



MAGAZINE

OPINION | LAW AND ORDER

A Conservative Judge Draws a Line in the Sand With the Trump Administration

Outraged the attorney general had ignored a court order, he authors a blistering opinion rebuking William Barr for overstepping his constitutional authority.

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By KIMBERLY WEHLE
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President Donald Trump has defanged Congress’ oversight authority. That became clear when the Senate acquitted the president of obstruction. But one conservative judge isn’t willing to let the executive branch steal power from *his* branch of government.

In a jaw-dropping [opinion](#) issued by the 7th U.S. Circuit Court of Appeals in Chicago on January 23, Judge Frank Easterbrook—a longtime speaker for the conservative Federalist Society and someone whom the late Justice Antonin

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as justification by the Board of Immigration Appeals (the federal agency that applies immigration laws) to ignore the court's ruling not to deport a man who had applied for a visa to remain in the country.

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As Washington reels from the surprise withdrawals of Roger Stone's prosecutors, apparently triggered by Trump's intervention in the upcoming sentencing of his long-time adviser, the Easterbrook broadside offers another window into the way the Trump administration is violating the division of power between the executive and judicial branches.

The 7th Circuit case involved an undocumented immigrant, Jorge Baez-Sanchez, who was subject to removal from the United States after being convicted of a crime. Baez-Sanchez applied for a special visa allowing him to remain in the U.S. if he was also a victim of a crime. An immigration judge twice granted Baez-Sanchez a waiver. But the Board of Immigration Appeals reversed the immigration judge's decision, claiming that only the attorney general personally could grant waivers—not immigration judges. Baez-Sanchez appealed to the 7th Circuit, which disagreed and remanded the case with a directive that the Department of Homeland Security comply with the immigration judge's waiver. When it refused, Easterbrook, a 35-year veteran of the court, had had enough of the willful disregard for judicial authority.

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themselves lucky that Baez-Sanchez has not asked us to hold them in contempt, with all the consequences that possibility entails.”

Given Trump’s record of defiance, Barr’s maneuver is predictable—but it is a shocking break with more than 200 years of constitutional and legal precedent.

In 1803, the U.S. Supreme Court in *Marbury v. Madison* established the bedrock principle that federal judges review the constitutionality of actions by the other branches of government. With few exceptions—such as Abraham Lincoln’s refusal to abide by Chief Justice Roger B. Taney’s decision that Lincoln’s 1861 suspension of habeas corpus was unconstitutional—presidents have adhered to Supreme Court rulings. President Richard M. Nixon famously turned over the Watergate tapes and effectively ended his presidency in dutiful compliance with the Supreme Court’s ruling that he must adhere to a subpoena for the tapes.

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to enforce the Supreme Court’s call for racial integration in public schools under *Brown v. Board of Education*, after the Arkansas governor’s refusal to integrate Little Rock’s Central High School in the fall of 1957. A year later, in *Cooper v. Aaron*, the court halted the Arkansas School Board’s ploy to suspend its desegregation plan, noting that *Marbury* “declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution.”

In defying the 7th Circuit, therefore, Attorney General Barr challenged the validity of *Marbury v. Madison* itself—and thus the federal judiciary’s authority to say what the law is and have it stick.

If Trump continues on the path of upending the authority of federal courts (as can be expected), Easterbrook’s contempt threat will necessarily become a reality. Federal judges will have to use their contempt powers to protect the constitutional prerogative of the judicial branch of government. But contempt against the government can be tricky. A judge can impose a monetary fine, but fines raise legal questions of sovereign immunity. A judge can alternatively put someone in prison. But imprisonment raises the question of who would go behind bars for defying a court order on behalf of the president. In normal times, an order declaring that the president’s staff is guilty of contempt could as a third option trigger enough shame to prompt compliance. But with Trump in the White House, we are not in normal times.

Hence, those who say “it could never happen in America” need only consider Easterbrook’s holding, which is so elementary that the very fact that he put it in writing underscores how dangerous Barr’s defiance is: “The Attorney General, the Secretary, and the Board ... are not free to disregard our mandate in the very case making the decision.”

The question looming over the presidency today is not what the law says, but what happens when the executive branch violates established law. As we saw



What will happen, then, on the inevitable day that Trump’s administration refuses to honor a judicial decision? That scenario beggars belief, too. Courts enforce contempt through the U.S. Marshals Service, a team of federal police officers that is ultimately within the president’s chain of command. Will U.S. Marshals side with the judge over the president or vice versa? And if they get that choice wrong, what branch of government stands ready to hold them accountable to the people?

Trump and his ally in the Senate, Majority Leader Mitch McConnell, are notably sanguine over the 187 appointments to the federal bench—including two Supreme Court justices—that they have managed to push through confirmation to date (four of them on the 7th Circuit). The expectation, no doubt, is that Trump appointees will uniformly implement a conservative agenda in lockstep with the whims and desires of Trump and his loyal base. That might well be the case when it comes to hot-button social issues like abortion and substantive immigration law. But federal judges serve for life, and—unlike members of Congress—do not have to worry about reelection. Easterbrook’s decision suggests that when push comes to shove, even conservative judges are unlikely to abdicate their Article III prerogative and destroy what’s left of the separation of powers just because Trump tells them to.

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