jeopardy if it follows an impeachment trial, that impeachment and removal is not necessarily the sole remedy.

Nonetheless, prosecution of a sitting president, even by an independent counsel, presents some formidable questions. The Department of Justice, in 1973 and 2000, concluded that indictment or prosecution of a sitting president was unconstitutional because it would undermine the president’s ability to discharge executive duties. Moreover, how could the executive branch operate with the president in prison? Accordingly, formidable obstacles exist to prosecuting a sitting president.

SEE ALSO Clinton v. Jones, 520 U.S. 681 (1997); Independent Counsel; Nixon, Richard; Unitary Executive; World War II and the President’s Power

**BIBLIOGRAPHY**


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**PRESIDENTIAL RESPONSE TO JUDICIAL DECISIONS**

Supreme Court decisions help shape the context in which other political figures, including presidents, perform. Court rulings tend to prompt presidential responses in two different situations. On relatively rare occasions the president or some other high executive official, as a party to a judicial proceeding, becomes the recipient of a judicial order. The president’s response tests adherence to several related structural ideals of the constitutional system, such as whether the executive is subject to law and to what extent the judiciary can check executive conduct. More often, even though the administration is not a party to the litigation, judicial rulings impact programs or policies of consequence to it. Nonetheless, the efficacy of a judicial order may depend on executive support.

**PRESIDENTIAL RESPONSE IN THE NINETEENTH CENTURY**

Although the results are not entirely uniform, presidents have generally complied with Court orders directed to them. *Marbury v. Madison*, 5 U.S. 137 (1803), seemed likely to present an early test of whether the executive was amenable to judicial command. William Marbury (1762–1835) sought a writ of mandamus directing Secretary of State James Madison (1751–1836), and implicitly President Thomas Jefferson, to deliver to him a commission appointing him as a justice of the peace. The Court thought Marbury entitled to the post to which President John Adams (1735–1826) had appointed him in the closing hours of his term. Yet the case presented the Court, and its new chief justice, John Marshall, with a seemingly intractable dilemma.

The Jeffersonians had recently won control of the executive and legislative branches, while the Federalists retained control only of the judiciary. On the one hand, Jefferson and Madison were thought unlikely to obey a Court order, and such defiance would reveal the inherent weakness of the federal judiciary. On the other hand, Marshall did not wish to disclaim jurisdiction over the executive, thereby weakening the judiciary as a check on executive conduct and placing the executive above the law. Marshall found a resolution that allowed him to attack the propriety of the executive’s conduct in withholding Marbury’s commission without having to issue an order that Madison and Jefferson could defy. The Court opined that Jefferson and Madison were acting illegally in withholding the commission, and that the Constitution allowed the Court generally to assert jurisdiction over the executive in a case in which individual rights were implicated (although not when an issue had been committed to the executive’s discretion). But Marshall escaped his quandary by holding unconstitutional Section 13 of the Judiciary Act of 1789 under which the Court’s jurisdiction was predicated in Marbury’s case. The absence of jurisdiction in this particular case precluded the Court from issuing an order. As such,
Marshall established the important principle of judicial review while avoiding a showdown with the executive that a decision on the merits would have risked.

The Civil War (1861–1865) produced a greater test of executive compliance with judicial decisions. After President Abraham Lincoln suspended the writ of habeas corpus in April 1861, John Merryman (1824–1881), a secessionist, was arrested and held at Fort McHenry. In Ex parte Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861), Chief Justice Roger Taney issued a writ of habeas corpus directing that Merryman be tried by a court or released. Lincoln directed Merryman’s custodian to refuse to accept the order. Taney ruled that Lincoln had acted illegally and in a manner that jeopardized the principle of the rule of law. The chief justice reasoned that Congress—not the president—had authority to suspend the writ, civilians could not be arrested by military personnel independent of the civil courts, and a citizen could not be detained indefinitely without trial. Lincoln essentially ignored Taney’s decision. Lincoln thought Taney had misconstrued the Constitution by denying that the president had power to suspend the writ in an emergency, at least when Congress was not in session. “Are all the laws but one to go unexecuted and the government itself go to pieces, lest that one be violated?” Lincoln asked rhetorically.

**Presidential Response in the Twentieth Century**

During the twentieth century, however, presidents have increasingly complied with Supreme Court decisions adverse to them in several high profile cases. For instance, in Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952), the Court held that President Harry S. Truman (1884–1972), through Secretary of Commerce Charles Sawyer (1887–1979), had acted unconstitutionally when he seized American steel mills to prevent a work stoppage during the Korean War (1950–1953). Although the justices did not adopt a uniform rationale, six of the nine justices thought Truman’s action illegal, including two of the four whom Truman had named to the Court. The decision surprised Truman. His friend, Chief Justice Fred M. Vinson, had told Truman privately that he had authority to seize the mills; Justice Tom C. Clark (1899–1977), when Truman’s attorney general, had given similar counsel in a generic context. Although Truman thought the decision misguided, he promptly complied with the Court’s order, humiliating though it was.

Richard M. Nixon acceded to a judicial decision in the Nixon tapes case, which accelerated his departure from office. By 1974, a number of Nixon’s closest associates had been indicted for various crimes and Nixon was facing imminent impeachment for his role in the Watergate cover-up. Nixon initially resisted a subpoena from the Watergate special prosecutor for tape recordings of various Nixon conversations pertinent to the criminal proceedings. Nixon claimed that the Court lacked jurisdiction over him and that an executive privilege protected from exposure his communications with his close governmental associates. In United States v. Nixon, 418 U.S. 683 (1974), the Court, in an eight-to-zero decision, rejected Nixon’s position. After determining that the decision left him no room to resist, Nixon produced the tapes. The recordings included evidence that placed Nixon at the center of the cover-up within a few days of the break-in at Democratic headquarters at the Watergate hotel complex. Following revelation of the contents of these tapes, Nixon’s support in the House of Representatives and Senate totally collapsed and, with his impeachment and conviction apparently inevitable, he resigned. Nixon’s compliance in a case of such personal consequence to him confirmed the American commitment to the principle that the president is subject to law. To be sure, Nixon occupied a weakened political and legal position. Yet he correctly concluded that defiance of the Court’s order would produce even worse consequences than his forced departure from office.

Nixon was no longer president when the Court upheld his claim that he had absolute immunity from civil liability in connection with his official duties in Nixon v. Fitzgerald, 457 U.S. 731 (1982). He had every reason to celebrate that result. President William Clinton (1946–) was, however, in office when the Court unanimously rejected his attempt in Clinton v. Jones, 520 U.S. 681 (1997), to defer until he left office a sexual harassment suit against him arising out of alleged prepresidential behavior. Clinton participated in further proceedings in that case, including giving a deposition. Indeed, his deposition answers regarding his relationship with Monica Lewinsky (1973–), a White House intern, set in motion a chain of events leading to his impeachment.

**Predicting Future Presidential Response**

It is, of course, impossible to anticipate every plausible situation that might arise in which a future president might be the recipient of an adverse judicial order. The public’s acceptance of the ideal that no person stands above the law who likely encourage compliance with a Supreme Court order, making defiance politically costly; a broad consensus supports executive compliance with orders directed to it.

The more common situation raising the possibility of conflict between the president and the Court arises when a president believes that a Supreme Court decision to which he is not a party misconstrues the Constitution or reflects bad public policy, or both. Presidents have responded in these situations in a variety of ways, sometimes using conventional presidential powers to undercut Court decisions with which they disagree.
Early in his administration, Thomas Jefferson demonstrated his unwillingness to accept the Court as the ultimate constitutional interpreter. Various citizens had been prosecuted and sentenced under the Sedition Act for criticizing the Adams administration. Since Jefferson viewed the Sedition Act as unconstitutional, he pardoned those convicted and sentenced under it. Although the law had implicitly been found constitutional, Jefferson disagreed and accordingly issued the pardons based on his independent constitutional conclusion incident to the exercise of his pardon power.

Occasionally, presidents have simply refused to lend support to a Court decision with which they disagree. In Worcester v. Georgia, 31 U.S. 515 (1832), the Marshall Court struck down as inconsistent with federal law a Georgia law under which Samuel Worcester (1798–1859) had been convicted. The law implicated Indian affairs and President Andrew Jackson was thought to be averse to enforcing a Court order favorable to the Cherokee tribe. Legend has Jackson saying, “John Marshall has made his decision, now let him enforce it.” The story may be apocryphal but it certainly reflected Jackson’s disposition and he took no action to enforce the judicial decree.

After the Court struck down much New Deal legislation during the first term of President Franklin D. Roosevelt, he responded in 1937—as after his landslide re-election—with his infamous Court-packing plan. Roosevelt disingenuously claimed that the Court’s personnel was too old to handle its docket and sought authority to appoint an additional justice for each one over the age of seventy. Such authority might have given Roosevelt as many as six appointments, more than enough to create a new Court majority disposed to uphold such legislation. Although Congress was overwhelmingly Democratic, it refused to acquiesce in Roosevelt’s transparent scheme. The Court thereafter began to uphold New Deal legislation when Justice Owen Roberts (1875–1955) began to construe the Constitution to give Congress greater power. Although some have credited the Court-packing plan with prompting “the switch in time which saved nine,” more recent scholarship suggests that doctrinal, rather than political, factors may have influenced Roberts. Within a short time, some of Roosevelt’s judicial foes left the Court and Roosevelt soon was able to appoint virtually an entire Court. Still, Roosevelt paid a political price for his attempt to pack, and therefore neutralize, the Court.

Other presidents have responded to adverse decisions by trying to remake the Court in more conventional fashion by filling Court vacancies with jurists thought to share their constitutional vision. These efforts have not always succeeded. Presidents Ronald Reagan and George H. W. Bush (1924–) promised to appoint justices opposed to the Court’s decision in Roe v. Wade, 410 U.S. 113 (1973), which recognized a woman’s right to terminate a pregnancy. Although they successfully appointed six justices (including the elevation of William Rehnquist from associate to chief justice) in twelve years, three of those they named coauthored the plurality opinion in Planned Parenthood v. Casey, 505 U.S. 833 (1992), which reaffirmed Roe’s central holding.

Presidents have also sought to address Supreme Court decisions they oppose by instructing the Justice Department to ask the Court to overrule such decisions. This strategy is more likely to succeed when the decision in question was delivered by an earlier Court. President Truman, for instance, authorized the Justice Department to intervene in a number of cases to argue that the “separate but equal” doctrine of Plessy v. Ferguson, 163 U.S. 537 (1896), be overruled. Ultimately in Brown v. Board of Education, 347 U.S. 483 (1954), the Court rejected that doctrine in public education. Similarly, the Reagan and Bush administrations repeatedly asked the Court to overrule Roe, though with less success.

Finally, at times presidents recognize an obligation to follow Court decisions but use that as a way to avoid taking a position on the merits. When the Supreme Court decided Brown, President Dwight D. Eisenhower observed that he was constitutionally compelled to uphold judicial decisions. He repeatedly passed up opportunities to embrace the Court’s rejection of “separate but equal.” Rather, he called for calm from extremists on both sides. He showed greater enthusiasm in endorsing Brown v. Board of Education (Brown II), 349 U.S. 294 (1955), particularly its call for “gradual implementation” of school desegregation. Several years after Brown, President Eisenhower sent federal troops to Arkansas to help integrate Little Rock’s Central High School incident to the Cooper v. Aaron, 358 U.S. 1 (1958), litigation that followed Brown.

Yet Brown and Cooper also illustrate the conventional presidential response to judicial decisions (although sending troops is an extreme example). Presidents commonly recognize an obligation to respect the Court’s decisions, even those that are counter to presidential preferences, even while trying to change them through political and judicial action.

SEE ALSO Congressional Response to Judicial Decisions; Court-Packing; Eisenhower, Dwight D.; Jackson, Andrew; New Deal: The Supreme Court vs. President Roosevelt; Roosevelt, Franklin D.; Watergate and the Constitution; Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952)

BIBLIOGRAPHY
PRESS COVERAGE

In the twenty-first century, press coverage of the Supreme Court is at its lowest point in recent history, with only a handful of reporters covering the Court on a full-time basis. This may be because the justices are not largely public figures, and they therefore are unrecognizable to a public that is hungry for celebrity news. In addition, many of the legal issues the Court decides are technical and difficult for those outside the legal profession to understand. It is also true that the majesty of the Court does not come across well in the difficult-to-follow audio and transcription formats.

Certainly the public does not know much about the Supreme Court, and the vast majority of Americans are hard-pressed to name a single justice. The media, ironically, use this lack of knowledge to justify its lack of coverage. While press coverage tends to increase during the days after a nomination of a new justice and during confirmation hearings, it is soon scaled back after these events.

The first major coverage of the Supreme Court in the media may well have been in the days of Chief Justice John Marshall, who served on the Court from 1801 until 1835. The weekly *Niles Register* was founded in Baltimore in 1811 and was a well-read paper in nineteenth-century America. It published Supreme Court opinions, congressional debates about the judiciary, and objective reports about the impact and importance of these decisions. Major outlets, such as the *New York Tribune*, the *Nation*, the *Chicago Tribune*, and the *Washington Post* published commentary and even criticism about the issues of the times beginning as early as the mid-nineteenth century. Furthermore, newspapers weighed-in heavily on confirmation battles. A high point in press coverage of the Court came with Franklin D. Roosevelt’s attempts to push through the New Deal and “pack” the Court. Around this time, editorials concerning the Court became more prevalent and the radio became a source of information about the Court for the public. More recently, the *New York Times*, the *Los Angeles Times*, and the *Washington Post* have assigned reporters to the judicial beat. The Supreme Court Historical Society, founded in 1974, publishes scholarly articles on the Court.

THE NEWS MEDIA IN THE CONFIRMATION PROCESS

Scholars have noted that the Supreme Court confirmation process may be more contentious because the news media