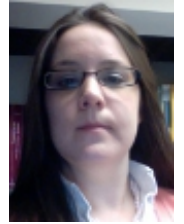


Despite Trump's attempts to delegitimize them, the Courts are checking executive power exactly as they should.

blogs.lse.ac.uk/usappblog/2017/02/15/despite-trumps-attempts-to-delegitimize-them-the-courts-are-checking-executive-power-exa

2/15/2017

Recent weeks have seen Donald Trump's controversial executive order banning immigration from seven Muslim-majority countries halted by rulings from federal judges. In response, Trump has attacked the judiciary, arguing that they do not have the power to stop his order. [Meghan Leonard](#) writes that the Courts' ability to undertake judicial review in cases such as this are at the heart of judicial power in the United States. And while presidents in the past – from Lincoln to Obama – have challenged decisions, they have been generally unable to limit the power of the Courts. Rather than facing a constitutional crisis, she argues, our system is working exactly the way it is supposed to.



The government has taken the position that the president's decisions about immigration policy, particularly when motivated by national security concerns, are unreviewable, even if those actions potentially contravene constitutional rights and protections. ... There is no precedent to support this claimed unreviewability, which runs contrary to the fundamental structure of our constitutional democracy...It is beyond question, that the federal judiciary retains the authority to adjudicate constitutional challenges to executive action. ([State of Washington & State of Minnesota v. Trump 2017](#)).

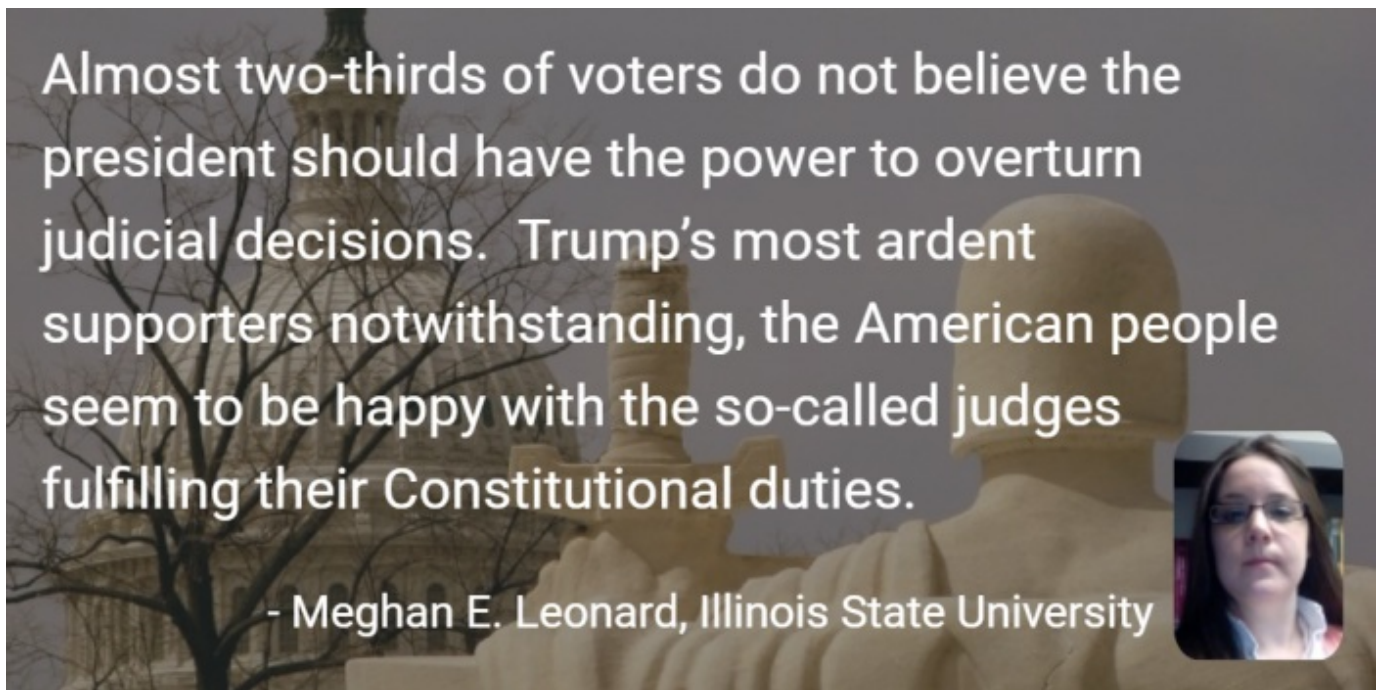
The quotes above highlight the narrative in President Trump's seeming 'war' on the power of the federal courts. The President, disheartened by the district court's temporary restraining order on his executive order, attacked both federal District Court Judge James L. Robart ("[so-called judge](#)") and the power of the federal courts to make this decision. Of course, the federal courts do have the power to halt potentially unconstitutional executive orders and check the other two branches of government.

The power of the Supreme Court and federal courts more generally to interpret the Constitution, or 'say what the law is' was given to the Court by its own Chief Justice John Marshall in 1803, in *Marbury v. Madison*. Not explicated in the Constitution itself, judicial review is the heart of judicial power in the United States. While *Marbury* gives the Court the legal authority to say what the law is, the legitimacy of the courts gives them the political capacity to have their decisions complied with.

The legitimacy of the Supreme Court is best understood as a [reservoir of goodwill](#) toward the institution, whereby individuals accept the decisions of the Court [because they trust the institution](#). While a [debate](#) exists on how [ideology](#) and agreement with [individual Court decisions](#) affects support for the Court, political scientists have generally concluded the support for the Supreme Court is [high](#) and [enduring](#). And given that the courts have neither the 'power of the purse nor the sword' it is this diffuse support that leads the other branches of government to comply with and implement the decisions of the Court. Not doing so could lead to backlash from the public, which the elected branches, which are concerned centrally about reelection seek to avoid.

The legitimacy of the Court does not mean the president or Congress won't express their disagreement with judicial decisions. In 2010, then-President Obama famously challenged the Supreme Court's decision in *Citizens United v. FEC*, by suggesting in his state of the union address "[\[w\]ith all due deference to separation of powers, last week the Supreme Court reversed a century of law...](#) that would open up the floodgates to special interests." This was neither

the first nor the last time a sitting president has used their power to 'go public' to challenge the decision of the Supreme Court. Yet, while presidents often disagree with Supreme Court decisions on issues most important to their administration, they most often comply with the decision of the Court, even once [calling the National Guard to do so](#). Not always the case, for example, Lincoln ignored the post-*Dred Scott* Court's decision in *ex parte Merryman*, this would be the exception, rather than the rule.



In another way to respond to the Court, the president may turn to allies in Congress and attempt to check the power of the court through court-curbing legislation. Most famously used by President Roosevelt in his attempt to add six justices and pack the Court that struck down many pieces of his New Deal legislation, this [court-curbing](#) legislation is designed to propose limitations to the power of the federal courts as well as demonstrate to the public response to unpopular decisions. Research demonstrates that the Court is responsive to new court-curbing legislation, and will limit the use of judicial review in [response](#). So, while the Trump White House is arguing the [federal courts are too powerful](#) in their ability to check the executive and legislative branches, there are at least some limitations on this power.

Given the difference in the comments by President Trump compared to past presidential statements that highlight the importance of trusting the separation of powers, many commenters have raised concern that we might be facing a crisis of the Constitution. At this point, I would conclude rather than a crisis, our system is working exactly the way it is supposed to. The judicial branch is checking the power of the executive branch, in an effort to stop any potential violations of the Constitution.

As for the future relationship between Trump and the Courts? [New polling hints at what the American people think](#) : 53 percent of Americans trust the courts to make the right decisions, while only 38 percent would trust President Trump more. Only a quarter of voters would want President Trump to have the power to overturn the decisions of the courts, though of Trump voters 51 percent would give the president this power. Almost two-thirds of voters do not believe the president should have the power to overturn judicial decisions. Trump's most ardent supporters notwithstanding, the American people seem to be happy with the so-called judges fulfilling their Constitutional duties.

Featured image credit: debaird. [CC BY-SA 2.0], via Wikimedia Commons

[Please read our comments policy before commenting.](#)

Note: This article gives the views of the author, and not the position of USApp– American Politics and Policy, nor of
2/3

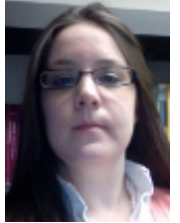
the London School of Economics.

Shortened URL for this post: <http://bit.ly/2I7nB1K>

About the author

Meghan E. Leonard – *Illinois State University*

Meghan Leonard is an Associate Professor of political science at Illinois State University. Her work focuses on the decision-making of state supreme court justices. She examines, opinion-writing and court-curbing in the American states. Her work has been published in *State Politics and Policy Quarterly*, *American Politics Research*, and the *Justice System Journal*.



- CC BY-NC 3.0 2015 LSE USAPP