

Presidential Power and the Constitution Challenging the Court's Authority: A Missed Opportunity or a Use of Presidential Prerogatives?

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This paper explores the relationship between the judicial and executive branches as it has evolved from the framing of the Constitution. This paper seeks to answer the questions: What has been the role of the Supreme Court in shaping the actions of the President? How have the rulings in specific cases affected the policies and public perceptions that have thus followed these rulings? Case studies examining the responses of different presidents following decisions from the Supreme Court will illustrate the effects the Supreme Court has on the exercise of the president's powers.

The Framers of the Constitution sought to create three equal branches of government in which a separation of powers and a constitutional system of checks and balances would allow the country's political institutions to develop with a changing society. In *The Federalist*, No. 51, James Madison made the claim that "[i]n republican government, the legislative authority necessarily predominates." Although this was certainly the case throughout the twentieth century, with the advent of the bureaucratic government and the expansion of executive programs and policies, many would argue that the executive has rapidly advanced to the front of the three branches. As the executive branch has developed in its size and scope, so has its involvement with the other two branches of the federal government. Namely, the interaction of the executive and the judiciary has been an issue of contention for over two-hundred years, but has been brought into the public sphere by the media in the most recent decades. An expansion of presidential powers has brought about challenges to this authority through cases heard by the Supreme Court. A ruling in favor of the executive has given authority and legitimacy to the powers of the President. However, when the Supreme Court has not sided with the executive, some Presidents have chosen not to comply. This has led to conflict regarding the scope and authority of the President's powers and constitutional authority.

THE CONSTITUTIONAL FRAMEWORK AND THE EXECUTIVE

The Articles of Confederation created an exceptionally limited national government. In the country's initial stages as a union, members of the government

feared an executive with any real power, stemming from their previous negative experiences under the control by the English Crown which they had only recently evaded. As Rossum and Tarr have explained, (2007) the original executive established under the Articles was not centered on the federal level. Instead, each state maintained its own executive. Like the federal government, the state's allowed their executives to exercise little to no real authority. The results of the limited executive proved to be disastrous. At both the state and federal levels, the restrictions on the executive created a government ill-equipped to effectively check any actions of the legislature as well as provide for efficient administration (p. 179).

The delegates sent to the Constitutional Convention learned of the necessities of an increased involvement and leadership within the executive based on their experiences with their own state executives. The Convention brought with it the Framers who had come to believe that the efficiency of the government depended upon the possibilities of an energetic and independent executive and a government that could only prove its effectiveness with successful interaction and an interdependence of the three branches. In *The Federalist*, No. 70, Alexander Hamilton defines the reasoning and necessity behind maintaining a strong executive:

Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy (522).

Continuing with the same Federalist Paper, Hamilton also moves on to explain the consequences of an executive ill-equipped to handle the aforementioned necessities of government.

A feeble Executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government (523).

In accordance with Hamilton's advocacy of a strong executive, the Framers used the Constitution to outline an executive that could embody the "energy" deemed necessary to the establishment of the republic and its democratic principles.

Article II of the U.S. Constitution outlines the roles and responsibilities of the President. Section 2 outlines the President's appointment powers to, "nominate, and by and with the Advice and Consent of the Senate, shall appoint... Judges of the Supreme Court..." The Constitution establishes very little connection between the functions of the Supreme Court and those of the President. With so little written law regarding the interaction of the two branches, the possibility for conflict

between the two branches seems remote. However, in times of necessity, it has been necessary for the President to exercise some form of prerogative powers not outlined in the Constitution. The Supreme Court has been asked to determine the Constitutionality of these presidential claims to power.

SHAPING THE COURT

Nominating justices to the Supreme Court is the most recognizable way for the president to influence the decisions of the Court. Regarded by some presidents as a priority during their tenure in office, many have exercised considerable discretion in selecting their nominations to the Court. Typical of most presidents is the effort to place justices on the bench who adhere to the same policy preferences as themselves and will be most likely to advance the president's agenda through the decisions made by the Court. In a discussion of his President Eisenhower's time spent in office, when asked if there were any mistakes he had made as president, he replied, "Yes, two, and they are both sitting on the Supreme Court," (as cited in Edwards & Wayne, 2006, p.392) referring to his appointments of Earl Warren and William Brennan who both turned out to be significantly more liberal justices than Eisenhower had anticipated.

Tarr (2007) discusses the different approaches presidents have taken in selecting justices. During Franklin Roosevelt's presidency, he found the Court to be consistently in opposition to his liberal, New Deal legislation. Consequently, he unsuccessfully attempted to "pack the court" by adding additional justices who would support his New Deal policies. Other presidents, such as Jimmy Carter and Ronald Reagan, although they stayed true to party lines in their nominations, placed a much higher emphasis on the demographic composition of the Court and filled vacancies on the Court with women and ethnic minorities (p. 74-9). The president's role in judicial appointment is not taken lightly. It is seen as a way to advance the president's goals and policies.

Furthermore, the president plays an indirect role in the selection of cases that will be heard in the Supreme Court. Edwards and Wayne outline this process by explaining that although the president cannot directly approve or reject cases the Court will hear, the solicitor general, who is a presidential appointee confirmed by the Senate does have considerable influence over the docket of the court. The solicitor general works under the attorney general who is also an integral member of the executive branch. A major responsibility of the solicitor general is to decide which of the cases that have been lost by the federal government in the federal district courts or the courts of appeals will be appealed to the next higher court. Cases heard by both the Supreme Court and the federal courts of appeals have included the federal government as a party in about half the cases heard in the most recent years (393). In these cases, it is typically the role of the solicitor general to prepare the case for the government and present it to the court (p. 399).

Examinations of the relationship between the solicitor general and the Supreme Court have revealed interesting results. According to a study in the

American Journal of Political Science (2005), members of the Court tend to be more accepting of the views of the solicitor general when their political ideology is in agreement (p. 72-85). This means that when the views of justices seated on the Court are in accordance with the current president, they will be more likely to side with the government in a case, because the solicitor general has also been appointed by the president.

Finally, in shaping the Court, the enforcement of the Court's decisions typically depend upon the support of the executive because of the limited powers of the Court. The Constitution does not explicitly define how the president should best aid the executive branch; the president can use such methods as executive orders to ensure compliance with court orders. One example of this is the decision of both Eisenhower and Kennedy to utilize federal troops to ensure compliance with the Court's order to desegregate public schools.

In addition to a president's zealous attempts to ensure compliance with the Court's rulings, some presidents have also taken no action to enforce court orders such as in the case of *Worcester v. Georgia* when the Court said it was the President's responsibility to enforce their decision to release missionaries arrested on Indian Lands in the state of Georgia. President Jackson is reported to have said, "Well, [Chief Justice] John Marshall has made his decision, now let him enforce it" (as cited in Edwards & Wayne, 2006, p. 395). Often the relationship between the executive and legislative branches has been one of successful coordination. However, there arise instances where questions of the constitutionality with the potential for the two branches to collide. With the Constitution as their only guide, the justices of Supreme Court must decide on these issues, and it is up to the President to decide to comply with their decisions.

INCREASES IN PRESIDENTIAL POWER

Presidential power has increased since the nineteenth century due to both those powers that are expressly delegated in the Constitution as well as those which are recognized as implied within the framework of the document. Former Chief Justice and President of the United States William Howard Taft advocated the more literal interpretation of a president's implied powers in one of his most famous passages,

...the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as necessary and proper for exercise (as cited in Edwards & Wayne, 2006, p. 392).

This view presents Taft's position as significantly more conservative in regards to expanding presidential power. He does however; also suggest that the president's powers are not completely limited to only those which are spelled out in the Constitution. Decisions by the Supreme Court have typically reflected Taft's

statement. However, some president's have taken their implied powers too far, forcing the Supreme Court to rule against the constitutionality of their actions.

In their use of implied powers, Presidents have cited clauses within the Constitution that they believe to have authorized their actions that come into question before the Court. Presidents have used such claims as executive privilege, prerogative powers, and declarations of presidential immunity. More often than not, the Supreme Court has ruled in favor of the use of these powers by the executive. However, there have been instances throughout history where the Court ruled presidents to be in violation of the Constitution as well.

JUDICIAL SUPREMACY

Under the concept of judicial supremacy the Court issues an order and essentially forces all other branches to adopt its view. In the United States Supreme Court Case of *Cooper v. Aaron* (1958), the Arkansas state governor openly resisted the decision of the Supreme Court to desegregate schools in its 1954 ruling from *Brown v. Board of Education*. When the case reached the Supreme Court, the nine justices all ruled unanimously that the Fourteenth Amendment obliged the state to provide equal educational opportunities afforded to the student by the ruling of the Supreme Court. The unanimous decision was also an attempt to further assert the Court's supremacy in its authority to determine constitutional law.

In the opinion, the justices cite Article VI of the Constitution which makes it the "supreme law of the land." The justices incorporate the words of former Chief Justice John Marshall. Over 150 years ago, in 1803, Chief Justice Marshall referred to the constitution as "the fundamental and paramount law of the nation." Furthermore, traveling back to the very beginnings of the Supreme Court, in *Marbury v. Madison* (1803), Marshall stated, "It is emphatically the province and duty of the judicial department to say what the law is" (as cited in ...) Marshall's ruling in *Marbury* makes clear that the Court is the final interpreter of the Constitution. Therefore, when the Court ruled in *Brown* to integrate public schools, it signified their interpretation of the Fourteenth Amendment and the meaning according to the Constitution.

"No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it (as cited in)" It could be argued that in viewing the Constitution in light of the Judiciary's interpretation, the definition of the law is essentially placed in the hand of the justices, making the judiciary the most powerful branch of government. However, what is more important to detract from Marshall's words is the obligation that all members of the government have to abide by the Constitution, including the President.

Cases which question the constitutionality of presidential action also bring into focus the concept of judicial supremacy. When the actions of a president are found to be unconstitutional, and the president willingly complies with the ruling of the court, he helps to assert the authority of the Court and give further legitimacy to

the rulings. By doing so, the president helps to bring the concept of judicial supremacy to its climax.

COMPLYING WITH THE COURT

Upon formally assuming his position in office, each president takes the following oath in accordance with Article II, Section 2 of the Constitution:

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.

With only a few exceptions, the Presidential Oath of Office has always been administered by the Chief Justice of the Supreme Court, signifying the connectedness between the two branches as well as the duty and obligation of the President to maintain respect for the authority of the Supreme Court.

Because nearly half of the cases that make it to the Supreme Court involve the government as a party, (Edwards & Wayne, 2006, p. 396), it is not surprising that some of these cases also specifically designate the President as one of the parties. More often than not, the Supreme Court has sided with the President when certain powers are in question. However, there have also been instances where this has not been the case, and the Court has been forced to declare certain acts of the President unconstitutional. Following the Court's rulings, some presidents have done as the justices ordered and rectified or ceased their actions. However, other presidents have chosen not to comply with the Court for reasons they believed justified their actions. With only the Constitution as their guide, many would believe the Supreme Court could never be wrong, but because the Framers chose to leave particular clauses vague and perhaps open for additional interpretation, the door for a battle over Constitutional interpretation swung itself wide open.

CASE STUDIES IN PRESIDENTIAL CONFLICTS WITH THE COURT: THOMAS JEFFERSON

President Thomas Jefferson's constitutional thought has been studied extensively by constitutional scholars. One of the most interesting aspects of his constitutional thought was his view on the judicial branch and its place in the federal government. David N. Mayer (1994), who presents a compilation of the thoughts and writings of Thomas Jefferson in his book, states that before he became president, Jefferson's writings suggested that he maintained a "great confidence" in the efforts of the judiciary to uphold the intentions of the Constitution and to protect the rights of individuals as well as the government. He actually advocated a more integrated judicial and executive branch. Upon receiving the drafted Constitution in 1787, Jefferson wrote to James Madison that he may have "liked it better had the

Judiciary been associated” with the executive in holding the power to veto legislation or “invested with a similar separate power” (as cited in Mayer, 1994, p. 257). This statement signifies Jefferson’s opinion that the judiciary should have some sort of power to check the other branches.

However, when he assumed the title of President Jefferson in the year 1800, his opinions regarding the judiciary seem to have taken a turn in the opposite direction, sparking a constant controversy and storm of debate that lasted throughout his presidency and into his retirement that ended with referrals to the judiciary as a “corps of sappers and miners,” whom he believed to be in constraint pursuit of undermining federalism and ultimately ending in a “solecism” of the country’s republican government (Mayer, 1994, p. 257, 261.)

Much to his dismay, at the beginning of his presidency although the Republican Party had been vindicated in the 1800 elections, the Supreme Court was what Jefferson referred to as a “stronghold” of the Federalist Party (p. 257). Even more detrimental to his relationship with the judiciary was the deteriorating relationship between Chief Justice John Marshall and the president, Jefferson opposed the practice of judicial review regarding acts of the legislature. He was concerned about the abuse of power by the judiciary and instead advocated for a complete separation of powers among the three branches. Marshall’s famous opinion in *Marbury* was completely contrary to this view. He maintained that a judge should be “a mere machine” which would bestow upon the people the law “equally and impartially” (p. 257).

In his classroom lecture series, Collins asserts that the beginnings of Jefferson’s conflict with the judiciary and his advocacy of “coordinate review” or his tripartite theory of government began when he was Vice President under John Adams with the wake of the Alien and Sedition Acts of 1798. Jefferson argued that for the president to comply with the acts would be to allow the legislature to unconstitutionally deprive the courts of their powers by giving the president the authority to deport aliens without the benefit of trial (2008).

As President, his first attack in a life-long battle with the judiciary began with the repeal of the Judiciary Act of 1801. Jefferson sought to weaken the strength of the Federalists whom he felt had lodged themselves into the judiciary for far too long. The act was an attempt to expand the jurisdiction of federal courts and create several new offices which would be filled by Federalists appointed by John Adams in the final days of his presidency, known as the “midnight appointments. Jefferson clearly stated his opinion of the act

By a fraudulent use of the Constitution, which has made judges irremovable, they have multiplied useless judges merely to strengthen their phalanx (Mayer, 1994, p. 266).

The repeal of the act, although not outside the boundaries of his powers, was Jefferson’s first move to weaken the Federalist control of the judiciary. Furthermore the Court’s decision in *Marbury*, which reinforced the concept of judicial review,

convinced Jefferson that the ability of the judiciary to regulate acts of the executive posed an immediate danger to the concept of separation of powers (Mayer p. 267-8).

The Alien and Sedition Acts, which were still in place while he was president in 1804 constituted another refusal by Jefferson to surrender to the Court. The Supreme Court approved the acts, but Jefferson refused to continue the prosecutions of offenders of the act. Mayer (1994) asserts, Signaling his own duty to interpret the Constitution, he called them “impalpable and unqualified contradiction to the Constitution” making them a “nullity.” In his work, Mayer presents a letter to Abigail Adams, Jefferson wrote of the authority of the Court to exercise judicial review and in defense of his actions:

You seem to think it devolved on the judges to decide on the validity of the sedition law. But nothing in the constitution has given them a right to decide for the executive, more than to the Executive to decide for them. Both magistracies are equally independent in the sphere of action assigned to them. The judges, believing the law constitutional, had a right to pass a sentence of fine ad imprisonment, because that power was placed in their hands by the constitution. But the Executive, believing the law to be unconstitutional, was bound to remit the execution of it; because that power has been confided to him by the constitution (p. 269).

In the conclusion of his letter, Jefferson stated that by giving the judiciary the power to determine the constitutionality of the actions of the other branches would make the “judiciary a despotic branch.” The president, according to Jefferson, was bound to the constitution and except in circumstances where a higher, unwritten law might rule, he would be “compelled to act accordingly” (p. 269).

In a draft of his first message to Congress that was eventually omitted because of its controversial nature, President Jefferson attempted to define his constitutional theory by stating, “The constitution...has provided for it’s own reintegration by a change of the persons exercising the functions of those departments,” meaning that if a conflict between the branches were to develop, it would not be left for the judiciary to determine the outcome, but instead, it should be left up to the people who assert their approval or disapproval of the actions of the government through their own right to vote (Mayer, 1994, p. 270).

Mayer (1994) refers Jefferson’s battle with the Court as an “administration-sponsored assault on the judiciary” (p. 273) was not one-sided and left uncontested by the opposing party. In the treason trial of Aaron Burr Chief Justice Marshall granted the defense motion to issue a subpoena requiring the president to comply with an order to submit papers the Court believed to be pertinent to the case. Marshall’s authorization of the subpoena was seen by Jefferson as a direct challenge to his advocacy of a separation of powers as well as an act which had the potential to destabilize the balance of the federal government in favor of the

judiciary (p. 275). In a letter to the United States attorney and chief prosecutor in the case Jefferson generalized his sentiment in relation to the subpoena.

The leading principle of our constitution is the independence of the legislature, executive, and judiciary of each other, and none are more jealous of this than the judiciary. But would the executive be independent of the judiciary, if he were subject to the commands of the latter, and to imprisonment for disobedience... (p. 275).

Jefferson attempted to remedy the situation with a partial compromise involving the papers. More importantly however, his actions in refusing to completely comply with the court constituted the beginning of what is known today as executive privilege. Although he is considered the first, Jefferson would certainly not be the last to invoke the doctrine of executive privilege. Jackson set the stage and began a precedent in presidential power that continues to evolve today and has been a source of disagreement in the federal government since Thomas Jefferson and the Aaron Burr trial.

ANDREW JACKSON

Similar to Thomas Jefferson, Andrew Jackson was a firm advocate of an executive independent of the chains of the decisions of the judiciary. Prior to his election to the office of president, Jackson wrote in a letter to his nephew, “the Constitution is worth nothing and a mere bubble [sic] except guaranteed to them by an independent and virtuous judiciary” (as cited in Longaker, 1956, p. 341). Throughout his tenure in office, President Jackson is remembered for his defiance of the judiciary based on his belief of a separation of powers. One of his most famous statements, “John Marshall has made his decision; now let him enforce it,” is regarded by many as the cornerstone of his judicial policy (as cited in Longaker, 1956, p. 341). However, Jackson’s refusals to comply with the doctrines of the Court are rooted in more than simply his constitutional thought. Jackson’s decisions also involved personal and political considerations.

Jackson, who is regarded as an advocate of state’s rights, began his term in office skeptical of Chief Justice John Marshall. The President believed that the Chief Justice’s nationalism threatened the sovereignty of the states. Furthermore, he felt that Marshall was responsible for the aggressive nature of the Court (Longaker, 1956, p. 342).

Longaker (1956) argues that the battle between President Jackson and Chief Justice Marshall was not based purely on conflicting opinions of constitutional interpretation. It should also be noted that Marshall had offended Jackson in his election campaign of 1828, and is noted for making the statement, “should Jackson be elected, I shall look on the government as virtually dissolved” (as cited in Longaker, 1956, p. 342) In addition to his statement of hostility, Marshall went on to say that he would vote for the first time in twenty years to do his part to ensure

Jackson did not make it to office (p. 342). It seems obvious that when Jackson was elected president the same year, he did not place the Marshall Court high on his list of allies in the federal government.

One of Jackson's earliest and most defiant acts against the judiciary centered on conflict with the state of Georgia. The state passed laws prohibiting the Cherokee tribe to establish its own government within the state. The laws came into conflict with not only treaties that had been negotiated with the United States but also the Judiciary Act of 1802. Included in the Act was a provision providing for the removal of intruders on Indian lands by the federal government (Longaker, 1956, p. 343).

Longaker presents three specific instances in which individuals brought suit to the federal courts. In the first instance, the Supreme Court issued a writ of error on a decision of a lower court to convict an Indian of murder under Georgia's laws that the state held were extended throughout the Cherokee territory. The writ was ignored and the man was executed. The President failed to enforce the Court's decision with any assistance from the executive. His predecessor, John Quincy Adams wrote of his disdain for Jackson's decision, "The Constitution, the laws and treaties of the United States are prostrate in the State of Georgia...because the Executive of the United States is in a league with the state of Georgia. He will not take care that the laws be faithfully executed" (as cited in Longaker, 1956, p. 343-4).

A second instance occurred two years later. Once again, an Indian was convicted of murder under Georgia law that had been imposed throughout the Cherokee lands. The case reached the Supreme Court who again issued a writ of error in the case. The president once again responded with inaction, refusing to enforce the Court's decision.

The final instance involving the violation of Georgia state law by two white missionaries to the Cherokee. The case of *Worcester v. Georgia* held that states did not have the authority to redraw boundaries of Indian lands which had already been negotiated by Congress with the tribes. Following the Court's ruling in Worcester, once again President Jackson not only refused to enforce the Court's mandate but actually aided the state of Georgia in its effort to remove Worcester from a postmastership as a reprimand (Longaker, 1956, p. 344).

Jackson's refusal to comply with the decisions of the Court was based on more than purely his personal disdain for Chief Justice Marshall. The President felt that although it was legal to use force to enforce the Supreme Court's decision, it was also unnecessary and in violation of the rights of the state of Georgia. Furthermore, Jackson did not agree with the Court's decision that the Cherokee had rights independent of the state. The President reasoned that by siding with either the Court or Worcester he would be "going beyond his own power and compounding the erroneous decision of the Supreme Court with his own unconstitutional action." Jackson knew that enforcement of the mandate would be "difficult and bloody" (as cited by Longaker, 1956, p. 345-6, 349). Jackson's first explicit defiance of the Court was not impulsive. On the contrary, his reactions to

the Court can be considered extremely calculated and perhaps in what he felt were in the best interests of the country at the time.

While the conflict with the state of Georgia was taking place, so too was a conflict involving the chartering of a United States Bank which Jackson had vetoed in 1832. His veto was not only in clear conflict with Congress' will to establish the bank, but it was also seen as a challenge to earlier precedent set by the Supreme Court's decision in *McCulloch v. Maryland* which recognized the right of Congress to establish national banks. In his Veto Message, the President declared that identical to the judiciary, the executive also had the power and responsibility to examine the constitutionality of any bill or resolution that he was expected to approve. In further defense of his position, Jackson declared, "Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power..." (as cited by Longaker, 1956, p. 350-1).

In his statement, Jackson was asserting the authority of the executive's opinion over that of the judiciary. In defense of his separation of powers doctrine, Jackson asserted, "...the opinion of the Judges has not more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both" (as cited by Longaker, p. 352).

President Jackson's constant conflict with the Judiciary was one of the defining characteristics of his presidency. Although personal reasons served as motives for this conflict, his defiance was also based on his constitutional interpretations of executive authority and powers which were delegated to him through the Constitution. President Jackson's ability to resist the decisions of the Court allowed him to formulate his own domestic policy agenda and set the stage for the coming presidents.

ABRAHAM LINCOLN

Abraham Lincoln, indisputably one of the nation's greatest presidents, also took his turn at challenging the authority of the Court. The *Dred Scott* decision, which had been decided by the Court four years prior to his election, remained a source of debate into his presidency. Lincoln's actions and uses of presidential powers were questioned by the Supreme Court during his tenure as president and following his death.

The case of *Dred Scott v. Sandford* was decided by the Court in 1857. Dred Scott, who was a slave, had been transported by his owner into states where slavery was considered to be illegal. He was ultimately returned to Missouri where his owner could keep him as a slave. Dred Scott brought suit to the Court in an attempt to claim freedom based on his claim that he had been free once he entered the states where slavery was illegal. The Supreme Court ultimately ruled that Dred Scott was not considered a citizen under the Constitution and therefore not entitled to privileges and immunities extended to citizens of the states. Furthermore, the Court pointed out that the Constitution explicitly declares protection for those who are

trafficking slaves or any other form of personal property (Rossum, 2007, p. 325-334).

In the Lincoln-Douglas debates before the election, Abraham Lincoln spoke of his opposition to the Court's decision to define Dred Scott as a slave, and he vowed that when another question comes up pertaining to a similar issue, he would do everything in his power to overrule their decision.

On March 4, 1861, in his first inaugural address, President Lincoln spoke to a nation crippled by the early effects of a civil war. Two weeks earlier, Jefferson Davis had been inaugurated as the President of the Confederacy. Lincoln addressed the concerns of the Union and addressed the realities of the country's current situation. Returning to the issue surrounding the *Dred Scott* decision, one of the defining sections of his address refers to the authority of the Supreme Court. Lincoln does not resist the authority granted to the Court to decide questions of constitutionality. However, he does state that decision made by the Court, "...may be erroneous in any given case...with the chance that it may be overruled and never become a precedent for other cases." He goes on to talk of the consequences of decisions made by the Court:

...the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rules, having to that extent practically resigned their Government into the hands of that eminent tribunal (Basler, ed. 1946, p. 585-6)

Lincoln's statement made clear that in his view, the Supreme Court was not the final authority and however binding their decisions may be also have the potential to be overruled at anytime.

One of Lincoln's most famous actions while in office occurred when he chose to suspend the writ of habeas corpus without the authorization of Congress, which according to Article I, Section 9 of the Constitution, was necessary. In addition, Lincoln refused to call Congress into session in order to validate his actions, as required by the Constitution. He claimed that it was his prerogative under his authority to take care that the laws be faithfully executed. Lincoln asserted that it was in the best interests of the country to prevent Confederate allies and sympathizers from interaction with their forces.

Less than one month after Lincoln had suspended the writ of habeas corpus, a case known as *Ex Parte Merryman* made its way to the Supreme Court. John Merryman, who was a lieutenant in the Maryland Cavalry was arrested by the Union forces under the writ for his assistance in the efforts in the destruction of the Union. In front of the Chief Justice Taney (the case was not argued in front of the entire court but instead in the Chief Justice's chambers), Merryman alleged that the President had no constitutional authority to suspend the writ, which constitutionally only belonged to Congress (Rossum, p. 325).

Chief Justice Taney ruled on the case and declared that only the Congress has the authority to suspend the writ. He went on to say, that the president must

“faithfully execute the laws” (Findlaw.com). This does not mean that he should “execute them himself” instead; he should ensure that no outside forces interfere with the carrying out of the laws. The President also argued that certain extraordinary circumstances called for the exercise of this power. Taney responds to this claim by asserting that if the executive can invoke this power whenever he deems necessary, “the Constitution is worth nothing.”

Upon hearing Justice Taney’s ruling that Merryman be released, Lincoln was forced to respond. He chose to do nothing and continued the detention of John Merryman. Lincoln held the suspension of the writ and continued the use of his own prerogative powers. It is also said that Lincoln decided to have a warrant issued for the Chief Justice’s arrest. Controversy surrounds the truthfulness of these claims because Taney was never actually arrested, but letters from Lincoln’s law partner tell of the warrant and the inability to find a marshal who was willing to arrest the 84 year old justice (Rossum, 2007, p. 235).

Lincoln’s usurpation of judicial and legislative power on more than one occasion was fueled by his desire to protect the best interests of the country. It is very likely that Lincoln knew what he was doing was unconstitutional, but he also knew that it was what the country needed in order to survive. In a case brought to the Court following Lincoln’s death, known as *Ex Parte Milligan*. Like *Merryman* *Milligan* challenged the authority of the government under Lincoln to suspend the writ of habeas corpus when civilian courts are still in operation and the Court ruled in favor of Milligan although he admitted Lincoln’s questionable actions were in the best interests of the country at the time. Associate Justice David Davis stated, “Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln” (as cited in Rossum, 2007, p. 242). In his opinion, Justice Davis knew he could not constitutionally take the side of Lincoln, but he knew that a great president like Lincoln knew what was best for the country. For Lincoln, by ignoring the demands of the Supreme Court and acting on his own prerogative, he was able to help the nation through one of its most difficult times. Like Jackson, Lincoln created his own domestic defense policies. The Court trusted that the President ultimately knew what was necessary for the survival of the nation.

FRANKLIN D. ROOSEVELT

President Franklin D. Roosevelt helped America through one of the most difficult times in history. The Great Depression called for increases in government assistance through programs and efforts that would help corporations and private citizens get back on their feet. The policies and bills passed by Congress and the President reflected this increased involvement by the government. However, the members of the Supreme Court did not completely embody these new economic principles. Consequently, the President faced some difficulty with some of his new programs.

In the case of *Schechter Poultry Corp. v. United States* (1935), owners of the Schechter Poultry charged that section 3 of the National Industrial Recovery Act, part of Roosevelt's New Deal program, which empowered the president to implement industrial codes, regulate weekly employment hours, wages, and minimum ages of employees was an unconstitutional delegation of the legislative powers and responsibilities of Congress (Rossum, 2007, p.167).

In a unanimous decision the Court ruled that the under the Constitution the President did not have the authority to implement industrial codes and ruled this use of power unconstitutional. President Roosevelt responded to this decision with the Judiciary Reorganization Bill of 1937. The bill was a proposal to add an extra justice for one on the bench over the age of 70½. Six additional justices would have been appointed. This was Roosevelt's attempt to "pack the court" in order to gain support of his economic development programs.

Although the Court eventually opened up in support of Roosevelt's programs, Roosevelt found it necessary to take extraordinary measures to gain the support of the judiciary and more importantly, support for his economic policies that would lead the country out of the Depression.

HARRY TRUMAN

One of the most significant cases in the Court's ruling against the president came under the term of President Harry Truman in 1952. In the midst of a war with Korea, the United States was faced with an impending strike of all the nation's steel workers which threatened to throw the entire domestic economy into unrest. President Truman took action by seizing the nation's steel mills and placing them under government control while maintaining the current management.

Youngtown Sheet & Tube Co. v. Sawyer was a case brought to the Supreme Court in which the owners of the Youngstown Sheet and Tube Company alleged that the president did not have the constitutional authority to simply seize the steel mills without authorization from Congress or through the use of additional constitutional measures. The Supreme Court ruled that the President did not have the authority to seize the privately owned steel mills (Rossum, 2007, p. 211-15).

Within minutes, Truman ordered the steel mills to be returned to the control of their private owners, and the strike he had sought to prevent took place shortly thereafter. Truman was insulted by the decision and spoke angrily of it in his *Memoirs*. The decision by the Court to limit the president's power over economic policy represented one of the most extensive checks on presidential power at the time. The case for limiting the exercise of extra-legal powers by the president set the precedent for many cases in the future, and has consequently deterred future presidents from interfering with the economy in the private sector.

RICHARD NIXON

Richard Nixon will forever be remembered for the controversy surrounding the Watergate Scandals and his subsequent resignation from the Presidency. The special prosecutor in the case against Nixon filed a subpoena for Nixon to submit tapes recorded in the Oval Office of the White House which he believed contained important information that would indict all those involved, to possibly include the president. Nixon refused to submit the tapes, citing the doctrine of executive privilege, claiming that the conversations contained on the tape involved high government officials and needed to be protect in order to maintain national security (Rossum, 2007, p.114-19).

In a difficult, but unanimous decision, the Supreme Court ruled that through invoking executive privilege, the president was not above the law, and did not have the authority to withhold evidence that is "demonstrably relevant in a criminal trial." The Court also cited that the precedent set in *Marbury v. Madison* gave it the authority to decide the limits of presidential powers inherent in the Constitution.

CONCLUSION

The most immediately recognized ability of the President's to shape the judiciary in accordance with his policy goals is through the appointment of justices who share the same political ideologies. When the President either has the ability to appoint a significant number of justices or finds the Court to be already aligned in his favor, he also finds it significantly easier to receive approval from the judiciary when his actions come into question. Furthermore, in times of necessity and emergency, Presidents have found it necessary to invoke the use of extra-legal powers through the use of their own prerogatives or have cited such powers as those of executive privilege to justify their actions. In utilizing any extra-legal powers, the president's have known that their actions may be deemed unconstitutional by the Court, but they believed they were acting in the best interests of the nation.

In *The Federalist*, No. 70, Alexander Hamilton penned the words, "Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number..." In his essay, Hamilton advocated for a single, unitary executive that would act with energy and authority in the best interests of the nation. Throughout its history, the United States of America has had more than its share of great leaders who have adhered to these words. By doing so, they have set the precedent for future generations and allowed the government, policies, and institutions of the United States to become what we know it as today.

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