THE Authority *of the* Court *and the* Peril *of* Politics

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Fig. 1 is reformatted from Hannah Hartig, "Before Ginsburg's Death, a Majority of Americans Viewed the Supreme Court as 'Middle of the Road,'" Pew Research Center, September 25, 2020, https://www.pewresearch.org/fact-tank/2020/09/25/before-ginsburgs-death-a-majority-of-americans-viewed-the-supreme-court-as-middle-of-the-road.

Fig. 2 is reformatted from "Public Trust in Government: 1958–2019," Pew Research Center, April 11, 2019, http://www.pewresearch.org/politics/2019/04/11/public-trust-in-government-1958-2019.

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PREFACE

Some years ago the chief justice of the Supreme Court of Ghana came to visit our Court. She wanted to learn how the US Supreme Court had advanced and protected civil rights in America. She seemed particularly interested in this question: Why does the American public do what the Supreme Court says? Implicitly she also wanted to know why, or how, the Court could act as a check upon other parts of government, even presidents, where there is serious disagreement among the branches. These are indeed important questions.

Put abstractly, the Court's power, like that of any tribunal, must depend upon the public's willingness to respect its decisions—even those with which they

disagree, and even when they believe a decision seriously mistaken. Such respect matters most when a decision of the Court strongly conflicts with the expressed views of those in other branches, most notably the president. After all, the Court is without its own means to enforce its views directly, being reliant for this on the executive.

This essay will expand on the importance of public acceptance in safeguarding the role of the judiciary. The first part, to provide context, will set forth several examples illustrating the increase in the public's acceptance of the Court's decisions, and with it an increase in the Court's authority. The second and third parts will discuss more directly the Court's related power to act as a check upon the rest of the government. I shall illustrate the kinds of checks that I have in mind. I shall also illustrate how the Court's power to check has grown over time, with the public's acceptance of its authority. And I shall describe certain related, potential difficulties that may arise in the future. I will then propose a few steps the Court and public could take to help overcome these problems.

AUTHOR'S NOTE

I had originally prepared the following as remarks for a presentation in France. The topic was to be "The Supreme Court: Power and Counter-Power." Because of the difficulties of traveling to France, I decided to use these remarks as the basis for the 2021 Scalia Lecture at Harvard Law School and then to publish the resulting lecture in edited form. I believe this essay, reflecting in part my own experience, is relevant to recent disagreements over the nature and future of the Court. There are different, often competing, views about the Court's proper role. And in recent months, the topic has often been discussed more intensely. Here I seek, in simplified form and through examples, to show how I believe the

Court obtained power, the nature of that power, and some of the challenges now facing the Court. I also make several general suggestions about what the Court and the country might do to minimize the risks associated with those challenges. They are general suggestions; they do not purport to provide specific solutions to the problems that the judiciary faces.

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Why will people follow the suggestions, thoughts, even the orders of others? Long ago Cicero described an answer to this central question about the nature of power. He thought there were three possible ways to assure the obedience of those who live in a state: 1) the fear of punishment; 2) the hope of rewards or particular benefits; and 3) the perception that the state is a just one. This last way, justice, was to convince people that those who govern *deserve* obedience. Whether Cicero's view does or does not apply in general to government, it certainly applies to the US Supreme Court. The Court's ability to punish or to provide rewards or benefits is limited. Its ability to act justly, at least in my view, does play a major role in obtaining the public's respect and consequent obedience. The Court's history illustrates how that is so. A few examples will help support this point of view.

In considering those examples, it is important to keep in mind how the law provides the Court with legal power. That power has its principal source in the US Constitution as well as in the views of those who wrote it. The Constitution is a brief document. It has seven articles and twenty-seven amendments. It creates a representative federal democracy, with a separation of governmental powers both horizontal (legislative, executive, judicial) and vertical (state and federal); equality of individuals before the law; protection of fundamental rights; and a guarantee of the rule of law. The Constitution's framers had every right to admire their creation. But, as Alexander Hamilton points out in *Federalist* 78, one branch of government must have authority to assure that the other branches act within the limits set by the Constitution. Otherwise the document will have little effect; the framers might as well have hung it on the walls of a museum.

Which branch will have the authority to determine what limits the Constitution sets forth and when a branch has exceeded them? The executive branch,

namely, the president? Is there not a risk that the president would simply decide that whatever action he or she takes is consistent with the Constitution? What about Congress? Its members are popularly elected; they likely understand popularity. What would happen when, say, those entitled to constitutional protections are not popular? The Constitution, indeed law in general, applies to those who are not popular just as it applies to those who are popular. Can Congress be trusted to protect the unpopular?

The third branch, the judiciary, remains. Very good, Hamilton might have thought. Judges understand law. They are unlikely to become too powerful, for they lack the power of purse and of sword. Hence the judicial branch and the Supreme Court in particular should have the last word. The majority of the other framers agreed with Hamilton. But the acceptance of this view was not inevitable, nor was it to come without a long struggle. Unlike Hamilton, Thomas Jefferson was unwilling to give judges the ultimate power to resolve constitutional and statutory

conflicts, particularly at a time of heightened partisanship, when the judiciary was perceived as favoring Jefferson's political opponents, the Federalists. Indeed, Jefferson once wrote, "Each of the three departments has equally the right to decide for itself what is its duty under the constitution, *without any regard to what the others may have decided for themselves under a similar question.*"[1] As far as Jefferson was concerned, the less powerful the Supreme Court, the better.

It was Hamilton's view that Chief Justice John Marshall and the Supreme Court adopted in the famous 1803 case *Marbury v. Madison.*[2] The case arose at the time of the "midnight judges." John Adams, a Federalist, had just lost the presidential election to Jefferson, a Democratic-Republican (now the Democratic Party). Adams quickly nominated

[1] *The Works of Thomas Jefferson,* ed. Paul Leicester Ford, vol. 12 (New York: G. P. Putnam, 1905), 139 (emphasis added).

[2] 5 US 137 (1803).

several judges; the Senate, within a few days, confirmed them. All that remained was for Adams to deliver their commissions in time—that is, before his term as president expired. Adams failed to deliver William Marbury's commission on time. Did that mean that Marbury was not a judge?

Marbury brought a case in the Supreme Court. He asked the Court to order the new president, Jefferson, to deliver his commission. Marbury seemed likely correct in stating that the law required Jefferson to do so. Still, the request placed the Court on the horns of a dilemma. On the one hand, suppose the Court held that the law did *not* entitle Marbury to his commission. That decision would suggest to many that the Court was a weak institution, that it had departed from what the law seemed to require for fear that the president would simply ignore its decision. This would have been to suggest that courts, and perhaps the law itself, could not stand in the way of a determined president. On the other hand, if the Court held that the law *did* entitle Marbury to his commission, Jefferson (who saw

Cherokee, lived in northern Georgia on land that treaties guaranteed them. In 1829 gold was found on that land. The Georgians wanted the gold, and the state took control of the Cherokees' land. The Cherokees and their supporters found an excellent lawyer, William Wirt, to vindicate their treaty rights. Wirt filed complaints in court, and eventually the issue of territorial control found its way to the Supreme Court.

The Court found in *Worcester v. Georgia* that the Cherokees had the legal right to control their territory and that Georgia lacked legal authority to do so.[3] The state of Georgia, however, simply ignored the Court's decision. What did Andrew Jackson, president of the United States, do? Nothing. He is supposed to have said, "John Marshall has made his decision; now let him enforce it." Jackson (and his successor) then sent federal troops to Georgia but not to enforce the Court's judgment.[4] Rather, he sent

[3] 31 US 515 (1832).

[4] Leonard Baker, *John Marshall: A Life in Law* (New York: Macmillan, 1974), 745.

them to remove the Cherokees, forcing many of them to travel on the Trail of Tears to Oklahoma, where their descendants live to this day.

Would presidents respect decisions of the Supreme Court when they hold strongly contrary views? The case was not a happy omen.

Supreme Court justices would long remain uncertain whether the Court could sustain a judgment that other branches or the public strongly opposed. In 1903 Justice Oliver Wendell Holmes Jr. summed up the problem in a decision that effectively refused to enforce the Fifteenth Amendment's guarantee that former slaves could vote. How could Holmes have done this? He wrote that the Court has "little practical power to deal with the people of the state in a body." He added, it was said that "the great mass of the white population intends to keep the blacks from voting." If that was so, a Court decision ordering the contrary would be "an empty form."[5] The power to redress that evil must lie in the hands of the legislature and the executive, Holmes concluded.

[5] Giles v. Harris, 189 US 475, 488 (1903).