v. Hawaii*, 585 U.S. ____ (2018).

³⁶ Chris Riotta, *Nationwide Protests Erupt after Supreme Court Upholds Trump’s Travel Ban*, INDEPENDENT (June 26, 2018).

³⁷ Donald Trump (@realDonaldTrump), TWITTER (Oct. 13, 2017, 5:14 AM) (“ObamaCare is a broken mess. Piece by piece we will now begin the process of giving America the great HealthCare it deserves!”).

the Affordable Care Act's markets.³⁸ The cities of Baltimore, Chicago, Cincinnati, and Columbus filed suit, arguing that the order exceeded Trump's Article II powers and that his express attempts to undermine the statute conflict with his constitutional mandate³⁹ to "take Care that the Laws be faithfully executed."⁴⁰ In addition to the executive order, the suit cites Trump's "scaling back oversight of insurance issuers, cutting open enrollment in half, urging a federal court to throw out Obamacare's protections for pre-existing conditions and undermining the individual mandate."⁴¹ In the wake of this action, other plaintiffs filed similar suits,⁴² while a related breed of lawsuits urged courts to find the statute unconstitutional after Congress removed the individual mandate.⁴³ As of this writing, these cases are still pending and will likely require higher courts to resolve inconsistent lower court opinions and take a firm stand on the constitutionality of Trump's actions.

At this point, with cases pending, this legal conflict over the extent of Trump's authority seems to be coming to a head. Trump's demand for \$5.2 billion to build a wall on the United States' southern border—and Congress' reluctance to fund it—led to a record-breaking government shutdown in January 2019. Now, Trump has attempted to circumvent Congress by declaring a "national emergency," which arguably suspends many of the typical limits on executive power. Naturally, lawsuits have ensued, which will require courts to parse the murky

³⁸ Tami Luhby & Kevin Liptak, *Trump Begins Obamacare Dismantling with Executive Order*, CNN (Oct. 12, 2017).

³⁹ Heidi Przybyla, *Trump's Undermining of Obamacare Violates the Constitution, New LawsUIT Charges*, NBC NEWS (Aug. 2, 2018).

⁴⁰ U.S. CONST. art. II, § 3.

⁴¹ Przybyla *supra* note 39.

⁴² *See, e.g.*, David McFadden, *Maryland Suit Seeks to Protect US Health Law from 'Sabotage'*, ASSOCIATED PRESS (Sept. 13, 2018).

⁴³ Sarah N. Lynch, *Judge Signals Skepticism in Trump Team's Bid to Block Obamacare Suit*, REUTERS (Dec. 19, 2018).

law around what constitutes an emergency and what new powers an emergency bestows upon the executive. Commentators expect the declaration to culminate in a “showdown” between Trump and the swing voter(s) on the US Supreme Court.⁴⁴

Trump’s executive actions are not necessarily unprecedented; to the contrary, similar issues have plagued other recent presidential administrations. President Obama, for example, exercised his executive power on issues just as controversial, ranging from a legal mandate to decline to deport millions of illegal immigrants⁴⁵ to selectively enforcing Congress’ marijuana laws,⁴⁶ to delaying enforcement of a health insurance mandate. All of these issues ended up before the US Supreme Court, and the latter even prompted the US House of Representatives to sue the Obama administration for repeatedly “abus[ing] its power by using executive action as a substitute for legislation.”⁴⁷ President Obama also declared 13 national emergencies.⁴⁸ In fact,

⁴⁴ Jay Michaelson, *It’s Up to Chief Justice John Roberts to Stop Trumps’ Border Wall*, DAILY BEAST (Feb. 15, 2019), www.thedailybeast.com/its-up-to-chief-justice-john-roberts-to-stop-trumps-border-wall?ref=home. District courts have taken up the issue, but this battle will likely rage in courts at all levels for months or years to come. *See, e.g.*, Spencer S. Hsu, *U.S. Judge Questions House Lawsuit to Stop Trump Border Wall Construction*, WASH. POST (May 23, 2019) (reporting on District Judge Trevor N. McFadden’s comments during oral argument).

⁴⁵ Haeyoun Park & Alicia Parlapiano, *Supreme Court’s Decision on Immigration Case Affects Millions of Unauthorized Immigrants*, N.Y. TIMES (June 23, 2016) (discussing President Obama’s 2014 memorandum creating the Deferred Action for Parents of Americans and Lawful Permanent Residents and the administration’s related 2012 program, Deferred Action for Childhood Arrivals).

⁴⁶ Memorandum from James M. Cole, Deputy Attorney Gen., to All United States Attorneys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), www.justice.gov/iso/opa/resources/3052013829132756857467.pdf; *see also* Memorandum from Eric Holder, U.S. Attorney Gen., to All United States Attorneys and Assistant Attorney General for the Criminal Division, Department Policy on Changing Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (Aug. 12, 2013), www.popehat.com/wp-content/uploads/2013/08/holder-mandatory-drug-minimums-memo.pdf.

⁴⁷ United States House of Representatives v. Burwell et al., Case No. 14-cv-01967 (Complaint, filed Nov. 21, 2014).

⁴⁸ Deanna Paul & Colby Itkowitz, *What Exactly is a National Emergency? Here’s What That Means and What Happens Next*, WASH. POST (Feb. 15, 2019); Connor Veenstra, *All the Times*

the Trump administration cites a statute Congress passed and President Obama signed in 2016 as its authority for funding the border wall without congressional approval.⁴⁹ Trump's would not even be the first twenty-first century White House to face accusations of—or convictions for—obstructing justice.⁵⁰ But Trump is the first president whose conduct raises at least 10 specific instances of obstruction of justice, regarding the Mueller investigation.⁵¹

Each of the last three presidents has acted unilaterally where Congress—the body in which the Constitution solely vests legislative power⁵² and which the Founders intended to suffer some gridlock⁵³—declined to act. President Bush said, “I got a little frustrated in Washington because I couldn’t get the bill passed out of the Congress. They were arguing process. . . . Congress wouldn’t act, so I signed an executive order—that means I did it on my own.”⁵⁴

Obama Called for a National Emergency, TOWNHALL (Feb. 19, 2019), townhall.com/tipsheet/connorveenstra/2019/02/19/the-times-obama-called-national-emergency-n2541854.

⁴⁹ 10 U.S.C § 284; *see also* Josh Blackman, *How Congress and President Obama Made Trump’s Wall Possible*, LAWFARE (Feb. 15, 2019), www.lawfareblog.com/how-congress-and-president-obama-made-trumps-wall-possible (“This episode illustrates how Congress long ago relinquished its lawmaking powers.”).

⁵⁰ Andrew Glass, ‘Scooter’ Libby Sentenced to Federal Prison, POLITICO (June 5, 2018) (discussing the conviction of then Vice President Dick Cheney’s chief of staff).

⁵¹ *See* ROBERT S. MUELLER III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION, Vol. II (2019).

⁵² U.S. CONST. art. I, § 1.

⁵³ THE FEDERALIST NO. 73 (Alexander Hamilton) (“It may perhaps be said that the power of preventing bad laws includes that of preventing good ones; and may be used to the one purpose as well as to the other. But this objection will have little weight with those who can properly estimate the mischiefs of that inconstancy and mutability in the laws, which form the greatest blemish in the character and genius of our governments. They will consider every institution calculated to restrain the excess of law-making, and to keep things in the same state in which they happen to be at any given period, as much more likely to do good than harm; because it is favorable to greater stability in the system of legislation. The injury which may possibly be done by defeating a few good laws, will be amply compensated by the advantage of preventing a number of bad ones.”)

⁵⁴ Andrew Rudalevige, *Candidate Trump Attacked Obama’s Executive Orders. President Trump Loves Executive Orders*, WASH. POST (Oct. 17, 2017).

Similarly, President Obama said, “It is the belief of this administration . . . that we can’t wait for action on the Hill. . . . We’ve got to go ahead and move forward.”⁵⁵ Ironically, Trump accused then-President Obama of being “a president who can’t get anything done, so he just keeps signing executive orders all over the place,”⁵⁶ calling Obama’s circumvention of Congress “a very, very dangerous thing that should be overridden easily by the Supreme Court.”⁵⁷

But now Trump makes statements much like the predecessors that he attacked. For example, early in his term, Trump wrote, “[s]ince Congress can’t get its act together on HealthCare, I will be using the power of the pen to give great HealthCare to many people – FAST.”⁵⁸

In that context, some may argue that objections to Trump’s use of executive authority stem from dislike of the policy imposed by the order, not the novelty of the order’s scope. That grievance is not new either. In 2014, Obama told supporters, “Republicans didn’t seem to mind when President Bush took more executive actions than I did. Maybe it’s just me they don’t like.”⁵⁹ But perhaps that is precisely the problem. Perhaps Americans accept executive overreach when they agree with the underlying policy, while they remain unaware or unconcerned that the overreach lays groundwork for future presidential actions those same people may vehemently oppose.

⁵⁵ *Obama: If Congress Won’t Act I Will*, NEWSDAY (Oct. 31, 2011).

⁵⁶ Rudalevige, *supra* note 32.

⁵⁷ Meagan Flynn, ‘Subvert the Constitution’: Trump’s 2014 Remarks on Obama’s Executive Actions Show ‘Hypocrisy,’ Critics Say, WASH. POST (Feb. 15, 2019).

⁵⁸ Donald Trump (@realDonaldTrump), TWITTER (Oct. 10, 2017, 4:30 AM).

⁵⁹ Scott Horsley, House GOP Plows Forward with Plans to Sue Obama, NPR (July 22, 2014).

At bottom, there has been a trend for decades, perhaps since Franklin Roosevelt's presidency,⁶⁰ towards increasing executive power. So the point is not that any of Trump's executive actions are somehow unique when compared to his predecessors, but rather that, where presidents before him have been expanding executive authority to some extent, that authority is now the broadest it has ever been. And Trump is not afraid to use it to further his own personal and political interests.

With strong momentum in the direction of an increasingly powerful executive, the job of curbing executive overreach belongs to the courts. This is perhaps the most politically precarious role for courts. Legal challenges to executive actions generally arise when the executive has acted on a politically controversial issue. Thus, in these cases, courts find themselves between the battling executive and legislative branches, but also between supporters and opponents of the specific controversial policy. Often, the public focus on the policy issue (e.g., is the president's approach to immigration or healthcare favorable). But the courts' role is to focus instead on the constitutional and legal issues, even when their decision effectively hands victory to the least popular policy. That pressure is sometimes too much. In fact, reviewing controversial emergency actions like Trump's border wall has forced courts to make decisions that history has condemned

⁶⁰ Roosevelt holds the record for the most executive orders by a large margin. While President Obama issued 276 executive orders and President George W. Bush issued 291, President Roosevelt issued 3,721, and the United States Supreme Court overturned five of them as unconstitutional. *Heritage Explains Executive Orders*, HERITAGE FOUNDATION (Feb. 3, 2017), www.heritage.org/political-process/heritage-explains/executive-orders. Roosevelt's executive actions are not only numerous, they are far-reaching. One writer even argues that, where the first 31 presidents held the "modest office" the framers intended, Roosevelt led a "radical expansion of presidential power specifically through his executive orders" and laid the groundwork for a president who treats the office as "his own personal fiefdom." Rob Montz, *Donald Trump's Suffocating Presence and Unhinged Executive Power Is the Product of History*, USA TODAY (Dec. 14, 2018).

as capitulations to popular sentiment, despite clear law requiring the opposite result.⁶¹ And these kinds of decisions can damage the public’s view the courts’ legitimacy. Indeed, some of this damage is being done already. According to a January 2019 Fox News poll, 35 percent of respondents said the judicial branch is the branch of government they trust the most, down from 45 percent in 2017.⁶²

V. CONCLUSION

While it may be historically correct that the courts and judicial independence have come under siege before, Donald Trump’s multifaceted and unrelenting attacks on the rule of law, courts, and the principles they stand for cannot be ignored. The president has sworn to uphold the law, but attacks it instead. Even if the legal system successfully holds him accountable—whether through the ongoing investigations or an enforced court ruling that even presidents are, in fact, subject to the laws of the country—the influence Trump has had on the public conversation and political fabric will not be so easily undone. Trump has used the many powers available to him, including his microphone and Twitter account, to undermine the legitimacy of the courts and the rule of law in unprecedented ways. And his messages will echo in some Americans’ minds for years, eroding public opinion of the branch of government that is supposed to be the most trustworthy.

⁶¹ See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding executive action taken during national emergency to force Japanese-Americans into internment camps); Charlie Savage, *Korematsu Notorious Supreme Court Ruling on Japanese Internment, Is Finally Tossed Out*, N.Y. TIMES (June 26, 2018) (“In the annals of Supreme Court history, a 1944 decision upholding the forcible internment of Japanese-Americans during World War II has long stood out as a stain that is almost universally recognized as a shameful mistake.”).

⁶² Debra Cassens Weiss, *Confidence in Judiciary Drops, Poll finds; Which SCOTUS Justices Are Favorites?*, ABA JOURNAL (Jan. 31, 2019).

In summary, it will again to fall to the judiciary to uphold the rule of law and our fundamental governing principles, such as separation of powers and Congressional oversight. While history may be instructive on the independence of the courts and the acknowledgment of the executive branch to their authority, none of this may now be taken for granted in light of current attacks on and disregard by the White House for the rule of law. An informed and energized public cannot be complacent. We must demand that the judiciary remain above politics and independent, and that the other branches of government be reinforced and held accountable. In our current existential crisis, our country and the rule of law need nothing less.