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Presidents, Adverse Supreme Court Rulings, and Respect for the Rule of Law

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Since becoming president again, Donald Trump has suffered a series of losses in various courts. His responses are unique in U.S. history. Rather than offering a counterargument or changing his policies to comply with federal court orders, he has berated judges, called them names, and threatened the court system itself. He has bitterly complained that some judges he put on courts have not voted in his favor, as though federal judges and Supreme Court Justices are simply apprentices, working for him to do his bidding. His supporters have joined him in these attacks.[1]

Federal judges have expressed enormous concern and frustration at the Trump administration's refusal to comply with their decisions or orders. The president has been coy, at best, whether he would comply with adverse decisions, even if issued by the U.S. Supreme Court. We can expect, sooner or later, and probably sooner, that the Supreme Court will order the president to act or stop acting. The question is, will he and his administration obey the rule of law?

We can anticipate that the administration will argue that the president does not have to obey Supreme Court decisions. Instead, the president or his team will likely assert that he is following in the footsteps of other presidents. This is emphatically not true. On the contrary, presidents have consistently respected Court decisions, even when they did not like them. This article explores the major examples of this.

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1. Maureen Groppe, "Trump Republicans lash out at Supreme Court Justice Amy Coney Barrett as a DEI hire," *USA Today*, March 22, 2025. https://www.aol.com/amy-coney-barrett-giving-trump-034049326.html.

I: President Andrew Jackson and Chief Justice John Marshall

The most famous and *inaccurate* historical myths about presidents and the Supreme Court involve President Andrew Jackson and Chief Justice John Marshall. The first involved Jackson's veto of the recharter of the Second Bank of the United States and the second involved the Cherokee Nation in Georgia.[2] Despite claims by popular historians and many textbooks, in neither case did Jackson defy the Supreme Court nor refuse to enforce a Court order.

Even before he ran for president in 1824, Andrew Jackson hated Chief Justice Marshall's decision in *McCulloch v. Maryland* (1819), upholding the constitutionality of the Second Bank of the United States, which Congress had created with a twenty-year charter in 1816.[3] Jackson despised the National Bank. He saw it as a symbol of eastern economic and political power, oppressing western farmers and southwestern cotton planters (like himself), controlling local banks (including those where Jackson owned stock), and limiting land speculation, which harmed western landowners (including Jackson).

In 1824, Jackson lost the presidential election in a complicated four-candidate race. Jackson had the most electoral votes, but not a majority of the votes. It is unclear if he won the popular vote as well because the available figures are unreliable. Five states, including the largest, New York, did not record a popular vote. With no electoral majority, the election went to the House of Representatives, where each state delegation had one vote.[4] The House had to choose among the top three candidates. Henry Clay, who ran fourth in the electoral college (and thus was no longer in the running to be president) was the Speaker of the House of Representatives and used his influence and power to secure the election for John Quincy Adams, an ally of Chief Justice John Marshall. President John Adams (the father of President John Quincy Adams), had appointed

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2. President Jackson's Veto Message Regarding the Bank of the United States; July 10, 1832. https://avalon.law.yale.edu/19th_century/ajveto01.asp; *Worcester v. Georgia*, 31 US (6 Pet.) 515 (1832).

3. In 1791 Congress created the Bank of the United States (subsequently called the First Bank of the United States) with a twenty-year charter. Secretary of State Thomas Jefferson opposed the bank for political reasons and argued it was unconstitutional. His ally in the House of Representatives, James Madison opposed the creation of the Bank. In 1811 the charter expired, and Madison, who was then the President of the United States, did not ask Congress to renew the charter. However, after the War of 1812 Madison changed his mind, declaring that the Bank was necessary for the operation of the national government, and Congress passed a bill to create a new bank. Madison happily signed that bill, creating the Second Bank of the United States.

4. For a brief discussion of the antebellum electoral college, see Paul Finkelman, "The Proslavery Origins of the Electoral College," *Cardozo Law Review* 23 (2002): 1145−57.

Marshall to the Court. Like Chief Justice Marshall, John Quincy Adams strongly supported the Second Bank of the United States.

Jackson nursed his grievances after his 1824 defeat, complaining the vote in the House was unfair and the result of a corrupt bargain between Adams and the Speaker of the House, Henry Clay. Jackson spent four years complaining that the election was stolen. In 1828 Jackson won a substantial victory in the presidential election and made clear his opposition to the National Bank.

In July 1832, on the eve of successfully running for a second term, Jackson vetoed a bill to recharter the Second Bank of the United States for another twenty years. He argued that the bank was unconstitutional, and the new recharter was a bad policy. Jackson did not deny that the Supreme Court had the power to rule on the constitutionality of the bank. He merely argued, correctly, that as president he was entitled to veto the recharter and was not constrained by Marshall's opinion on the constitutionality of the bank chartered in 1816. He claimed to believe a bank might be useful and convenient, but, despite Marshall's opinion, he thought the 1816 charter of the Second Bank of the United States was "unauthorized by the Constitution, subversive of the rights of the States, and dangerous to the liberties of the people." He hoped the new proposed charter would address these issues, but he concluded it failed to do so. He found the "modifications of the existing charter proposed by this act are not such, in my view, as make it consistent with the rights of the States or the liberties of the people." Thus, Jackson vetoed the recharter bill.[5]

As president, Jackson had no power to unilaterally close the bank or take away its existing charter, which would expire in 1836. But even though the Court could certainly not require him to sign a law rechartering the bank, Jackson successfully destroyed the bank by vetoing the bank bill. Despite what some people think, he did not do this in defiance of the Supreme Court, because nothing in Marshall's opinion in *McCulloch v. Maryland* required the United States to use the bank or deposit funds in it. This story is a classic example of how "constitutionality" does not necessarily require any particular act by the executive branch.

After his reelection in 1832, Jackson made plans to remove federal deposits from the bank and place them in favored state institutions, known as "pet banks." This took time and planning, but by the spring of 1833 Jackson was ready to act. At the end of May he brought in a new secretary of the treasury, William J. Duane, who also hated the bank. Nevertheless, Duane balked at this drastic move, believing it would destroy the economy. In late September, Jackson replaced Duane with Roger B. Taney, who aggressively did Jackson's bidding. Jackson's bank veto and the removal of deposits from the bank set the stage for a nationwide depression that lasted into the 1840s and destroyed the presidency of his handpicked successor, Martin Van Buren. It would also lead to Jackson

5. President Jackson's Veto Message.

appointing Taney to be Chief Justice of the United States after the death of Marshall in 1835.

Jackson's other alleged confrontation with the Supreme Court and Chief Justice Marhsall involved the missionary Samuel Worcester, the state of Georgia, and the Cherokee Nation. This second alleged confrontation with Marshall and the Court is tied to the disastrous and incompetently supervised Cherokee Removal. The Cherokee Removal, known as the infamous Trail of Tears, is blamed on Jackson. Some historians refer to it as his policy, but in fact the removal and the way it was implemented was entirely in the hands of his successor, Van Buren.

Since 1802 the state of Georgia had been working to force "the tribe to get out" of the state or to "submit to state law."[6] As part of its desire to force the Cherokee to leave the state, in 1830 Georgia passed a law "to prevent white persons from residing within that part of the chartered limits of Georgia, occupied by the Cherokee Indians."[7] Georgia authorities arrested Rev. Worcester and another minister for living with, and preaching to, the Cherokee (with their permission), in violation of the state law. Worcester challenged his conviction on the grounds that the Cherokee lands were created by a federal treaty, and thus the Georgia law (and his prosecution under it) violated federal law, the treaty with the Cherokee, and the supremacy clause of the Constitution.[8] The law was part of Georgia's attempts to isolate the Cherokee and force them to leave the state.

Marshall's ruling in *Worcester v. Georgia* was narrow—that the Cherokee lived on land set aside by a treaty with the United States and that Georgia's law was in violation of this federal law and the supremacy clause of the Constitution. Marshall declared: "The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is by our constitution and laws, vested in the government of the United States." Thus, the Court concluded: "The act of the state of Georgia, under which the plaintiff in error was prosecuted, is consequently void, and the judgment a nullity."[9]

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6. Gerard N. Magliocca, "Preemptive Opinions: The Secret History of *Worcester v. Georgia* and *Dred Scott*," *University of Pittsburgh Law Review* 63 (2002): 487, 521.

7. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, at 521 (1832).

8. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Constitution, Article IV, Clause 2.

9. *Worcester v. Georgia*, at 561.

Georgia's arrest and incarceration of Worcester was unconstitutional. Before the Civil War, the Supreme Court only held two acts of Congress unconstitutional, in *Marbury v. Madison* and *Dred Scott v Sandford*. But the Court held many state laws unconstitutional, so this outcome was hardly unique or even unusual.

In 1864, long after Jackson was dead, Horace Greeley, the abolitionist editor of the *New York Tribune*, claimed to quote Jackson, saying, "John Marshall has made his decision, now let him enforce it." However, there is no evidence that Jackson ever said that. It is also utterly implausible that in 1832 the twenty-one-year-old Greeley, who was a typesetter and a printer (and not yet a journalist), would have encountered President Jackson.[10]

More importantly, there was nothing for the president to do. Marshall's decision was directed at a Georgia judge and did not call for any action by the president. Georgia ignored Marshall's decision, but there was no follow-up by the Court or Worcester's lawyers. The Court did not ask (or expect) Jackson to enforce its order, so he did not refuse to do so.

However, the story does not end here. In 1833, after he was safely reelected, Jackson persuaded Georgia's governor to commute Worcester's sentence, and the missionary moved to what is today Oklahoma. Thus, no one ever enforced Marshall's decision against the Georgia court, but President Jackson was the central figure in implementing Marshall's decision that Worcester should be released from jail.

Jackson had no love for Chief Justice Marshall, and as president he set in motion the removal of the Cherokee from Georgia, although the removal—the horrendous and lethal "Trail of Tears"—took place after Jackson was no longer president. But Jackson was a lawyer and a former state superior court justice. He believed in the rule of law and never openly defied the Supreme Court.

Since 1864, when Greeley published his contrived statement that he attributed to Jackson, numerous books have quoted him, although every serious scholar of the Indian removal and modern biographers of Jackson have pointed out that Jackson *never said this*. Nevertheless, if President Trump refuses to obey a Supreme Court order, we can anticipate someone in his administration, or the president himself, repeating the "fake" Jackson quotation.

II: Thomas Jefferson, His Cousin John Marshall, and the Supreme Court

Thomas Jefferson, a successful and very competent lawyer, had a stormy relationship with his cousin, Chief Justice John Marshall. In his first term in office, Jefferson's allies in the House of Representatives impeached Marshall's

10. Melvin I. Urofsky and Paul Finkelman, *A March of Liberty: A Constitutional History of the United States*, Volume I, *From the Founding to 1900* (3rd ed.; New York: Oxford University Press, 2014), 307−8.

fellow justice, Samuel Chase, essentially for upholding convictions of supporters of Jefferson under the Sedition Act of 1798. This was the first step in Jefferson's plan to remove Marshall and remake the Court in his own image. An impeachment by the House is the equivalent of an indictment. The impeached official—in this case Justice Chase—was then tried by the Senate. Jefferson had twenty-five allies in the Senate, while there were only nine Federalists, and Jefferson was confident his supporters in the Senate would convict Chase and remove him from office. However, Jefferson's allies in the Senate took seriously their oath "to support this Constitution."[11] On four articles of impeachment against Chase, a majority of Jefferson's Senate allies voted for acquittal, and on the other four the Jeffersonians never came close to obtaining the required two-thirds majority needed to convict and remove Chase from office. After Chase's acquittal, Jefferson gave up on trying to use the impeachment process to remove judges he did not like.[12] The implication of this impeachment was that Jefferson did not like the Court but knew that he had to abide by its rulings. Thus, he wanted to remake the Court to give him the decisions he wanted.

In 1807, near the end of his second term, Jefferson had his former vice president, Aaron Burr, indicted for treason for an alleged conspiracy involving Spain and land acquired from France through the Louisiana Purchase in 1803. He first had two of Burr's colleagues (or co-conspirators in Jefferson's mind), Justus Erick Bollman and Samuel Swartwout, arrested by the army, brought to Washington, D.C., and indicted for treason. The Circuit Court in Washington, D.C., in a two-to-one ruling (with Chief Judge William Cranch dissenting[13]) refused to grant the men a writ of habeas corpus. While the defendants appealed to the Supreme Court, Jefferson's spokesman in the Senate, William B. Giles of Virginia, quickly pushed through a bill to suspend the writ of habeas corpus, despite the fact that the Constitution only allowed suspension during an invasion or rebellion. Jefferson's supporters had a large majority in the House of

11. "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." U.S. Constitution, Art. VI, Cl. 3.

12. Paul Finkelman and Emily Van Tassell, *Impeachable Offenses: A Documentary History from 1787 to the Present* (Washington, DC: Congressional Quarterly Press, 1998), 101−7; Jerry W. Knudson, "The Jeffersonian Assault on the Federalist Judiciary, 1802−1805; Political Forces and Press Reaction," *The American Journal of Legal History* 14 (1970): 55−75; George Lee Haskins and Herbert A. Johnson, *History of the Supreme Court, Volume II, Foundations of Power: John Marshall, 1801−1815* (New York: Macmillan, 1981), 210−45.

13. Cranch was a staunch federalist, appointed to the District of Columbia Circuit Court in 1801 by President John Adams (who was also his uncle). He remained that position until 1855, when he died at age 86.

Representatives, but nevertheless, the House overwhelmingly rejected the suspension law.

The case then went to the U.S. Supreme Court. In *Ex part Bollman, Ex parte Swartwout*, Chief Justice Marshall ruled that whatever the two men had done, it did not constitute treason. In his opinion, Marshall found no problem with the fact that "the prisoners were apprehended, not by a civil magistrate, but by the military power," while noting that as civilians the government could not try them in a military court. They were charged with treason, which is clearly and quite narrowly defined in the Constitution: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."[14] Whatever Bollman and Swartwout had done, it could not be construed as "levying war" on the United States or "adhering to their Enemies," since the United States was not at war with anyone. Thus, Marshall ordered that both men be released from custody. In passing it is worth noting that President Trump often asserts that people who he dislikes or are his opponents should be tried for treason.[15] This extreme rhetoric undermines the rule of law in the United States and makes a mockery of constitutional rules and limitations.

Marshall made clear that while Bollman and Swartwout could not be tried for treason, they were not blameless. He suggested they might be indicted and tried for other crimes because the "discharge does not acquit them from the offence which there is probable cause for supposing they have committed" and thus "those whose duty it is to protect the nation, by prosecuting offenders against the laws" could "institute fresh proceedings against them."[16] Jefferson was furious with this outcome, and surely disappointed that his first nominee for the Court, Justice William Johnson of South Carolina, voted with Marshall to release Bollman and Swartwout.

Jefferson now turned to his real goal—convicting Burr of treason. Jefferson and Burr had run together in 1800 with the understanding that Jefferson would be president and Burr would be vice president. When the vote in the electoral college ended in a tie—both Jefferson and Burr had 73 votes—Jefferson expected Burr to step aside and let him be president. Instead, Burr argued, correctly, that under the constitution, the decision was up to the House of Representatives, as the

14. U.S. Constitution, Art. III, Sec. 3, Cl. 1.

15. "Donald Trump Accuses People Around Joe Biden of Treason," *Newsweek*, May 21, 2025. https://www.newsweek.com/donald-trump-accuses-joe-biden-team-treason-autopen-migrants-2075044.

16. *Ex part Bollman, Ex parte Swartwout*, 8 U.S. (4 Cr.) 75 (1807). Marshall's acknowledgment that the military could arrest civilians would be important when the Lincoln administration used the army to arrest pro-Confederate terrorists in Maryland and elsewhere during the Civil War.

Constitution provided before the ratification of the 12th Amendment in 1804. It took the House 36 ballots to finally choose Jefferson, on February 17, 1801, just two weeks before the scheduled inauguration of the new president.[17] Jefferson never forgave Burr for not withdrawing from the race, and they basically did not communicate for the four years of Jefferson's first term. While vice president, Burr killed Alexander Hamilton in a duel in July 1804. Burr did not run for reelection in 1804 and in March 1805, after Jefferson was inaugurated for the second time along with his new vice president, Burr left Washington, heading west, spending time in Pittsburgh and New Orleans, eventually ending up in the Mississippi Territory, where he was arrested and sent to Richmond, Virginia, guarded by a detachment of soldiers.

Marshall presided over Burr's trial, because at this time members of the Court rode circuit and served as trial judges. In this capacity Marshall issued a subpoena to Jefferson for some documents necessary for Burr's defense. With great anger Jefferson sent some of what Marshall asked for but redacted some of the text and refused to send other material. What Jefferson sent was sufficient for the trial to move forward. Jefferson, a practicing lawyer before and after the Revolution, accepted the rule of law, and did not refuse Chief Justice Marshall's order, even though the subpoena technically came from a trial court—the equivalent of today's U.S. District Courts, not the Supreme Court.[18]

Jefferson was furious when Marshall ruled that, whatever Burr had done, it was not treason, and Burr was acquitted. Jefferson contemplated pushing his allies in Congress to impeach Marshall and to pass legislation allowing for the removal of judges without impeachment, but neither went anywhere. In the end, Jefferson seethed and complained privately to his friends and allies but refrained from attacking Marshall or the Court.

Jefferson was egotistical, thin-skinned, and willing to use the courts to vent his grievances and pressure his opponents, antagonists, and those he might have called "Jefferson-haters." For example, ignoring his previous support of a free press after the passage of the Sedition Act of 1798, Jefferson urged state governors

17. The original Constitution provided that every presidential elector would vote for two candidates, and the person with the most votes would become president and the runner-up would be vice president. The Framers did not anticipate a majority of the electors voting for the same two people, as running mates, thus creating a tie. The 12th Amendment solved this problem by having electors designate a vote for the president and a second vote for the vice president.

18. See Peter Charles Hoffer, *The Treason Trials of Aaron Burr* (Lawrence, KS: The University of Press of Kansas, 2008); Nancy Isenberg, *Fallen Founder: The Life of Aaron Burr* (New York: Penguin, 2007). See also a very good concise history of the trial produced by Douglas Linder of the University of Missouri, Kansas City, School of Law: https://law2.umkc.edu/faculty/projects/ftrials/burr/burraccount.html.

and his own U.S. attorneys to prosecute journalists who criticized him.[19] When his abuse of the legal system failed to send newspaper editors to jail, Jefferson, the author of the Virginia Statute for Religious Freedom and the primary author of the Declaration of Independence, ultimately respected the rule of law. After Burr's acquittal, Jefferson did not seek to rearrest his former vice president on some new charge, exile him, or deport him.

III: Franklin Roosevelt, the New Deal, and the Supreme Court

Modern presidents have also faced adverse Supreme Court decisions and complied with them. Early in his presidency, Franklin D. Roosevelt lost a series of cases in the Supreme Court that devastated his legislative agenda at the beginning of the New Deal, striking down the National Recovery Act (NRA) and the Agricultural Adjustment Act.[20] In the first case, *Schechter Poultry*, the court unanimously ruled that the National Recovery Act was unconstitutional. The president was shocked by this unanimous rebuke of his program to save the American economy. At the time, the nation was in its worst crisis since the Civil War, with millions out of work and the depression destroying the economy. But even in the face of this crisis FDR complied with the Supreme Court's rulings.

Without any changes in Court personnel, in *United States v. Butler*, three justices supported the Agricultural Adjustment Act, a key part of FDR's recovery program. In response to the decision in *Schecter*, Congress passed the Guffy-Snyder Coal Conservation Act in 1935 to stabilize the coal industry. The Court struck down this act in *Carter v. Carter Coal Co.*, and this time there were four dissents, indicating that some justices were rethinking their views of the Constitution and also that Congress and the administration were putting together better legislation.[21] Finally, in 1937 the administration gained a victory in *National Labor Relations Board v. Jones and Laughlin Steel Corporation*.[22] New laws, better arguments in Court, and a respectful approach to the Court led to jurisprudential victories. FDR did not berate the Court for failing to support him. Instead, he just went back to the drawing board, as Congress crafted new laws, which the same Court now upheld.

In a clumsy response to the Court's rejection of his programs in 1935 and 1936, FDR proposed that Congress expand the Court, so that he could appoint six

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19. Leonard W. Levy, *Jefferson and Civil Liberties: The Darker Side* (Cambridge, MA: Harvard University Press, 1963).

20. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *United States v. Butler*, 297 U.S. 1 (1936).

21. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

22. *National Labor Relations Board v. Jones and Laughlin Steel Corporation*, 301 U.S. 1 (1937).

new justices. This seemed like a radical solution to the problem, and in Congress the proposal went nowhere. Many historians suggest that the threat of expanding the Court led to the change upholding the National Labor Relations Act in 1937. Some call this new decision "the switch in time that saved nine," meaning that the switch of a few votes on the Court headed off the expansion of the Court. Some textbooks and many commentators today make this claim, but the chronology of votes on the Court and the writing of opinions shows this is simply not true.

FDR announced his proposal to expand the size of the Court, known as the Court Packing Plan, in February 1937, after his sweeping victory in the 1936 election. But by then the Court had issued an important foreign policy decision supporting the president and a significant civil liberties opinion, which supported FDR's generally liberal views of free speech.[23] More importantly, shortly after FDR proposed the Court Packing Plan, the Court announced its decision in *West Coast Hotel v. Parrish*, upholding Washington State minimum wage law, which dovetailed with FDR's economic policy. At the same time, the Court upheld three other laws supporting the New Deal. A few weeks later the Court upheld the National Labor Relations Act in *National Labor Relations Board v. Jones and Laughlin Steel Corporation*.[24]

Scholars and commentators who do not fully understand the way the Supreme Court operates call this the "switch in time that saved nine." But we know that in conferences, which were never open to anyone but the Justices, the court voted on *West Coast Hotel* well before FDR announced his Court Packing Plan and the process of writing opinions in that case also began *before* FDR announced his plan. Thus, the switch actually began in December 1936, when the moderate Owen Roberts joined Chief Justice Hughes and Justices Louis Brandeis, Harlan Fiske Stone, and Benjamin Cardozo in voting in conference to uphold the Washington State minimum wage law in *West Coast Hotel v. Parrish*. By the time FDR announced his plan, there was already a five vote majority on the Court for New Deal legislation. Thus, FDR's patience and thoughtful responses to early losses in the Court paved the way for a constitutional revolution supporting the New Deal.[25] His threat to "pack the Court" had no effect on the Court's

23. *United States v. Curtis-Wright Export Corporation*, 299 U.S. 304 (1936; announced December 24, 1936); *DeJunge v. Oregon*, 299 U.S. 393 (1937; announced January 3, 1937).

24. *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937; announced March 29, 1937); Urofsky and Finkelman, *A March of Liberty, Volume II: From 1898 to the Present*, 768. *National Labor Relations Board v. Jones and Laughlin Steel Corporation*, 301 U.S. 1 (1937; announced April 12, 1937).

25. On the change in the Court's jurisprudence, see Urofsky and Finkelman, *A March of Liberty, Volume II: From 1898 to the Present*, 767−69. See also G. Edward White, *The Constitution and the New Deal* (Cambridge, MA: Harvard University Press, 2000), 300−12; Marian C. McKenna, *Franklin Roosevelt and the Great Constitutional War: The Court-Packing Crisis of 1937* (New York, NY: Fordham University Press, 2002), 411−15.

jurisprudence. The real change in the Court came after March 1, 1937, when Congress passed "AN ACT To provide for retirement of Justices of the Supreme Court,"[26] which allowed justices to retire on their full salary. Within a few years, four aged justices, all opponents of the New Deal, retired, allowing FDR to remake the Court.

IV: President Harry S. Truman, the Korean War, and the Court

During the Korean War, President Truman ordered Secretary of Commerce Charles Sawyer to take control of the nation's steel industry when it appeared that a labor dispute would stop steel production. In *Youngstown Sheet and Tube v. Sawyer* (1952),[27] the Supreme Court told the president he could not do this. Truman did not denounce the Court or defy it. He respected the rule of law and backed off from the temporary takeover of the nation's steel mills. The case today is remembered as an example of the Court preventing the president from exceeding the constitutional limits of the office. It is also remembered as an example of a president accepting an adverse ruling, even when he thought his actions were correct and necessary. In the end, steel workers went on strike, the manufacturing of war materials continued, and American forces in Korea were not hampered by a reduction in steel production.

V: Richard M. Nixon, the Vietnam War, Watergate, and the Supreme Court

When he successfully campaigned for president in 1968, Richard Nixon ran *against* the Supreme Court. He promised to appoint conservative justices who would roll back due process protections for accused criminals, crack down on pornography, slow the desegregation of the nation, and punish students protesting the war in Vietnam and other aspects of American society. Nixon did not disrespect the Court itself—he had been a successful attorney when not holding public office—but he despised the Warren Court, even though President Dwight Eisenhower (who Nixon had served as vice president) had appointed Chief Justice Earl Warren as well as the most influential liberal associate justice, William J. Brennan, and the moderate Potter Stewart, who often voted with Brennan and other liberals on the Court. In his first two years as president, Nixon was able to appoint a new chief justice, Warren Earl Burger, and a new associate justice, Harry Blackmun. He believed both were reliable conservative Republicans, but they did not always support Nixon and Blackmun would emerge as a strong supporter of progressive jurisprudence.

In 1971, President Richard M. Nixon urged the Supreme Court to allow the

26. 50 Stat. 24, Act of March 1, 1937.
27. 343 U.S. 579 (1952).

suppression of the Pentagon Papers, which were embarrassing to the United States government. The papers were based on a secret study of the cause of the Vietnam War, which showed the United States government had misled the nation about how the war began, and that despite the expenditure of massive amounts of money and the sacrifice of tens of thousands of American soldiers, the military had accomplished very little. The papers also showed that the South Vietnamese government, which the United States helped create and keep in power, was corrupt, incompetent, and lacked significant popular support. Despite the administration's dubious claims that the publication of these documents would threaten national security, the Court supported the First Amendment and freedom of the press. There was in fact little evidence that the publication of the papers threatened national security, since the Pentagon Papers project was a historical study of the Vietnam War, and did not reveal any military or strategic secrets. But the publication certainly embarrassed Nixon and undermined public support for continuing to fight the war. Thus, Nixon lost in an extraordinary session of the Court. Nixon was deeply angry at this outcome, but his administration did not try to close down the papers or arrest the publishers for publishing classified documents. He respected the Court's decision. The newspapers continued to publish the Pentagon Papers. President Nixon accepted an outcome he hated.[28]

While running for reelection in 1972, Nixon's campaign funded a break-in of the Democratic Party campaign offices in the Watergate Hotel in Washington, D.C. The main goal of this criminal act, in part perpetrated by men who had worked for the Central Intelligence Agency (CIA), was to plant electronic listening devices to spy on their political opponents. The burglars were arrested, and after Nixon's reelection they were tried and pled guilty in a case presided over by United States District Judge John Sirica. The burglars pled guilty to prevent a trial that would have revealed the complicated nature of Nixon's illegal activities. Judge Sirica believed avoiding a trial did not serve justice and gave long sentences to the men, in hopes they might reconsider their guilty pleas and reveal what had really happened. Eventually one of the defendants, fearful of spending a long time in jail, revealed the White House connections to the break-in. Because of this new information, in the summer of 1973, the Senate conducted hearings on what was now simply called "Watergate." During these hearings, a Nixon staffer revealed that the president had taped most of his conversations in the White House. This news dramatically changed the political and legal climate, because the tapes might reveal who was involved in planning the Watergate burglary and executing the cover-up. The hearings also revealed massive White House involvement in the break-in and in other illegal activities.

In May 1973, Attorney General Elliot Richardson appointed Archibald Cox, a Harvard law professor with a long record of public service, as a special prosecutor

28. *New York Times v. United States*, 403 U.S. 713 (1971).

to investigate Watergate. This removed the investigation from the Justice Department. On July 18, 1973, Cox requested that the White House supply him with tapes about Watergate. When Nixon refused, Cox took steps to subpoena tapes of conversations in the president's office (known as the Oval Office), in order to fully investigate who was involved in the break-in and the cover-up.[29] On October 20, 1973, Nixon fired Cox, leading Nixon's attorney general, Elliot Richardson, and the deputy attorney general, William Ruckelshaus, to resign in protest. A federal judge later ruled that the firing was illegal.

On November 1, 1973, a new special prosecutor, Houston attorney Leon Jaworski, took over the case. On March 1, 1974, Jaworski indicted seven close associates of Nixon, including Nixon's former attorney general (and campaign manager) John Mitchell, his White House counsel, Charles Colson, and his two closest White House aides, H. R. "Bob" Haldeman and John Ehrlichman. United States District Judge John J. Sirica presided over the trials, as he had for the burglars. Sirica was a lifelong conservative Republican nominated to the federal court by President Dwight Eisenhower. But he was also known as a strict, "law and order" judge—his nickname was "Maximum John" because of the sentences he imposed. Sirica would not let party politics interfere with the administration of justice and he would not protect anyone from the consequences of their illegal activities. Judge Sirica was thus determined to find out who was truly responsible for the break-in. Early on in the case, Nixon's constitutional law expert, Professor Charles Alan Wright from the University of Texas Law School, assured Sirica that "This President does not defy the law. He will comply in full with the orders of this court."[30] However, when Sirica issued a subpoena ordering Nixon to turn over secret tapes to the trial court, the president initially refused, and then only partially complied. His new lawyer, the criminal defense attorney James D. St. Clair, urged Sirica to quash the subpoena, asserting that "the President wants me to argue that he is as powerful a monarch as Louis XIV, only four years at a time, and is not subject to the processes of any court in the land except the court of impeachment."[31] Judge Sirica was not impressed with Nixon's claim that he had the same powers as a notoriously arbitrary French king.

When Sirica refused to quash the subpoena, St. Clair appealed to the Supreme

29. R. W. Apple Jr., "President Refuses to Release Tapes; Senate Unit and Cox Serve Subpoenas; White House Expected to Ignore them," *New York Times*, July 24, 1973. https://www.nytimes.com/1973/07/24/archives/president-refuses-to-release-tapes-senate-unit-and-cox-serve.html.

30. "The United States v. Richard M. Nixon, President, et al.," *Time Magazine*, July 22, 1974. https://time.com/archive/6876015/the-united-states-v-richard-m-nixon-president-et-al/.

31. Quoted in Michael G. Trachtman, *The Supremes' Greatest Hits: The 34 Supreme Court Cases that Most Directly Affect Your Life* (New York: Sterling Publishing, 2006). https://archive.org/details/supremesgreatest0000trac/page/n1/mode/2up.

Court, which unanimously upheld Judge Sirica's order.[32] Chief Justice Burger, who Nixon had placed on the Court, wrote the opinion. Nixon then complied with the Supreme Court's order, knowing that the tapes showed he had committed a number of criminal offenses while in the White House. Even though he had broken numerous laws, he complied with the Court's ruling, in part because of serious threats of impeachment if he did not comply.

Sixteen days after he released the tapes, Nixon resigned from office. By this time the judiciary committee of the House of Representatives had passed one article of impeachment, and some Republicans in the Senate told Nixon that based on the evidence they had seen, they would vote to convict him. Nixon still might have avoided conviction, which requires a two-thirds majority in the Senate, but instead, he resigned. Nixon initially tried to stonewall court orders, but even his supporters in Congress made it clear he had to obey the Court. And he did.

VI: William Jefferson Clinton's Private Legal Problems

President Clinton's issues with the Court did not involve high constitutional questions, such as those Nixon faced. They were more mundane and involved actions that were connected to his years as governor of Arkansas. In 1991, while governor, he allegedly made a sexual advance at Paula Jones, a young state employee, which she rebuffed. In 1994, Jones filed a civil suit against Clinton, who by this time was president. On December 28, 1994, U.S. District Judge Susan Weber Wright, in Arkansas, concluded that a sitting president could not be privately sued. Wright had been appointed to the bench by Clinton's Republican predecessor, George H. W. Bush. Judge Wright ruled that although the suit could not go forward while Clinton was in office, lawyers on both sides could gather evidence and take depositions, so the trial could begin immediately after Clinton left office.

In January 1996, the U.S. Court of Appeals reversed Judge Wright, asserting that a sitting president was not immune from private lawsuits that were not connected to the presidency. By a vote of two-to-one the Court rejected the argument that the case should be delayed because a civil suit, even for events that took place before Clinton became president, would interfere with his role as president. Clinton's lawyers argued that because Jones had waited until the last possible moment to file her private suit, it was clear that time was not of the essence in this case. Rather, his lawyers argued the suit was designed to undermine his presidency, since she could have easily filed it even before he ran for president. In *Clinton v. Jones* the U.S. Supreme Court unanimously agreed that the president was not immune from a private suit that was for unofficial conduct, not related to his official duties. Justice John Paul Stevens asserted that

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

"temporary immunity" from a suit for conduct unrelated to the presidency was not supported by the Constitution or precedent. President Clinton vigorously opposed having to give a deposition in a private lawsuit while he was in office. But when the Court ruled against him, he sat for the deposition, even though it embarrassed him and undermined his legacy as president. He eventually settled the case out of court, paying Jones $850,000.

VII: Abraham Lincoln, Chief Justice Taney, the Supreme Court, and the Civil War

If President Trump defies the Court, he may argue that he is acting like Abraham Lincoln, incorrectly claiming that Lincoln ignored a Supreme Court order. This would be an untrue statement about Lincoln and a misuse of the history of Lincoln's suspension of habeas corpus at the start of the Civil War. While Chief Justice Roger B. Taney denounced Lincoln's geographically limited suspension of habeas corpus at the beginning of the war, the case never went to the Supreme Court. Moreover, neither Taney nor the Supreme Court ever ordered Lincoln to do anything. Thus, Lincoln did not defy a Supreme Court order because there never was an order from that Court, or any court.

At the beginning of the Civil War the Lincoln administration faced terrorism and sabotage in Maryland. John Merryman, a slaveholding Maryland Confederate sympathizer, organized terrorists to destroy railroad tracks and bridges in Maryland in an attempt to cut off Washington, D.C., from the rest of the nation. The Constitution authorizes the suspension of "Privilege of the Writ of Habeas Corpus" to protect the "public Safety" during a "Rebellion or Invasion."[33] At the time there was no FBI, Secret Service, or other federal police force to stop such terrorism. Nor were there any federal laws prohibiting the destruction of railroad tracks or bridges. But if the terrorism and sabotage was not stopped, state militias from the North might have been unable to reach Washington to protect the national capital. In addition, if the railroad lines were destroyed it would have been almost impossible for members of Congress to reach the capital for the special session Lincoln had called for July 1861. When the war began, Congress was not in session because it usually met in December. Therefore, Lincoln could not call on Congress to pass emergency legislation to deal with the cascading events in Maryland and elsewhere.

The only force Lincoln had to suppress terrorists like Merryman was the army. Thus, Lincoln suspended habeas corpus, and the army arrested Merryman, incarcerating him at Fort McHenry in Baltimore Harbor. In May 1861, Roger B.

33. U.S. Constitution, Art. I, Sec, 9, Cl. 2: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

Taney issued a writ of habeas corpus to bring Merryman to his private chambers. He did not do this as Chief Justice of the U.S. Supreme Court, but as the Circuit Justice for the District of Maryland. The commander of Fort McHenry, General George Cadwalader, himself a lawyer, requested a delay in any hearing to consult with the counsel and the government. Instead, Taney issued an opinion without scheduling a formal proceeding or hearing arguments from General Cadwalader or any attorney for the United States government.[34]

In a written opinion, Taney stated that only Congress could suspend habeas corpus, although the constitutional clause is actually opaque on this issue. The Framers envisioned the need to suspend habeas corpus in an invasion or insurrection. They had seen the British seize Philadelphia (the capital of the new nation) during the Revolution, forcing the Continental Congress to flee. The Constitution does not say who can suspend habeas corpus but only says it can be suspended during an invasion or insurrection, which the Civil War clearly was. Surely, the delegates to the Constitutional Convention in 1787 could have imagined an enemy seizing Congress, but if only the Congress could suspend the writ, then the president could not act to protect the nation. Suspension was, after all, a temporary act available only *if* the public safety required it and *if* there was a rebellion or invasion. Furthermore, the Framers did not expect Congress to always be in session, so they had to anticipate that the president might have to suspend the writ in the event of an invasion, such as took place during the Revolution and later the War of 1812, or during an insurrection.

Taney ignored the logic of all this. He did not explain how Congress could act when it was not in session or how Congress might come back to Washington for a session if Merryman was allowed to destroy bridges and railroad tracks connecting the national capital to the rest of the nation. Nor did Taney offer any guidance on how the president, who was the commander-in-chief of the army and had taken an oath to "protect"[35] the nation during an armed rebellion, could do this if he could not use the army to restore order. With a Confederate army sitting across the Potomac River, Taney denied that the President had the constitutional authority to actually "preserve and protect" the nation.

Taney's aggressive hostility to the Lincoln administration led the Chief Justice to assert that "Even if the privilege of the writ of habeas corpus were suspended by act of congress" Merryman "could not be detained in prison" but was entitled "to a speedy and public trial."[36] In other words, Taney argued that the government

34. *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861).

35. U.S. Constitution, Art. II, Cl. 8: "Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: −'I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.'"

36. Merryman at 149.

would lack any power to arrest terrorists like Merryman and stop their sabotage. This analysis of course made no legal sense at all, since the Constitution clearly allows some branch of government—the legislative or executive branch, or both—to suspend habeas, and the essence of suspension is that people arrested under the suspension do not have a right to a speedy trial, and that the government may in fact imprison them until the emergency passes. The idea of suspension is that it allows the government to arrest dangerous people in response to a rebellion or invasion.

Having berated the administration, Taney did not actually order the president or the administration to take any particular action, including releasing Merryman. Taney's opinion was not an opinion of the U.S. Supreme Court, which never heard the case. Nor could it be seen as an official court proceeding since there was no hearing or trial with briefs and lawyers' arguments. Instead, Taney ordered that "all the proceedings in this case, with my opinion, to be filed and recorded in the circuit court of the United States for the district of Maryland" and directed "the clerk to transmit a copy, under seal, to the president of the United States. It will then remain for that high officer, in fulfilment of his constitutional obligation to 'take care that the laws be faithfully executed,' to determine what measures he will take to cause the civil process of the United States to be respected and enforced."[37] In other words, Taney did not order General Cadwalader or President Lincoln to take any specific action. Thus, the president did not respond to Taney's one-man crusade against saving the Union during the Civil War, and the Supreme Court said nothing. Lincoln did not refuse an order from the Supreme Court because he never received one.

A month later, on July 4, 1861, Congress met in a special session, passed a series of laws to support military action against the rebellion, and adjourned in August. Lincoln referred to the Merryman case in his address to Congress, but Congress ignored the issue. Congress could have passed a law allowing suspension or passed a resolution (or law) disallowing it. But in fact, Congress did not pass any legislation on habeas corpus or debate the issue. In early 1863, Congress finally passed a law allowing Lincoln to suspend habeas corpus throughout much of the nation.[38]

While President Trump might see this as a precedent for him to ignore the Supreme Court, the circumstances are hardly similar. Unlike during Lincoln's administration, the United States is not at war, there has been no rebellion, and no foreign or Confederate army has invaded the nation. Nor is an enemy army sitting across the Potomac River, ready to capture Washington, D.C. Taney's written opinion was not based on a traditional legal proceeding with briefs and formal

37. Merryman at 153.

38. An Act relating to Habeas Corpus, and regulating Judicial Proceedings in Certain Cases, 12 Stat. 755 (Act of March 3, 1863).

arguments from counsel for both sides of the case. Nor was it an opinion of the Supreme Court, or even the opinion of a trial court. Finally, neither the Supreme Court nor any other federal court ordered Lincoln to act. He did not defy a court order because there was none.

After the war, in another case, *Ex parte Milligan*,[39] the Supreme Court held that civilians could not be tried by military courts if the civilian courts were in operation when the trial took place. A military court in Indiana had sentenced Lambdin P. Milligan to death for trying to organize a Confederate army in that state. He had received funds from the Confederate government and was taking action to engage in war on the United States. Although Milligan probably deserved to be incarcerated, and even hanged, Lincoln promised to pardon him when the war ended, but, the assassination of Lincoln prevented that. President Andrew Johnson commuted the death sentence, but believed Milligan should remain in prison. However, when a unanimous Supreme Court held that the military had no power to try Milligan, President Johnson complied with the Court's decision, releasing Milligan from custody, even though he had tried to raise a Confederate army in Indiana.

VIII: President Trump and the Future of the Rule of Law in the United States

Hopefully, the current president will learn from history that the oath he took—"to preserve, protect and defend the Constitution of the United States"—means that he must not only accept and comply with the decisions of the courts, but that he should do it gracefully, without threats of retribution or denunciations of the jurists. That is part of his oath to "faithfully execute the Office of President of the United States." Then he will act as Jefferson, Jackson, Roosevelt, Truman, Nixon, Clinton, and Lincoln did.

39. 71 U.S. (4 Wall.) 2 (1866).