

Sticks, Stones, and So-Called Judges: Why the Era of Trump Necessitates Revisiting Presidential Influence on the Courts

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INTRODUCTION

In the United States, there is a long history of Presidents and other elected officials clashing with the courts.¹ These clashes have often been about complex and significant issues, including the role of judicial review in American jurisprudence, slavery, New Deal legislation, and the treatment of Native Americans.² Presidents choose to attack the judiciary for a number of reasons, but it is not entirely clear where the line should be drawn between legitimate acts of presidential dissent and acts of active hostility meant to undermine the legitimacy of the judiciary. Moreover, what is the consequence of a judiciary whose legitimacy is weakened over time? While the legislative branch is able to constitutionally alter the courts, primarily via jurisdiction stripping and judicial impeachment, the executive is much more limited in terms of legitimately checking the judicial branch.³

This Note will be primarily divided into three main sections. Part I of this Note will begin by discussing the importance of judicial independence in modern society and the role of elected officials in shaping the public perception of the courts. Additionally, as problems of judicial legitimacy are age-old and date back to America's founding, Part I will include a brief discussion of an early clash between President Thomas Jefferson and the courts.

Parts II and III of this Note will seek to place President Trump's conduct towards the judicial branch within the proper historical context. Part II examines the ways in which Presidents have been able to significantly alter the makeup of the judiciary while in office. For considerations of brevity, this section will include a few illustrative examples in which Presidents have sought to alter the makeup of the courts, and each will be discussed in the context of the actions of President Trump.

Part III will explore instances of Presidents undermining the legitimacy of the judiciary by making comments about pending and past court cases, particularly using examples from more recent administrations. This Note concludes that, while

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1. *See generally* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY (2007).

2. *See id.*

3. STEPHEN M. ENGEL, AMERICAN POLITICIANS CONFRONT THE COURT: OPPOSITION POLITICS AND CHANGING RESPONSES TO JUDICIAL POWER 31 (2011); *see also* Richard E. Welch III, "They Will Not Open Their Ears": Should We Listen to the Supreme Court and Should the Court Listen to Us?, 47 NEW ENG. L. REV. 93, 113–114 (2012).

President Trump’s behavior regarding the judiciary has been the subject of intense media scrutiny during his first two years in office, it is important to place his comments and actions in a historical context by looking at the examples set by past Presidents. Through this frame of analysis, this Note concludes that, although President Trump’s rhetorical attacks on the independence of the judiciary—particularly in the criminal context and in targeting individual judges—have been numerous and unprecedented,⁴ President Trump is also quietly shaping the makeup of the judiciary in a way that could become even more drastic if his administration embraces a modern Court-packing plan or continues to make judicial appointments at staggering rates.

I. BACKGROUND

When the courts, and particularly the Supreme Court, render opinions, the vast majority of Americans digest the information handed down by the courts through second-hand sources, primarily the media and elected officials.⁵ Thus, there is considerable variation in the ways in which information can be presented to ordinary citizens by the media and elected officials, especially given that so few Supreme Court decisions are actually discussed in-depth in the mainstream media.⁶ Underlying this fact is the notion that, for the vast majority of citizens, the Supreme Court is viewed as being the legitimate final arbiter of the law, as being independent from the political branches, and therefore as being “worthy of protection from political interference.”⁷ Indeed, recent public opinion polling shows that roughly sixty-eight percent of Americans have either a “great deal” or “fair amount” of trust and confidence in the judicial branch, which tends to be much higher than other institutions, and public confidence in the courts has remained high over time.⁸ Thus, elected officials, and particularly the President, play a critical role in shaping the public debate around Supreme Court decisions, particularly regarding media coverage on controversial cases.⁹

According to some, including at least one former Supreme Court justice, rhetorical attacks on the judiciary by the other branches of government have arguably “accelerated” in past years.¹⁰ Moreover, as will be discussed in detail below,

4. See Neil S. Siegel, *Reciprocal Legitimation in the Federal Courts System*, 70 VAND. L. REV. 1183, 1233 (2017) (“[Trump] is disparaging the federal courts and particular federal judges in ways that are unprecedented in modern times.”); see also Jeffrey Rosen, *Not Even Andrew Jackson Went as Far as Trump in Attacking the Courts*, THE ATLANTIC (Feb. 9, 2017), <https://perma.cc/BWQ5-7FPG>.

5. MICHAEL A. ZILIS, *THE LIMITS OF LEGITIMACY: DISSENTING OPINIONS, MEDIA COVERAGE, AND PUBLIC RESPONSES TO SUPREME COURT DECISIONS* 5 (2015).

6. See *id.* at 16.

7. *Id.* at 10; see also Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 776–77 (2002).

8. *Supreme Court*, GALLUP NEWS (2017), <https://perma.cc/VBC3-U2TK>; see also ZILIS, *supra* note 5, at 11, 13. See generally Or Bassok, *The Supreme Court’s New Source of Legitimacy*, 16 U. PA. J. CONST. L. 153 (2013).

9. ZILIS, *supra* note 5, at 42.

10. See ENGEL, *supra* note 3, at 1, 3 (noting Justice Sandra Day O’Connor’s observations

criticisms of and attacks on the judiciary are not unique to one political party over another.¹¹ One of the primary reasons public confidence in the courts is so important is the lack of an enforcement mechanism.¹² Alexander Hamilton famously described the judiciary as being “the least dangerous branch,” in large part because it “has no influence over either the sword or the purse.”¹³

Presidential conflict with the courts is an age-old issue which dates back to the earliest days of American democracy.¹⁴ As law professor Charles Geyh notes, “[b]outs of Court directed animus have come and gone at generational intervals, since the founding of the nation,” including clashes involving Thomas Jefferson, Andrew Jackson, Abraham Lincoln, and Franklin Delano Roosevelt.¹⁵ Judicial independence has also been the focus of debate and scholarship since the founding of the nation.¹⁶ Judicial independence was of particular importance to the Founders, as they were dissatisfied with colonial judges who lacked independence and “who served at the pleasure of the king.”¹⁷

Examining historical practice in this area of separation of powers jurisprudence is critical because the Constitution—excluding the appointments clause¹⁸—is silent as to what constitutes proper interactions between the President and the judiciary.¹⁹ Curtis Bradley and Trevor Morrison state that “[p]residential power in the United States is determined in part by historical practice . . . [e]specially when the text of the Constitution is unclear or does not specifically address a particular question.”²⁰

This silence of the Constitution regarding the relationship between the President and the judiciary is particularly relevant in understanding anti-Federalist clashes with the judiciary at the turn of the nineteenth century. As professor Barry Friedman notes, tensions between Jefferson and “highly partisan” Federalist judges ultimately resulted in the impeachment of Supreme Court Justice Samuel Chase,²¹ who to this day remains the only Supreme Court justice to have been impeached.²²

about increased “criticism of judges across America”); *see also* Welch, *supra* note 3, at 95 (“Conservative politicians railing against federal judges is nothing new, but recently the rhetoric has increased in intensity.”).

11. *See* ENGEL, *supra* note 3, at 1.

12. *See id.* at 14.

13. The Federalist No. 78 (Alexander Hamilton).

14. *See* CHARLES GARDNER GEYH, *WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA’S JUDICIAL SYSTEM 2* (2006).

15. *See id.*

16. *See id.* at 24.

17. *See id.*

18. U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, *Judges of the supreme Court*, and all other Officers of the United States.”) (emphasis added).

19. *See* Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 269–70 (2017).

20. Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1098 (2013).

21. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 364 (1998).

22. Keith E. Whittington, *Reconstructing the Federal Judiciary: The Chase Impeachment*

The prevalence of partisan judges is exemplified by the so-called “midnight appointments” made by outgoing President John Adams, which ultimately led to *Marbury v. Madison*.²³ It was this decision that led to Jefferson’s belief that, in the words of Friedman, “according the power of constitutional interpretation to any one branch was a prescription for tyranny.”²⁴ Debates about departmentalism and constitutional interpretation by the executive branch have persisted over time,²⁵ though this is beyond the purview of this Note. Instead, Jeffersonian clashes with the judiciary are only meant to illustrate that Presidents have fought with the courts since the earliest days of American democracy, and that examining historical practice is necessary in evaluating the actions of President Trump.

II. ALTERING THE COURTS AND TARGETING JUSTICES

Influencing the makeup of the Supreme Court using the appointment power is one way in which Presidents can legitimately attempt to influence the outcome of cases in ways that agree with their political views.²⁶ This section will discuss examples of attempts to alter the makeup of the courts by examining the actions of Presidents Roosevelt, Nixon, and Reagan, and how their actions compare to those of President Trump.

A. *The Need for “New Blood”*

Any evaluation of presidential influence on the courts must include Franklin D. Roosevelt’s infamous Court-packing plan. On February 5, 1937, in the aftermath of an overwhelming electoral victory, Roosevelt proposed his Court-packing legislation to Congress.²⁷ The plan called for an additional six justices to be added to the Court, bringing the total number of justices to fifteen.²⁸ In his address to Congress, Roosevelt described his concerns with a “judicial backlog” and the perceived inability of older justices to hear cases in an expedient manner.²⁹ As William Ross explains regarding this attack on the physical and mental capacities of the justices, “historians agree that one of Roosevelt’s worst tactical blunders was his disingenuous contention that the Justices were tired old men who were unable to shoulder their workload.”³⁰

and the Constitution, 9 *STUD. AM. POLITICAL DEV.* 55, 55 (1995).

23. 5 U.S. 137, 142 (1803); *see also* Whittington *supra* note 22, at 87.

24. *See* Friedman, *supra* note 21, at 377; *see also* GEYH, *supra* note 14, at 53.

25. *See, e.g.*, Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 *L. & CONTEMP. PROBS.* 105 (2004).

26. *See* ENGEL, *supra* note 3, at 323.

27. William G. Ross, *When Did the “Switch in Time” Actually Occur?: Re-discovering the Supreme Court’s “Forgotten” Decisions of 1936-1937*, 37 *ARIZ. ST. L.J.* 1153, 1154 (2005).

28. *Id.*

29. ROBERT SCIGLIANO, *THE SUPREME COURT AND THE PRESIDENCY* 44 (1971).

30. Ross, *supra* note 27, at 1215.

In July of 2016, when Donald Trump was the presumptive Republican nominee for President, Justice Ruth Bader Ginsburg, in unscripted comments given to a CNN reporter during an interview, called Trump a “faker,” elaborating that she believes “he has no consistency about him at all”³¹ and, in a separate interview, claimed that she “can’t imagine what the country would be—with Donald Trump as our president.”³² Trump wasted no time in denouncing Justice Ginsburg’s comments, taking to Twitter to announce that “Justice Ginsburg of the U.S. Supreme Court has embarrassed all by making very dumb political statements about me. Her mind is shot - resign!”³³ Many media outlets and scholars referred to the exchange between a sitting Supreme Court justice and a presidential nominee as “unprecedented,”³⁴ and Ginsburg’s comments were widely criticized as being out of line by individuals from both ends of the political spectrum, as well as many in the legal profession who questioned what Ginsburg’s comments would mean in cases involving the Trump administration that would inevitably come before the Court.³⁵

While Trump’s response to Ginsburg’s comments is greatly lacking in nuance and sophistication and seemingly comes from a motivation to insult, rather than to influence the make-up of the Court, it must be noted that Trump’s comments bear some resemblance to the rationale put forward by Roosevelt.³⁶ The idea that justices who reach a certain age are no longer able to adjudicate as effectively—or in Justice Ginsburg’s case are more prone to making ill-advised decisions—was essentially Roosevelt’s original rationale for attempting to “infuse new blood into all our Courts” in order to “to make the administration of all Federal justice speedier and, therefore, less costly.”³⁷ While Trump’s comments were made as a candidate, they are relevant in noting that attacks upon the capacities of judges are seemingly not a new phenomenon, and that President Trump is certainly not the first to raise this concern.³⁸

B. Court-Packing of Old and a Modern Resurgence

Roosevelt seemed to focus more on the real motive behind the Court-packing legislation in one of his subsequent “fireside chats,” in which he addressed the nation

31. Joan Biskupic, *Justice Ruth Bader Ginsburg Calls Trump ‘A Faker,’ He Says She Should Resign*, CNN (July 13, 2016, 7:45 AM), <https://perma.cc/UT4E-5HPE>.

32. Adam Liptak, *Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term*, N.Y. TIMES (July 10, 2016), <https://perma.cc/4CM2-NFJZ>.

33. Donald J. Trump (@realDonaldTrump), TWITTER (July 12, 2016, 9:54 PM), <https://perma.cc/KAN3-86B8>.

34. See Aaron Blake, *Here’s How Unprecedented Ruth Bader Ginsburg’s Anti-Trump Comments Were*, WASH. POST (July 13, 2016), <https://perma.cc/5G34-B7YN>.

35. See Aaron Blake, *In Bashing Donald Trump, Some Say Ruth Bader Ginsburg Just Crossed a Very Important Line*, WASH. POST (July 11, 2016), <https://perma.cc/2NGJ-YQFV>.

36. See Jonathan R. Nash, *Trump Is Not the First President to Criticize the Judiciary*, THE HILL (Feb. 9, 2017, 5:00 PM), <https://perma.cc/Y3EG-V5B8>.

37. Franklin D. Roosevelt: “Fireside Chat,” AM. PRESIDENCY PROJECT (Mar. 9, 1937), <https://perma.cc/7VCP-3572>.

38. See Nash, *supra* note 36.

by radio about the Court-packing plan.³⁹ In this address, Roosevelt detailed the need to protect New Deal legislation from being defeated by the Supreme Court.⁴⁰ In one of the more memorable parts of the address, Roosevelt described the three branches of government as a team of three horses, pulling a carriage being directed by the American people, but that one of the three horses (the judiciary) was not pulling anymore.⁴¹ Roosevelt also spoke of the precariousness of a recent 5-4 decision and how the Court was very close to “throw[ing] all the affairs of this great Nation back into hopeless chaos.”⁴² Roosevelt suggested that the nation was on the precipice of yet another national emergency if immediate action was not taken, stating in part that “the dangers of 1929 are again becoming possible, not this week or month perhaps, but within a year or two.”⁴³ As Ross notes, the Court-packing plan was met with widespread criticism from both politicians and the public alike.⁴⁴ The plan was ultimately defeated by the so-called “switch in time,” in which the Court began validating several pieces of New Deal legislation—including minimum wage legislation.⁴⁵

While Roosevelt’s Court-packing plan was unsuccessful, the concept of Court-packing has seen a revival of sorts in at least some ideological circles during President Trump’s tenure in office. In November of 2017, Steven Calabresi, co-founder of the conservative Federalist Society, presented a proposal to Congress to increase the size of the federal judiciary by somewhere between thirty and fifty percent before the 2018 mid-term elections.⁴⁶ In other words, this expansion would have given President Trump the ability to appoint twice as many judges in twelve months as Obama did over his two terms as President.⁴⁷ In the words of Calabresi, the plan was meant as a means of “Undoing President Barack Obama’s Judicial Legacy,” though Calabresi also argued that this Court-packing plan could be justified by “focusing on the problem of the federal courts’ caseloads and unpublished opinions.”⁴⁸ This proposal was introduced despite the fact that President Trump is currently filling an astonishing amount of judicial vacancies left over from the

39. Roosevelt, *supra* note 37.

40. *See id.*

41. *See id.*

42. *Id.*

43. *Id.*

44. See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law’s Politics*, 148 U. PA. L. REV. 971, 982 (2000) (“Ordinary citizens also lambasted the Court-packing plan and expressed serious concern about tampering with an independent judiciary . . . [p]opular opinion shifted in response to political events, and political tides shifted quickly with popular opinion.”); see also Michael Hiltzik, *How a New Court-Packing Scheme Could Save the Supreme Court from Right-Wing Domination*, L.A. TIMES (July 2, 2018, 6:30 AM), <https://perma.cc/PU9N-QH5K>.

45. See Ross, *supra* note 27, at 1153; see also Joshua Zeitz, *How Donald Trump Could Pressure the Supreme Court*, POLITICO (Feb. 14, 2017), <https://perma.cc/DXU3-3YZB>; *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

46. See Ronald A. Klain, *Conservatives Have a Breathtaking Plan for Trump to Pack the Courts*, WASH. POST (Nov. 21, 2017), <https://perma.cc/CJ3B-AVPP>.

47. *See id.*

48. Steven G. Calabresi & Shams Hirji, *Proposed Judgeship Bill*, NW. PUB. L. & LEGAL THEORY SERIES, No. 17–24, at 1, 5 (2017).

Obama administration, which were effectively left open by Republican obstruction in the Senate (not unlike what was done with the Merrick Garland nomination).⁴⁹ In fact, President Trump is on track to have more confirmed appointments to the federal appeals courts in his first two years in office than any other administration within recent memory.⁵⁰

The Federalist Society, and most notably its Executive Vice President Leonard Leo, has played a crucial role in advising the Trump administration on candidates placed on President Trump's "short list" of twenty-five candidates for the Supreme Court, including the vetting and selection of Neil Gorsuch and Brett Kavanaugh.⁵¹ Under Leo's leadership, the Federalist Society has helped create a "pipeline for taking conservative law students and grooming them to be judges and public figures."⁵² One report states that nearly half of President Trump's nominees to the federal judiciary thus far are either current or past members of the Federalist Society.⁵³ Additionally, of the twenty-five individuals on President Trump's short list for the Supreme Court, all but one are either members of or are affiliated with the Federalist Society.⁵⁴ In the wake of Justice Anthony Kennedy's announcement that he would retire from the Court, Leo quickly stepped away from his role with the Federalist Society in order to spearhead President Trump's search for Kennedy's replacement.⁵⁵

Besides the vetting of candidates and helping to create a list of potential nominees for President Trump, Leo is also affiliated with an organization called the Judicial Crisis Network, which spends millions of dollars on judicial races across the country, including \$17 million on defeating the nomination of Merrick Garland and supporting the confirmations of Neil Gorsuch and Brett Kavanaugh.⁵⁶ As one

49. See Klain, *supra* note 46; see also Caroline Fredrickson, *The Least Dangerous Branch—And the Last Hope of the Left*, 12 HARV. L. & POL'Y REV. 121, 143 (2018).

50. Jordain Carney, *Republicans Confirming Trump's Court Nominees at Record Pace*, HILL (May 1, 2018, 4:52 PM), <https://perma.cc/ZA8Z-WN7U>. For additional discussion of the differing numbers of judges confirmed between Obama and Trump, see Fredrickson, *supra* note 49.

51. See Nolan D. McCaskill, *Trump Releases Updated Short List of Potential Supreme Court Nominees*, POLITICO (Nov. 17, 2017, 4:48 PM), <https://perma.cc/9YBD-TGUR>; see also Jess Bravin, *Meet the Conservative Activist Who Plays Critical Role in Supreme Court Picks*, WALL ST. J. (July 1, 2018, 5:12 PM), <https://perma.cc/EJ2C-QKRN>; Fredrickson, *supra* note 49; Mark Landler & Maggie Haberman, *Brett Kavanaugh Is Trump's Pick for Supreme Court*, N.Y. TIMES (June 9, 2018), <https://perma.cc/KFQ4-DT9V>.

52. Jennifer Bendery, *Trump Isn't Remaking the Supreme Court. Leonard Leo Is.*, HUFFPOST (July 2, 2018, 5:33 PM), <https://perma.cc/YP3K-XHYN>. The President of the American Constitution Society, Caroline Fredrickson, states that "President Trump's list includes names of very young lawyers whose only track record is one of extreme conservatism." Fredrickson, *supra* note 49.

53. See Zoe Tillman, *After Eight Years on the Sidelines, this Conservative Group Is Primed to Reshape the Courts Under Trump*, BUZZFEED (Nov. 20, 2017, 8:06 AM), <https://perma.cc/LRC7-XXZB>.

54. Jay Michaelson, *The Secrets of Leonard Leo, the Man Behind Trump's Supreme Court Pick*, THE DAILY BEAST (July 9, 2018), <https://perma.cc/W2X2-UPRM>.

55. See Bendery, *supra* note 52.

56. Michaelson, *supra* note 54.

commentator notes, “Leo effectively manages [the Federalist Society and the Judicial Crisis Network] which work out of the same office and are funded by the money he raises.”⁵⁷ In describing Leo’s role in influencing President Trump and George W. Bush’s judicial appointments, Professor Carl Tobias stated in part that “[i]t’s incredible. Certainly, [Leo has] had an outsize influence for any one person. I know President George W. Bush relied on him a fair amount for two nominees, and in this administration, I don’t think there’s ever been anything quite like it.”⁵⁸

While the Calabresi plan never gained serious momentum, calls for Court-packing from *liberal* voices have greatly increased following the retirement of Anthony Kennedy.⁵⁹ With President Trump now having two Supreme Court appointments in his first term, and the possibility of more, many liberals fear a rightward shift on the Court for decades to come.⁶⁰ Consequently, dozens of articles, blog posts, and tweets were posted in the aftermath of Kennedy’s retirement announcement advocating for Democrats to pack the Court in the coming years.⁶¹ Professor Erwin Chemerinsky claims that plans for increasing the size of the Supreme Court could materialize if Democrats are successful in taking Congress and the presidency in 2020.⁶² While reacting to these calls for Court-packing, some commentators have rightly pointed out that liberals should be wary of this plan of action.⁶³ If Roosevelt’s Court-packing proposal is any indication, a modern liberal Court-packing plan could be very unpopular with a large segment of the population.⁶⁴ Professor Chemerinsky elaborated that, “[p]rogressives should be very careful about suggesting [court-packing] might happen,” because of the backlash and conservative voter mobilization that could result.⁶⁵ A liberal Court-packing plan has garnered support from several law professors, though some of them voiced their opposition to the Calabresi plan put forth only months earlier.⁶⁶ If anything, this discussion is meant to illustrate the point made earlier in this Note that both political parties are willing to shape the judiciary in ways that advance their political objectives, even if that means being hypocritical at times.⁶⁷

Calabresi’s “efficiency” rationale for vastly increasing the size of the federal judiciary is also similar to Roosevelt’s original justification for his Court-packing

57. *Id.*

58. Bendery, *supra* note 52.

59. See Josh Blackman, *Don’t Try to Expand the Number of Supreme Court Justices*, NAT’L REV. (July 5, 2018, 2:15 PM), <https://perma.cc/756K-BEWY>.

60. *See id.*

61. *See, e.g.*, Zach Carter, *Hey Democrats: Pack the Court*, HUFFPOST (June 27, 2018, 7:01 PM), <https://perma.cc/9LYW-B3R2>; Dylan Matthews, *Court-Packing, Democrats’ Nuclear Option for the Supreme Court, Explained*, VOX (July 2, 2018, 8:20 AM), <https://perma.cc/V73C-NC5Q>.

62. Hiltzik, *supra* note 44.

63. Charles C.W. Cooke, *Court Packing is a Fringe Fantasy*, NAT’L REV. (July 2, 2018, 11:42 AM), <https://perma.cc/TR47-Q9XW>; *see also* Blackman, *supra* note 56.

64. Hiltzik, *supra* note 44; *see also* Cooke, *supra* note 63; Adam J. White, *Rage at the End of Justice Kennedy’s Camelot*, WKLY. STANDARD (June 30, 2018, 6:59 PM), <https://perma.cc/5HSY-9B4S>.

65. Hiltzik, *supra* note 44.

66. *See* Blackman, *supra* note 59; *see also* White, *supra* note 64.

67. *See supra* text accompanying note 11.

plan. Calabresi's plan to "solve" the problem of increasing caseloads for federal judges, on its face, seems innocuous enough, just as Roosevelt's stated purpose of making the Court more efficient in its decision-rendering is a seemingly noble cause.⁶⁸ However, when examining the true purpose of these Court-packing measures, it is clear that the underlying purpose is not efficiency but rather ideology.⁶⁹ While Calabresi's plan was not officially sanctioned by the Trump administration or the President himself, its inclusion in this discussion of Court-packing is necessary because of Calabresi's prominent position in legal academia and because of the way President Trump has kept his word on promising to appoint Federalist Society-approved judicial nominees.⁷⁰ For Calabresi to put forth a sweeping plan of this sort during the Trump presidency, there must be at least some expectation that a plan like this could realistically be passed by Congress.⁷¹

Arguments regarding efficiency have led to substantial changes in the make-up of the federal judiciary in the past. In 1980, Jimmy Carter oversaw the breaking-up of the southern Fifth Circuit, which was justified by proponents as necessary because of the overwhelming amount of cases burdening the system, though it was *not* an attempt to break up a circuit based on ideology.⁷² For his part, President Trump has been harshly critical of the Ninth Circuit Court of Appeals, particularly because of the adverse rulings on the travel ban (discussed below).⁷³ In response to these rulings, as well as an adverse ruling from the Ninth Circuit concerning the Trump administration's targeting of so-called "sanctuary cities," President Trump has stated that he has "absolutely" considered breaking up the Ninth Circuit.⁷⁴ Of course, only Congress has the power to alter the make-up of judicial districts and circuits, but President Trump theoretically, with a Republican-controlled House and Senate, could push a bill through which could significantly alter the Ninth Circuit, which would seem to represent more of an ideological motivation as opposed to an efficiency rationale.⁷⁵

President Trump has explicitly rejected an efficiency rationale for increasing the number of immigration judges in the United States. In June of 2018, as the debate over family and child separations at the southern border dominated the national conversation regarding the Trump administration's immigration policies, Senate Republicans stated that they were working on a plan to increase the number of immigration judges in order to expedite the hearing process and reduce the backlog

68. See Jed Handelsman Shugerman, *The Trump Court-Packing Plan Is Based on a Fiction*, SLATE (Dec. 5, 2017, 6:51 PM), <https://perma.cc/X4PK-DZRK>.

69. See Ilya Somin, *The Case Against Court-Packing*, WASH. POST (Nov. 27, 2017), <https://perma.cc/K2PL-RLNX>.

70. See Tillman, *supra* note 53; see also Blackman, *supra* note 59 ("[Calabresi's] proposal was destined to fall by the wayside, but for the identity of its lead author").

71. See Somin, *supra* note 69.

72. See Amber Phillips, *Trump Keeps Throwing Shade on the 9th Circuit. But He Probably Won't Be Able to Break It Up*, WASH. POST (June 13, 2017), <https://perma.cc/6YKJ-RGFL>.

73. See *id.*

74. See Sarah Westwood, *Exclusive Interview: Trump 'Absolutely' Looking at Breaking Up 9th Circuit*, WASH. EXAMINER (Apr. 26, 2017, 5:00 PM), <https://perma.cc/ECU6-J4VQ>.

75. See Phillips, *supra* note 72.

of immigration cases.⁷⁶ President Trump rejected these proposals as “crazy,”⁷⁷ and he seemingly believes that the United States already has *too many* immigration judges compared to other countries.⁷⁸ Moreover, an argument can be made that President Trump fundamentally rejects the role of immigration judges in affording due process to undocumented immigrants.⁷⁹ On Twitter, President Trump stated in part that “[w]e cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came. Our system is a mockery to good immigration policy and Law and Order.”⁸⁰ Although immigration judges are technically a part of the executive branch, this is one area where President Trump is unwilling to act even in the face of case backlogs and perceived inefficiency.⁸¹

C. Richard Nixon and Applying Pressure to the Court

Upon winning the 1968 election, Richard Nixon was able to quickly make two key Supreme Court appointments, including Warren Burger and Harry Blackmun.⁸² While Burger’s appointment was the result of a vacancy created by outgoing Chief Justice Earl Warren, the seat filled by Blackmun became available under more dubious circumstances.⁸³

John Dean, one of Nixon’s legal advisors, stated that when Nixon took office, he was intensely focused on figuring out ways to create Supreme Court vacancies.⁸⁴ Nixon began looking at the most liberal justices on the Court, and he was made aware of connections between Justice Abe Fortas—a Lyndon Johnson-appointee and prominent liberal on the Court—and a Wall Street financier who had been convicted of financial crimes.⁸⁵ Nixon, with the aid of his Justice Department, began

76. Michael D. Shear, Sheryl Gay Stohlberg & Thomas Kaplan, *G.O.P. Moves to End Trump’s Family Separation Policy, but Can’t Agree How*, N.Y. TIMES (June 19, 2018), <https://perma.cc/9WWA-2V2T>.

77. *Id.*

78. See Salvador Rizzo, *Trump’s Claim that U.S. Is Only Country with ‘Thousands’ of Immigration Judges*, WASH. POST (May 17, 2018), <https://perma.cc/8MYX-8R5E>. In one statement on the subject, Trump stated in part that, “[a]nd just to show how ridiculous—we have judges. We have thousands of judges. Do you think other countries have judges? We give them, like, trials.” *Id.*

79. See Salvador Rizzo, *President Trump’s Misconceptions About Immigration Courts and Law*, WASH. POST (June 26, 2018), <https://perma.cc/9BTA-K8TG>.

80. Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 AM), <https://perma.cc/49G2-TWFT>.

81. See Raul A. Reyes, *Immigration Judges Deserve Respect—Not Unfounded Criticism*, THE HILL (June 30, 2018, 7:00 AM), <https://perma.cc/GAZ9-Z6LC>.

82. See ENGEL, *supra* note 3, at 306–07.

83. See *id.*

84. See JOHN W. DEAN, *THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT* 5 (2001); see also Richard K. Neumann Jr., *The Revival of Impeachment as a Partisan Political Weapon*, 34 HASTINGS CONST. L.Q. 161, 262 (2007).

85. See DEAN, *supra* note 84, at 5.

investigating Fortas and leaking damaging information to the press.⁸⁶ Besides the mounting public and media pressure, Nixon's Justice Department increased the pressure on Fortas by convening a grand jury to determine whether Fortas's wife had obstructed justice.⁸⁷

Fortas resigned shortly thereafter, succumbing to Nixon's successful strategy to use the full force of the executive branch to pressure a sitting Supreme Court justice to resign.⁸⁸ Fortas was considered one of the most liberal justices on the Court at the time, save for Earl Warren, who retired shortly after Nixon took office.⁸⁹ Moreover, Warren himself had previously faced calls for impeachment from those who were at odds with the Warren Court's decisions on some of the more controversial issues of the time, including racial desegregation and school prayer.⁹⁰

Fresh off of the resignation of Abe Fortas, the Nixon administration set its sights on another liberal Supreme Court Justice: William O. Douglas.⁹¹ However, the Nixon administration had been looking closely at Douglas since the Internal Revenue Service (IRS) began auditing him only five days after Nixon took office.⁹² Besides the IRS, White House aid John Ehrlichman had hired a private investigator to monitor Douglas's movements, and the Federal Bureau of Investigation (FBI), led by J. Edgar Hoover, was also conducting an open investigation of Douglas and his business dealings, including a wiretap on Douglas's phones.⁹³ Then-Republican minority leader Gerald Ford led the movement for impeachment against Douglas, who he called on to resign.⁹⁴ While Dean states that Ford never fully explained why he went after Douglas, "[Attorney General] John Mitchell believed that Ford was acting at the direct request of the president."⁹⁵ The impeachment effort ultimately failed to garner enough support, and Douglas remained on the Court until his retirement in 1975, intentionally staying on the Court long enough that Nixon could not appoint his replacement.⁹⁶ Thus, it is clear that, as Dean concludes, Nixon and those around him "[m]isused the resources and powers of the Department of Justice, and other executive branch agencies, to literally unpack the Court by removing life-tenured justices they found philosophically or politically untenable."⁹⁷

Presidents are not given the power to remove Supreme Court justices by the Constitution and applying the full force of the executive branch to target individual members of the judiciary, particularly based on perceived ideological leanings, is arguably a textbook example of altering the courts using what can be described as a "partisan weapon."⁹⁸ While President Trump has not shied away from encouraging

86. *See id.* at 8.

87. *See id.* at 10.

88. *See id.* at 1, 5–11.

89. *See id.* at 11.

90. *See* GEYH, *supra* note 14, at 109.

91. *See* DEAN, *supra* note 84, at 24.

92. *Id.*

93. *Id.* at 25.

94. *See id.*

95. *Id.* at 26.

96. *See* William O. Douglas, OYEZ (2017), <https://perma.cc/98VR-7QCU>; *see also id.*

97. DEAN, *supra* note 84, at 1–2.

98. *See* Neumann, *supra* note 84, at 162.

his Department of Justice to investigate past political foes, such as Hillary Clinton and former FBI Director James Comey,⁹⁹ there is certainly nothing to indicate that President Trump has considered using the Nixonian tactics described above against members of the judiciary. It is important to remember, however, that the revelations about Nixon's behavior regarding pressuring Supreme Court justices to leave the Court only became known years later when written about by those such as John Dean.¹⁰⁰ As Dean notes, Nixon called Abe Fortas the day Fortas resigned to "express his sympathy," and while Fortas likely suspected the Nixon administration had something to do with his ouster, there was no public showing to implicate the President.¹⁰¹ Similarly, Justice Douglas, who narrowly escaped impeachment, mentioned the idea to former Chief Justice Warren that he thought Nixon opposed his impeachment, while it is now clear that behind closed doors Nixon was orchestrating the entire scheme.¹⁰²

While not necessarily "pressuring" judges to resign, President Trump has targeted individual members of the judiciary with whom he disagrees.¹⁰³ However, on the surface, President Trump's motivation for the targeting of individual judges does not seem to be to create vacancies in a Nixonian fashion, but rather his attacks on individual judges seem to come from a place of personal animus based upon cases involving President Trump's personal economic interests, as in the Trump University case, and his political objectives.¹⁰⁴

1. The "Mexican" Judge

On May 27, 2016, in front of a crowd gathered in San Diego, President Trump lamented his perceived unfair treatment at the hands of U.S. District Court Judge Gonzalo Curiel, who was then overseeing the class action lawsuit against Trump University.¹⁰⁵ In what was described by one news report as "a 12-minute

99. See Louis Nelson, *Trump Ratchets Up Call for DOJ to Investigate Hillary Clinton*, POLITICO (Nov. 3, 2017), <https://perma.cc/K5EL-EMXC>; see also Louis Nelson, *Comey on Trump Calling for Him to be Jailed: 'This is Not OK,'* POLITICO (Apr. 17, 2018, 4:26 PM), <https://perma.cc/2VDG-H5TD>; Louis Nelson, *Trump Suggests Huma Abedin Be Jailed After State Department Email Release*, POLITICO (Jan. 2, 2018, 8:38 AM), <https://perma.cc/HJS6-S57A> ("The president's suggestion that the Department of Justice probe his political enemies breaks with a longstanding tradition that the department operate free from political influence.").

100. See DEAN, *supra* note 84.

101. See *id.* at 26.

102. See *id.*

103. See Hanna Trudo, *Trump Escalates Attack on 'Mexican' Judge*, POLITICO (June 2, 2016, 10:05 PM), <https://perma.cc/3P8N-XD82>; see also Ashley Killough, *Gorsuch: Criticism of Judges—Including Trump's—'Disheartening,'* CNN (Mar. 22, 2017), <https://perma.cc/Q43V-WN87>; Kyle Balluck, *Trump Calls on Ginsburg to Resign: 'Her Mind Is Shot'*, THE HILL (July 13, 2016, 6:43 AM), <https://perma.cc/R388-D78M>.

104. See Kristine Phillips, *All the Times Trump Personally Attacked Judges—and Why His Tirades are 'Worse than Wrong,'* WASH. POST (Apr. 26, 2017), <https://perma.cc/GHY5-KDF6>; see also *In His Own Words: The President's Attacks on the Courts*, BRENNAN CTR. FOR JUSTICE (June 5, 2017), <https://perma.cc/QR6S-WBWA>.

105. See Trudo, *supra* note 103.

diatribe,”¹⁰⁶ Trump discussed the history of the case and accused Curiel of being “a hater” before stating that “[w]hat happens is the judge, who happens to be, we believe, Mexican, which is great. I think that’s fine.”¹⁰⁷ When asked to clarify his comments about Curiel’s racial heritage, Trump stated that Curiel’s Mexican-American heritage was “an absolute conflict,” and he further stated that “I’m building a wall. It’s an inherent conflict of interest.”¹⁰⁸ Curiel was born and raised in Indiana and is of Mexican-American heritage.¹⁰⁹ The case eventually settled for \$25 million in what the Attorney General of New York deemed “a stunning reversal” by President Trump, who had previously vowed to take the case to trial.¹¹⁰

Of course, the sentiments about Judge Curiel took place *before* Trump became President. However, Trump’s criticisms of Curiel are relevant because, not only did Trump indicate that judges of Mexican-American heritage would be unable to fairly adjudicate proceedings completely unrelated to his immigration policies, but he also implied that he believes it is possible that judges who are Muslim might not be able to hear cases in which he is involved.¹¹¹ Using this line of reasoning, what kinds of judges *would* be able to hear cases involving President Trump or his policies? This line of reasoning could just as easily be extended to women who serve as judges, as many feel that President Trump has a highly objectionable history regarding his interactions with women.¹¹² The current Supreme Court includes three women, including Justice Sonia Sotomayor, who is of Hispanic heritage.¹¹³ Using President Trump’s reasoning, what other justices on the Supreme Court or judges on lower federal courts are disqualified? The notion that judges cannot be impartial is completely antithetical to the underlying principles of fairness and impartiality that are so inherent to our shared understanding of the role of the judiciary.¹¹⁴ As Republican Speaker of the House Paul Ryan stated, President Trump’s comments about Judge Curiel go “beyond the pale” of grievances past Presidents have levied against judges.¹¹⁵ Ironically, President Trump’s rhetoric about Judge Curiel has seemingly shifted since Curiel granted a favorable ruling regarding President Trump’s proposed border wall.¹¹⁶ Though President Trump did not recognize Curiel

106. *See id.*

107. *Id.*

108. *Id.*

109. *See id.*

110. *See* Josh Gerstein, *Judge Approves \$25 Million Trump University Settlement*, POLITICO (Mar. 31, 2017, 1:45 PM), <https://perma.cc/4XME-NHX3>.

111. *See* Kyle Cheney, *Trump: Muslim Judge Might Not Be Fair to Me Either*, POLITICO (June 5, 2016, 9:16 AM), <https://perma.cc/6UWG-55BD>.

112. *See* Meghan Keneally, *Trump’s Long History of Calling Women ‘Crazy,’ Attacking Their Appearance*, ABC NEWS (June 29, 2017, 12:56 PM), <https://perma.cc/C8H5-3BD4>.

113. *See* Charlie Savage, *Sotomayor Sworn in as Supreme Court Justice*, N.Y. TIMES (Aug. 8, 2009), <https://perma.cc/PT3Z-YV5D>.

114. *See* Vikram David Amar, *Why Trump’s Attack on Judge Curiel Is Clearly Racist*, NEWSWEEK (June 25, 2016, 9:00 AM), <https://perma.cc/K7XU-GRRS>.

115. Nicki Rossoll, *Paul Ryan Calls Trump’s Judge Comments ‘Beyond the Pale,’* ABC NEWS (June 9, 2016, 5:31 PM), <https://perma.cc/ZQ4J-7Z4L>.

116. *See* Tal Kopan, *Judge Curiel, Once Attacked by Trump, Rules Border Wall Can Proceed*, CNN (Feb. 28, 2018), <https://perma.cc/CV7P-QE5X>.

by name in his tweet and only referred to him as a “U.S. judge,” President Trump stated that Curiel’s ruling was a “big legal win” for the Trump administration.¹¹⁷

2. So-called Judges

Another example of President Trump verbally criticizing members of the judiciary can be found in his comments regarding the travel ban cases. In December of 2015, while on the campaign trail, President Trump called for “a total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what the hell is going on.”¹¹⁸ After his election, President Trump followed through on this promise when, on January 27, 2017, he signed an executive order banning entry of persons into the United States from seven Muslim majority nations for ninety days, as well as banning immigration from Syria indefinitely.¹¹⁹ The signing of the executive order initiated widespread panic and protest at airports across the United States, and numerous legal challenges were filed.¹²⁰ One of those legal challenges came before U.S. District Court Judge James Robart, who temporarily blocked enforcement of President Trump’s executive order.¹²¹ While the administration stated that it would file for an emergency stay of the ruling, President Trump took to Twitter to voice his displeasure with the decision in the following tweet: “The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!”¹²² President Trump coupled this tweet with several others, which claimed that allowing entry of individuals covered by the executive order into the country would lead to “death and destruction,” as well as the idea that “[i]f something happens blame [Robart] and [the] court system. People pouring in.”¹²³

President Trump was not immune from criticism from those within his own party, and notably then-Supreme Court nominee Neil Gorsuch denounced President Trump’s criticisms of Judge Robart as “disheartening” and “demoralizing.”¹²⁴ While it is not clear whether Robart was one of them, several judges involved in the travel ban cases received threats to their physical safety, which were significant and serious enough to warrant increased security details from the U.S. Marshals in the aftermath

117. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 27, 2018, 8:28 PM), <https://perma.cc/H3F5-Y5BM>; *see also id.*

118. Jenna Johnson, *Trump Calls for ‘Total and Complete Shutdown of Muslims Entering the United States,’* WASH. POST (Dec. 7, 2015), <https://perma.cc/W6NN-585J>.

119. *See* Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

120. *See* Michael D. Shear, *New Order Indefinitely Bars Almost All Travel from Seven Countries*, N.Y. TIMES (Sept. 24, 2017), <https://perma.cc/M4EJ-SD39>.

121. Matt Zapposky, Lori Aratani, & Justin Jouvenal, *Federal Judge Temporarily Blocks Trump’s Entry Order Nationwide*, WASH. POST (Feb. 4, 2017), <https://perma.cc/QQ8U-M7MM>.

122. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 5:12 AM), <https://perma.cc/PN7A-733G>; *see also id.*

123. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 5, 2017, 12:39 PM), <https://perma.cc/232E-FN9R>.

124. *See* Killough, *supra* note 103; *see also* Jonathan Mermin, *Three Ways of Looking at a President*, 32 ME. B.J. 30, 31 (2017).

of President Trump's criticisms.¹²⁵ Law professor Neil Siegel wrote that it is possible that, by making these types of comments about the judiciary, President Trump is setting himself up for an opportunity to shift the blame onto the judiciary for future terrorist attacks on U.S. soil.¹²⁶ While Roosevelt did not personally and publicly attack judges in ways similar to President Trump, his fireside chat about the Court-packing plan spoke of impending economic doom similar to what the country went through in 1929, which could obviously create feelings of fear and anger by members of the public towards the Supreme Court.¹²⁷ However, by targeting individual judges for criticism, such as Curiel and Robart, President Trump is focusing a national spotlight upon them that undoubtedly attracts the attention of those in society who feel they need to take it upon themselves to right a perceived wrong.¹²⁸ It is not yet clear whether this type of targeting will make it more likely that certain judges will choose to leave the bench rather than face continued criticisms and threats to their physical safety.¹²⁹

D. Reagan's Use of the Appointment Power

Ronald Reagan used ideological screening for judicial appointments as a means of influencing the interpretation of the law.¹³⁰ Reagan ended the use of nominating commissions established by Jimmy Carter, and instead, with the help of then-Attorney General Edwin Meese, "placed responsibility for advising judicial selection within [the Office of Legal Policy (OLP)]."¹³¹ OLP was thus able to advocate for screening potential judicial nominees based upon their "legal views,"¹³² though one scholar referred to this screening as "engag[ing] in the most systematic philosophical screening of judicial candidates seen in the nation's history."¹³³ When he left office, Reagan had appointed forty-seven percent of the federal judiciary at the time, including four Supreme Court justices and approximately 372 federal judges in total.¹³⁴ The process by which these judges were selected is described as emanating from the Reagan administration's "commitment to seek out and nominate those in harmony with the President's judicial philosophy."¹³⁵

Ironically (or perhaps not so ironically), Meese was in attendance at the nomination announcement of Brett Kavanaugh and was personally recognized by

125. See Evan Perez, Shimon Prokupecz & Ariane de Vogue, *Threats Against Judges in Immigration Ban Cases Leads to Increased Security*, CNN (Feb. 9, 2017), <https://perma.cc/DT6C-ZK94>.

126. Siegel, *supra* note 4, at 1244–45.

127. Roosevelt, *supra* note 37.

128. See Perez et al., *supra* note 125.

129. See *id.*

130. See Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363, 397 (2003).

131. ENGEL, *supra* note 3, at 327; see also *id.*

132. See Johnsen, *supra* note 130.

133. ENGEL, *supra* note 3, at 327 (quoting Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318, 319–20 (1989)).

134. Goldman, *supra* note 133, at 318.

135. *Id.*

President Trump in his remarks.¹³⁶ Meese was in attendance because, as one commentator noted, after the nominations of Sandra Day O'Connor and Anthony Kennedy, who were viewed by some as being less conservative than many conservatives hoped for, Meese "made it a mission since then to advise subsequent Republican Presidents on judicial nominations," including President Trump.¹³⁷ At the same nomination ceremony, President Trump made a problematic claim regarding Reagan and judicial appointments when he said, "[i]n keeping with President Reagan's legacy, I do not ask about a nominee's personal opinions. What matters is not a judge's political views but whether they can set aside those views to do what the law and the [C]onstitution require."¹³⁸ The existing literature on Reagan and Meese's ideological screening of nominees fully contradicts President Trump's assertion that the Reagan administration was not concerned with potential nominees and their ideology; in fact, the evidence shows that the opposite was true.¹³⁹ During Brett Kavanaugh's remarks at the ceremony, he stated that "[n]o president has ever consulted more widely or talked with more people from more backgrounds to seek input about a Supreme Court nomination [than Trump has]."¹⁴⁰ Based on the facts laid out above regarding President Trump's rigid and consistent practice of choosing candidates from a list created largely by Leonard Leo and the Federalist Society, Kavanaugh's statement is objectively inaccurate, and it is hard to believe that Kavanaugh was unaware of the circumstances surrounding his appointment.¹⁴¹

President Trump's strict adherence to Federalist Society-recommended federal judicial nominees seems strikingly similar to the type of ideological screening that took place during the Reagan administration.¹⁴² As Lee Epstein, Jeffrey Segal, and Chad Westerland note, Presidents generally do not have personal knowledge of specific nominees, and they rely on the lists created by advisors and recommendations from external sources.¹⁴³ However, while past administrations have traditionally consulted with outside groups about nominees, many believe that the Federalist Society is playing a disproportionate role in President Trump's filling of judicial vacancies.¹⁴⁴ Trump even stated during the 2016 campaign that "we're going to have great judges, conservative, all picked by the Federalist Society."¹⁴⁵

136. Peter Baker, *A Conservative Court Push Decades in the Making, With Effects for Decades to Come*, N.Y. TIMES (July 9, 2018), <https://perma.cc/5SVW-M8Q3>.

137. *Id.*

138. Jennie Neufeld, *Trump Nominates Brett Kavanaugh to Supreme Court: Full Transcript*, VOX (July 9, 2018, 9:49 PM), <https://perma.cc/4AJU-MN65>.

139. *See supra* text accompanying notes 132–33.

140. Neufeld, *supra* note 138.

141. *See* Aaron Blake, *Brett Kavanaugh's Remarkably Political Intro Speech*, WASH. POST (July 10, 2018, 9:51 AM), <https://perma.cc/RRR7-GFLP>; *see also supra* text accompanying notes 51–55.

142. *See* Lawrence Baum & Neal Devins, *Federalist Court*, SLATE (Jan. 31, 2017, 10:12 AM), <https://perma.cc/XE49-H3LL>.

143. *See* Lee Epstein, Jeffrey A. Segal & Chad Westerland, *The Increasing Importance of Ideology in the Nomination and Confirmation of Supreme Court Justices*, 56 DRAKE L. REV. 609, 611 (2008).

144. *See* Tillman, *supra* note 53.

145. Ian Millhiser, *Trump Says He Will Delegate Judicial Selection to the Conservative Federalist Society*, THINKPROGRESS (June 15, 2016, 7:26 PM), <https://perma.cc/4ZCF-RTHM>.

III. COMMENTING ON CURRENT AND PAST CASES

One recent study has found that, while sometimes useful as a rhetorical tool in speech-making, Presidents generally wait until after court rulings have been handed down to weigh in.¹⁴⁶ Indeed, from Eisenhower through Obama, public remarks made about cases before they were heard by the Supreme Court made up only five percent of total remarks made by Presidents about Supreme Court cases.¹⁴⁷ One reason for this result is that Presidents generally refrain from making comments that would lead to accusations of them attacking “decisional independence,” especially in criminal cases.¹⁴⁸ Presidents tend to comment much more frequently on cases that have already been decided,¹⁴⁹ and there are several reasons why Presidents might choose to publicly comment on these types of cases. Foremost among these reasons is that Presidents recognize that the Supreme Court and its more controversial decisions can serve as tools to motivate supporters to head to the polls on Election Day and to engage with their elected officials.¹⁵⁰ As Engel notes, the Supreme Court was a top voting issue in the 2008 campaign,¹⁵¹ as well as the 2016 election, in which roughly sixty-five percent of voters stated that the Supreme Court would be “a very important factor” in who they supported in the election.¹⁵² This section of the Note explores the historical practice of past Presidents surrounding commenting on past and pending cases as they relate to President Trump.

A. Past Court Decisions

Those in the Reagan administration were highly critical and vocal regarding past Court decisions.¹⁵³ Reagan’s Attorney General, Edwin Meese, spoke of “interpretational independence,” or the idea that the executive branch should have an important role in interpreting constitutional meaning independently from the courts.¹⁵⁴ In order to enact this vision of the role of the judiciary, Reagan and his administration often criticized what they perceived to be “unelected judges” who engaged in unconstitutional judicial activism.¹⁵⁵ Thus, in order to counter the perceived flaws of the judiciary, Meese and OLP issued a series of reports about various contemporary legal issues.¹⁵⁶ Besides describing “the Reagan

146. See Matthew Eshbaugh-Soha & Paul M. Collins, Jr., *Presidential Rhetoric and Supreme Court Decisions*, 45 *PRESIDENTIAL STUD. Q.* 633, 633 (2015).

147. *Id.* at 639.

148. *See id.*

149. *See id.*

150. *See id.*; see also ENGEL, *supra* note 3, at 50–51.

151. *See* ENGEL, *supra* note 3, at 51.

152. *Top Voting Issues in 2016 Election*, PEW RES. CTR. (July 7, 2016), <https://perma.cc/39F2-S9RK>.

153. *See* Johnsen, *supra* note 130, at 366–67.

154. *Id.* at 387–89.

155. *See id.* at 390; see also Jeff Shesol, *Obama Follows Reagan, FDR in Airing Supreme Court, Constitution Views*, *THE DAILY BEAST* (Apr. 6, 2012, 4:45 AM), <https://perma.cc/7JEM-UBZA>.

156. *See* Johnsen, *supra* note 130, at 389.

administration's view of the correct interpretation of the law" on a given issue, the reports also included "lists of Supreme Court decisions that OLP considered 'consistent' and 'inconsistent' with the administration's positions."¹⁵⁷

In contrast to the widespread condemnation of specific Supreme Court cases within the Reagan administration, Obama, while making his constitutional views about a recently decided Supreme Court case known to the public, received negative pushback. In January of 2010, the Supreme Court reached a decision in *Citizens United v. FEC*, in which the Court removed many of the barriers to corporate financing of political campaigns using the rationale that preventing this type of behavior was an impermissible restriction on free speech.¹⁵⁸ Just days later at the State of the Union Address, Obama, with six Supreme Court justices sitting in the front row, criticized the ruling, saying "[w]ith all due deference to separation of powers, last week the Supreme Court reversed a century of law that, I believe, will open the floodgates for special interests, including foreign corporations, to spend without limit in our elections."¹⁵⁹ Justice Samuel Alito, who voted with the majority in *Citizens United*, was captured by a television camera shaking his head as the President was speaking, and he appeared to say the words "not true."¹⁶⁰

Reactions to the exchange between Obama and Alito were mixed, with some legal scholars expressing disappointment in both of them, in one instance calling it "an unfortunate display for both branches."¹⁶¹ While some compared Obama's criticism of the Court to that of Franklin Roosevelt, legal scholars such as Professor Jack Balkin stated that there is a significant difference between *mentioning* a Court decision in a short paragraph of a speech, as opposed to Roosevelt's widespread campaign to discredit the Court's New Deal-era rulings.¹⁶² Another interesting opinion on the State of the Union backlash came from Robert E. Welch III, a Superior Court judge from Massachusetts.¹⁶³ Welch stated that those who jumped at the opportunity to criticize Obama needed to "toughen up," as Obama's comments were "rather restrained," and lower court judges, particularly those involved in highly-publicized criminal cases, are "subjected to at least this level of criticism on a frequent basis."¹⁶⁴ Regardless of which side of the argument one ends up on, Obama's remarks, though relatively tame compared to the tactics of the Reagan administration or Roosevelt, clearly caused a stir among political elites and opened a dialogue about the appropriate boundaries around Presidents and their criticisms of judicial opinions.

157. *Id.* at 389–90.

158. See *Citizens United v. FEC*, 558 U.S. 310 (2010); see also Robert Barnes & Dan Eggen, *Supreme Court Rejects Limits on Corporate Spending on Political Campaigns*, WASH. POST (Jan. 22, 2010), <https://perma.cc/CZE4-R6SE>.

159. See Robert Barnes, *Reactions Split on Obama's Remark, Alito's Response at State of the Union*, WASH. POST (Jan. 29, 2010), <https://perma.cc/7NE3-VP9E>.

160. See *id.*

161. *Id.* (quoting Barbara A. Perry, a Sweet Briar College professor).

162. See Jack Balkin, *Bad Mr. Obama Was Very Very Mean to the Poor Poor Supreme Court*, BALKINIZATION (Jan. 28, 2010, 11:37 AM), <https://perma.cc/25YT-RALX>.

163. See Welch, *supra* note 3, at 114–15.

164. *Id.*

It is unclear how the Trump administration will handle past Supreme Court precedent.

Arguably President Trump's most prominent Supreme Court victory came on June 26, 2018, when the Court ruled that the Trump travel ban was constitutional.¹⁶⁵ In response to the ruling, President Trump stated that the Court's decision was "a tremendous victory for this country."¹⁶⁶ One can only wonder what President Trump's response would have been had the Court ruled against the travel ban. After all, in the lower court decisions regarding the travel ban President Trump coined the term "so-called judge," as well as implying that any future acts of terrorism in the United States can be directly attributed to the so-called judge.¹⁶⁷ This past term, President Trump also weighed in on the decision in *Janus v. AFSCME*,¹⁶⁸ a case in which the conservative members of the Court held 5-4 that requiring nonunion employees to pay so-called "fair share fees" is violative of free speech.¹⁶⁹ President Trump seemed to focus on the political effects the decision would have, tweeting in part that the decision would be a "[b]ig loss for the coffers of the Democrats!"¹⁷⁰

While the Court has arguably not yet decided a case as controversial as *Citizens United* during President Trump's tenure in office, President Trump will almost certainly have opportunities to comment on additional high-profile cases within his first term. Moreover, President Trump, as outlined previously, has shown a propensity to comment on cases involving his economic and political interests, and assuming that a case involving sanctuary cities or presidential pardon powers does come before the Court in the future, it seems likely that President Trump will weigh in either before or after the decision (or both) by potentially targeting individual justices who decide against him.¹⁷¹ Obama's comments at the State of the Union, while personal in that the justices were in attendance that night, were not directed at any one justice, nor did he question the authority of the judges to decide constitutional issues such as those presented in *Citizens United*.¹⁷² Obama disagreed with the *law*, but not the underlying legitimacy of the justices to decide such questions.

Additionally, it is unclear whether or not Attorney General Jeff Sessions will follow in the footsteps of Meese in outlining the administration's views on past

165. See *Trump v. Hawaii*, 585 U.S. ____ (2018); see also Adam Liptak & Michael D. Shear, *Trump's Travel Ban Is Upheld by Supreme Court*, N.Y. TIMES (June 26, 2018), <https://perma.cc/A5ZA-B5RC>.

166. Alexander Mallin, *President Trump Calls Travel Ban Ruling 'A Great Victory' for the Constitution*, ABC NEWS (June 26, 2018, 6:58 PM), <https://perma.cc/L5UU-NH6E>.

167. See *supra* text accompanying notes 122–23.

168. 585 U.S. ____ (2018).

169. Irina Ivanova, *Supreme Court Rules Against Paying for Union Representation in Janus v. AFSCME*, CBS NEWS (June 27, 2018, 10:12 AM), <https://perma.cc/Z8D5-ZTKS>.

170. Donald J. Trump (@realDonaldTrump), TWITTER (June 27, 2018, 7:11 AM), <https://perma.cc/E9JP-73GP>.

171. See, e.g., Veronica Stracqualursi, *Trump Suggests He'll Take Sanctuary Cities Case to Supreme Court*, ABC NEWS (Apr. 26, 2017, 10:02 AM), <https://perma.cc/6R9A-MFVW>; Neil Lloyd, *Presidential Pardons are Reviewable by the Courts*, SLATE (June 8, 2018, 8:00 AM), <https://perma.cc/RU4S-T7FU>.

172. See Welch, *supra* note 3, at 114–15.

Supreme Court cases.¹⁷³ For example, Sessions stated in his confirmation hearings that he would defend *Roe v. Wade*¹⁷⁴ as a legitimate decision of the Court, even though he believed it was wrongly decided.¹⁷⁵ However, President Trump stated several times during the 2016 campaign that he believed *Roe* would be overturned if he won, and President Trump has indicated that being pro-life is necessary in order to pass the “litmus test” to get on the Court, despite his advisors telling him to publicly say otherwise.¹⁷⁶ Thus, it is unclear where *Roe* and the Court’s subsequent decisions stand with the Trump administration.¹⁷⁷

B. Pending Court Decisions

1. Pending Supreme Court Cases

One recent example of presidential influence on a pending Court decision in the non-criminal context involves Obama. In April of 2012, as the Supreme Court was deliberating its decision regarding Obama’s signature health care law, the Affordable Care Act,¹⁷⁸ Obama made several remarks about the case in a speech from the Rose Garden.¹⁷⁹ Among other comments, Obama stated “[u]ltimately, I am confident that the Supreme Court will not take what would be an unprecedented, extraordinary step of overturning a law that was passed by a strong majority of a democratically elected Congress.”¹⁸⁰ Many in the press, as well as some legal scholars such as Harvard Law professor Laurence Tribe, agreed that Obama’s remarks, which were viewed by some as an attempt to influence justices on the Court, were out of step with the idea that “[p]residents should generally refrain from commenting on pending cases during the process of judicial deliberation” because these comments can “can contribute to an atmosphere of public cynicism.”¹⁸¹ Others, however, such as Walter Dellinger, former solicitor general during the Clinton administration, expressed sentiments that Obama was perfectly justified in making these remarks, and that “[t]he justices’ life tenure secures their independence. There is no reason that issues before the [C]ourt should be fenced off from public debate.”¹⁸² Just months later, the Supreme Court held that the so-called “individual mandate” provision of the Affordable Care Act was constitutional as a

173. See *supra* text accompanying note 157.

174. 410 U.S. 113 (1973).

175. See Dan Merica, *Sessions Pledges to Respect Roe v. Wade Decision Despite Personal Beliefs*, CNN (Jan. 10, 2017), <https://perma.cc/9KPT-U5TF>.

176. Barbara Sprunt, *Trump Downplays Roe v. Wade Litmus Test as He Considers a Supreme Court Nominee*, NPR (July 1, 2018, 3:25 PM), <https://perma.cc/3EFJ-PH6V>.

177. See *id.*

178. Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

179. See Corbett Daly, *Obama: Supreme Court Overturning Health Care Would be “Unprecedented,”* CBS NEWS (Apr. 2, 2012, 5:36 PM), <https://perma.cc/Y59B-GU7C>.

180. *Id.*

181. Peter Wallsten & Robert Barnes, *Obama’s Supreme Court Comments Stir Debate*, WASH. POST (Apr. 4, 2012), <https://perma.cc/ZX6N-DU7U>.

182. *Id.*

legitimate use of the taxing power, scoring a “dramatic victory for Obama and Democrats’ decades-long effort to enact a health-care law.”¹⁸³

President Trump has not yet made any widely publicized comments regarding pending Supreme Court cases during his first two years in office. However, it should be noted that the comments made by Obama in the previous instance were not about a criminal case, and Obama did not have to worry about exposing potential jurors to information that would preclude them from making a fair assessment of the case. Obama, a former professor of constitutional law, was arguably making a statement which he believed was within the boundaries of normal presidential behavior.¹⁸⁴ Obama’s comments seem more like what Professor Friedman refers to as the President using the “bully pulpit” to send “signals” to the judicial branch.¹⁸⁵ This type of signaling between branches, according to Friedman, “permit[s] the other players to calculate what the response to a given decision might be.”¹⁸⁶ Judges receive a great deal of outside information, such as amicus briefs, in making their decisions.¹⁸⁷ It seems hard to believe that a statement such as that made by Obama about the pending case could have significantly influenced the thought processes of the justices any more than an amicus brief might.¹⁸⁸

2. Pending Criminal Cases

As noted at the beginning of this section, Presidents very rarely weigh in upon pending criminal cases.¹⁸⁹ As Professor James Joseph Duane notes, the dangers of Presidents weighing in on the outcomes of pending criminal cases is especially stark: by amplifying the guilt or innocence of an accused via speeches, tweets, or interviews, the President’s words reach tens of millions of potential jurors who could be improperly influenced regarding the culpability of the accused, and thus this reduces the chance that the accused will receive a fair trial.¹⁹⁰ Consequently, there are very few examples of Presidents weighing in on the guilt of the accused in criminal trials, though President Trump’s first two years in office have provided several.

In 1970, as notorious murderer and cult leader Charles Manson was on trial in California, President Richard Nixon stated in comments to reporters that Manson “was guilty, directly or indirectly, of eight murders without reason.”¹⁹¹ After

183. Robert Barnes, *Supreme Court Upholds Obama’s Health-Care Law*, WASH. POST (June 28, 2012), <https://perma.cc/WQP8-ET32>.

184. See Wallsten & Barnes, *supra* note 181 (quoting Walter Dellinger).

185. See Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 316 (2005).

186. *Id.*

187. See *id.* at 316 n.328 (citing LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 145–46 (1998)).

188. See *id.*

189. See Eshbaugh-Soha & Collins, *supra* note 146, at 639.

190. See James Joseph Duane, *What Message Are We Sending to Criminal Jurors When We Ask Them to “Send a Message” With Their Verdict?*, 22 AM. J. CRIM. L. 565, 675–76 n.367 (1995).

191. Peter Baker, *Trump Abandons Idea of Sending Terror Suspect to Guantanamo*, N.Y. TIMES (Nov. 2, 2017), <https://perma.cc/27EU-J3FP>.

learning of the President's comments, Manson's attorneys moved for a mistrial, and within hours Nixon was forced to make an additional statement, reinforcing his belief in the presumption of innocence by stating that "the last thing [he] would do is prejudice the legal rights of any person, in any circumstances."¹⁹²

Shortly after the bombing of a federal building in Oklahoma City in April of 1995, President Bill Clinton made five public statements condemning the attack and stating that the government would seek the death penalty for those responsible, though at the time no suspects had yet been charged in connection with the bombing.¹⁹³ In this case, the comments of Clinton and Attorney General Janet Reno advocating for the death penalty did not prevent the government from successfully pursuing the execution of Timothy McVeigh in 2001, though McVeigh's attorneys did ask the court to prevent Reno's involvement in the decision-making process about sentencing because of her past comments.¹⁹⁴ At least at the time, Clinton's words about the course of action were widely praised by members of Congress from both sides of the aisle, as well as in the press.¹⁹⁵

President Trump, in contrast with the two isolated examples provided above, has shown an unusual tendency to weigh in on pending criminal cases. This section will discuss President Trump's actions and compare them with Nixon and Clinton. It should be noted that, as this Note is being written, President Trump has weighed in on high-profile criminal cases on numerous occasions, and there is nothing to indicate that this type of behavior will not continue throughout the remainder of the Trump presidency.¹⁹⁶

i. "Dirty Rotten Traitor"

On October 16, 2017, Army Sergeant Bowe Bergdahl pleaded guilty before a military judge to desertion and misbehavior before the enemy, a charge levied against Bergdahl for endangering the lives of those who were sent to find him after he voluntarily left his post while deployed in Afghanistan in 2009.¹⁹⁷ Bergdahl was subsequently captured by the Taliban and was imprisoned and tortured until five

192. *See id.*

193. *See* Ann Devroy, *Clinton Praised for Responding to Disaster Swiftly and Strongly*, WASH. POST (Apr. 24, 1995), <https://perma.cc/B9R8-ZVFR>; Kevin Johnson, *How Trump's Comments on Charlottesville Murder Suspect May Threaten the Legal Case Against Him*, USA TODAY (Aug. 16, 2017, 3:37 PM), <https://perma.cc/SGJ7-29YF>.

194. *See* Johnson, *supra* note 193.

195. *See* Devroy, *supra* note 193.

196. Trump's proclivity to weigh in on criminal cases may be related to what has been viewed by some as a larger pattern of Trump criticizing various law enforcement officials and agencies. *See* Sharon LaFraniere, Katie Benner & Peter Baker, *Trump's Unparalleled War on a Pillar of Society: Law Enforcement*, N.Y. TIMES (Feb. 3, 2018), <https://perma.cc/X64W-WGSC> ("The war between the president and the nation's law enforcement apparatus is unlike anything America has seen in modern times."); *see also* Eugene Scott, *Trump Once Regularly Praised Law Enforcement. He Now Regularly Criticizes the FBI*, WASH. POST (Jan. 25, 2018), <https://perma.cc/RNQ2-CSG4> ("Trump seems to show less confidence in certain law enforcement officials and appears to want his supporters to do the same.").

197. Richard A. Oppel Jr., *Sgt. Bergdahl's Sentence May Be Lighter Because of Trump's Comments*, N.Y. TIMES (Oct. 30, 2017), <https://perma.cc/T7PF-6R35>.

years later, when the Obama administration made a deal with the Taliban for his return in a “prisoner swap.”¹⁹⁸ Trump was demonstrably harsh in his criticism of Bergdahl during the 2016 campaign, suggesting at various times that Bergdahl was “a dirty rotten traitor” and that he should be executed via firing squad or returned to the Taliban.¹⁹⁹ Upon pleading guilty, sentencing was delayed because of comments made by President Trump.²⁰⁰ When asked about a possible sentence for Bergdahl, President Trump initially said that he could not comment, before adding “[b]ut I think people have heard my comments in the past.”²⁰¹ In response to these latest remarks, Bergdahl’s counsel filed a motion saying that President Trump’s comments “amount to unlawful command influence, thus compromising Bergdahl’s chances to receive a fair sentencing.”²⁰² While the military judge chose not to dismiss the case, he did state that he would use Trump’s comments in mitigation during sentencing.²⁰³ Facing potential life in prison, Bergdahl was subsequently spared from serving any time in prison and was ordered to be dishonorably discharged.²⁰⁴ Within hours of the ruling, President Trump took to Twitter with the following message: “The decision on Sergeant Bergdahl is a complete and total disgrace to our Country and to our Military.”²⁰⁵

Some military experts have stated that President Trump’s post-sentencing comments further supported Bergdahl’s case to get his sentence overturned on appeal, while also suggesting that President Trump may have been trying to exert influence on those who are responsible for reviewing the sentence on appeal, as everyone in the military ultimately reports to President Trump, the Commander-in-Chief.²⁰⁶ Despite being counseled to refrain from commenting during Bergdahl’s sentencing phase, President Trump seemingly could not resist giving a wink and a nod to the press about “[his] comments in the past.”²⁰⁷ Whereas Nixon’s comments about Charles Manson seemed reckless to some degree, they lack the motivation to sway the public about the sentence given to the defendant. It is impossible to know exactly how the military judge in the Bergdahl case came to render the sentence he did, but it certainly seems significant that a sitting President’s words were not only used at the sentencing, but that they were used in *mitigation*.²⁰⁸ Perhaps Bergdahl would have received a greater sentence had President Trump kept quiet, perhaps not.

198. Morgan Radford & Corky Siemaszko, *Bowe Bergdahl’s Sentencing Delayed Over Trump’s Comments*, NBC NEWS (Oct. 23, 2017, 2:04 PM), <https://perma.cc/PGQ8-ZNJX>.

199. *See id.*; *see also* Oppel Jr., *supra* note 197.

200. Radford & Siemaszko, *supra* note 198.

201. *Id.*

202. Alex Horton, *Trump’s ‘Traitor’ Rhetoric Looms Over Bowe Bergdahl’s Sentencing*, N.Y. TIMES (Oct. 23, 2017), <https://perma.cc/WN2U-548H>.

203. *See* Oppel Jr., *supra* note 197.

204. *See* Richard A. Oppel Jr., *Bowe Bergdahl Avoids Prison for Desertion; Trump Calls Sentence a ‘Disgrace’*, N.Y. TIMES (Nov. 3, 2017), <https://perma.cc/86XL-42VQ>.

205. Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 3, 2017, 9:54 AM), <https://perma.cc/H7BD-9YQJ>.

206. *See* Oppel Jr., *supra* note 204.

207. *See* Radford & Siemaszko, *supra* note 198.

208. *See* Oppel Jr., *supra* note 197.

ii. President Trump and the Death Penalty

In addition to weighing in on the Bergdahl case, in November of 2017, President Trump again took to Twitter in two separate tweets to weigh in on the status of an individual accused of killing eight people in lower Manhattan by driving a rented pickup truck into individuals on a bike path.²⁰⁹ President Trump stated that authorities “[s]hould move fast. DEATH PENALTY!”²¹⁰ One former federal prosecutor, in response to the President’s tweet, pointed out that by weighing in on active cases, President Trump is making the outcome he desires more difficult for prosecutors to attain, as in the Bergdahl case.²¹¹ Weighing in on cases such as the New York terror suspect and advocating for the death penalty before an adjudication of guilt is similar to President Trump’s comments in 1989 that the so-called “Central Park Five”—who were accused of raping a white woman and were later exonerated—should be executed.²¹²

When examined in the context of the Clinton administration’s comments after the Oklahoma City bombing, there are several points of distinction. First, President Trump’s comments came *after* a suspect had been apprehended by authorities, whereas Clinton made a blanket statement that the death penalty would be sought for whoever was responsible. Legal scholar and journalist Adam Liptak differentiates Clinton and Reno’s comments from President Trump’s by stating that “they said that if [the system] does work and someone is convicted, the [Oklahoma City bombing] was heinous enough that they would seek the death penalty.”²¹³ While it is unclear what President Trump meant when he said that the authorities should “move fast” regarding the New York terror suspect, Liptak seems to think that President Trump’s tweets “leapfrog” the part about the system working to attain a conviction and instead that President Trump’s conclusion is that “this guy deserves the death penalty now, and it’s a pity that we have to go through the rigmarole of an actual trial.”²¹⁴

iii. “Travesty of Justice”

On November 30, 2017, a jury acquitted an undocumented immigrant of murder charges in the shooting death of an American citizen named Kate Steinle.²¹⁵ The death of Steinle was often cited by President Trump both on the campaign trail

209. See Aaron Rugar, *Trump Decries Bergdahl’s Sentence, Ignores Role His Calls for Bergdahl’s Execution Played in It*, THINKPROGRESS (Nov. 3, 2017, 2:05 PM), <https://perma.cc/4G2G-LAEJ>.

210. Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 2, 2017, 4:54 AM), <https://perma.cc/6J69-GE3Y>.

211. See Maegan Vazquez, *Trump Calls for Death Penalty in NYC Truck Attack*, CNN (Nov. 2, 2017), <https://perma.cc/H2VU-7TPN>.

212. See Sarah Burns, *Why Trump Doubled Down on the Central Park Five*, N.Y. TIMES (Oct. 17, 2016), <https://perma.cc/35AZ-6HCD>.

213. See Michael Barbaro & Sabrina Tavernise, *The Daily: The Texas Gunman, and Trump vs. the Courts*, N.Y. TIMES (Nov. 7, 2017), <https://perma.cc/FL8B-PJVV>.

214. See *id.*

215. Sophie Tatum, *Trump Says Steinle Verdict a ‘Travesty of Justice,’* CNN (Dec. 1, 2017), <https://perma.cc/8QY7-8WLK>.

and as President to justify his policies regarding the border wall and ending the existence of sanctuary cities.²¹⁶ After the verdict, President Trump took to Twitter to denounce the decision of a jury to acquit the killer, stating in part that “[h]is exoneration is a complete travesty of justice. BUILD THE WALL!”²¹⁷

This case provides yet another example of President Trump weighing in on an individual defendant’s guilt or innocence. This example is different from the Bergdahl example because here President Trump is criticizing a jury verdict, not a sentence handed down by a lone judge. Like previous examples, President Trump’s connection of the border wall and immigration policies to citizens’ physical safety implies that the justice system will not do enough to protect citizens from harm.²¹⁸ Though the defendant in the Kate Steinle case was acquitted of murder charges, he was found guilty of unlawful possession of a firearm, and under the direction of President Trump, the Justice Department has since detained the defendant for deportation proceedings.²¹⁹

iv. The Mueller Probe

As Special Counsel Robert Mueller’s investigation into Russian meddling into the 2016 elections continues to lead to criminal indictments of individuals closely tied to the Trump campaign, President Trump has chosen to selectively weigh in on occasion.²²⁰ However, in the following instances, President Trump has found himself in the position of advocating *for* criminal defendants, rather than against them as he did in the previous examples. For example, President Trump has spoken out on occasion regarding the indictment and investigation into his former campaign manager Paul Manafort.²²¹ While simultaneously trying to distance himself from and defend Manafort, President Trump tweeted, “[w]ow, what a tough sentence for Paul Manafort, who has represented Ronald Reagan, Bob Dole and many other top political people and campaigns. Didn’t know Manafort was the head of the Mob.

216. *See id.*

217. Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 1, 2017, 3:03 AM), <https://perma.cc/3T6K-ZY4S>.

218. *See supra* text accompanying note 123.

219. *See* Fred Barbash & Lindsey Bever, *Justice Department Issues Arrest Warrant After Jury Acquits Mexican Immigrant in ‘Sanctuary City’ Killing*, WASH. POST (Dec. 1, 2017), <https://perma.cc/A6FK-9QZF>. The similarity between President Trump’s comments about Steinle and the more recent death of Mollie Tibbets is striking. In August of 2018, authorities charged an undocumented immigrant for the killing of Tibbets, a 20-year-old college student from Iowa. Before any determination of guilt, Trump seized on the immigration status of the suspect, stating in part, “Mollie Tibbets, an incredible young woman, is now permanently separated from her family. A person came in from Mexico illegally and killed her. We need the wall. We need our immigration laws changed.” Natasha Korecki & Quint Forgey, *Trump’s New Rallying Cry: Mollie Tibbets*, POLITICO (Aug. 22, 2018, 2:04 PM), <https://perma.cc/4NV9-EBZR>.

220. *See* Brent D. Griffiths, *Trump: Lives Have Been ‘Devastated and Destroyed’ by Russia Probe*, POLITICO (May 27, 2018, 9:39 AM), <https://perma.cc/53NP-32XF>.

221. *See* Jen Kirby, *Trump: ‘Very Unfair’ that Manafort was Sent to Jail After Alleged Witness Tampering*, VOX (June 15, 2018, 2:45 PM), <https://perma.cc/6CBG-F85F>.

What about Comey and Crooked Hillary and all of the others? Very unfair!”²²² Here, President Trump was referring to a decision by the judge in Manafort’s case to jail Manafort prior to trial because he violated the terms of his house arrest; Manafort was not “sentenced,” as President Trump stated.²²³

President Trump was also very vocal regarding the investigation into his longtime attorney Michael Cohen—who has since pleaded guilty to eight criminal counts—which included search warrants being executed at several properties owned by Cohen.²²⁴ In response to these searches, President Trump stated that “it’s a disgrace, it’s, frankly, a real disgrace, it’s an attack on our country in a true sense. It’s an attack on all we stand for.”²²⁵ President Trump’s comments about Manafort and Cohen involve pending criminal cases, and it will be interesting to watch how the President’s involvement with these individuals affects the outcomes of their individual cases.²²⁶ As the Mueller investigation continues, President Trump will likely remain vocal about the charges against and sentences received by his associates.

CONCLUSION

As Professor Geyh notes, judges often become political targets in the aftermath of a regime change, as Presidents seek to make their own mark on the courts and lessen the influence of their predecessors.²²⁷ This phenomenon likely explains some of President Trump’s interactions with the judiciary thus far, particularly the speed with which he has filled judicial vacancies, and the potential that his allies in Congress might create even more.²²⁸ Since President Trump’s election, Americans

222. Donald J. Trump (@realDonaldTrump), TWITTER (June 15, 2018, 10:41 AM), <https://perma.cc/A4PV-XDPT>; *see also id.*

223. Kirby, *supra* note 221. During the jury’s deliberations in Manafort’s trial for tax evasion and bank fraud, Trump’s comments that “the whole Manafort trial is very sad” led to widespread condemnation from many in the legal profession. Sabrina Siddiqui, *Trump’s ‘Good Person’ Defence Could Affect Jurors in Manafort Trial*, THE GUARDIAN (Aug. 18, 2018, 9:09 PM), <https://perma.cc/9E5H-ZNDX>.

224. Stephen Collinson, *Trump Lashes Out as Cohen Raid Fuses Russia Probe and Stormy Case*, CNN (Apr. 10, 2018), <https://perma.cc/S6BG-VANX>; *see also* Alana Abramson & Ryan Teague Beckwith, *Michael Cohen Pleads Guilty to 8 Federal Charges and Says He Worked to Influence the 2016 Election*, TIME (Aug. 21, 2018, 5:50 PM), <https://perma.cc/8VJM-YC8Z>; Amy Davidson Sorkin, *President Trump’s Wild Response to the F.B.I. Raid on Michael Cohen’s Office*, NEW YORKER (Apr. 9, 2018), <https://perma.cc/7VDR-QWJE>.

225. *Id.*

226. Manafort’s association with Trump has already led to the judge in his case questioning the motives of prosecutors. In one exchange, the judge stated that he believed prosecutors were only interested in Manafort because of the possibility that he could provide incriminating evidence in support of Trump’s “prosecution or impeachment.” *See* Katelyn Polantz & Jessica Schneider, *Judge in Manafort Case Says Mueller’s Aim Is to Hurt Trump*, CNN (May 5, 2018, 12:13 PM), <https://perma.cc/396D-TTUS>.

227. *See* CHARLES GARDNER GEYH, *COURTING PERIL: THE POLITICAL TRANSFORMATION OF THE AMERICAN JUDICIARY* 24 (2016).

228. *See* Ariane de Vogue & Joan Biskupic, *How the Trump White House and GOP*

have witnessed pushes by both conservatives and liberals to pack the Court; liberals hope to diminish the influence of President Trump's numerous appointments, while the Calabresi plan was aimed at diluting eight years of judicial nominees under Barack Obama.²²⁹ The Federalist Society has served as a useful filter for President Trump in choosing nominees, though it is concerning that a single outside interest group has been able to exert this type of influence on something as critical and long-lasting as federal judicial appointments.²³⁰

It is also interesting that, as Geyh notes, today's preference for "sound bites," including social media and the twenty-four-hour cable news cycle, has created a means of "dissemination of information about the decisions judges make that render those decisions easier to attack and harder to defend."²³¹ As the examples in this Note show, a significant amount of President Trump's criticisms of judges and the judicial process come in the form of tweets, a platform that President Trump uses to reach millions of followers with messages that, by their nature, must be short, concise, and often lacking in nuance.²³² When a political message is boiled down to 140 characters, there is an obvious risk that much of the sophistication and development of logical reasoning is lost when compared to something like Roosevelt's fireside chats.²³³ Moreover, President Trump's use of Twitter has been particularly harmful in the instances in which he weighs in on pending criminal cases or chooses to attack individual judges.²³⁴

Looking at the larger picture, the negative aspects of President Trump's interactions with the judiciary are not always as clear cut as they sometimes seem. This Note concludes that President Trump's repeated involvement with pending criminal cases is wrong and deserving of condemnation. So too, President Trump's attacks on individual judges regarding their race or legitimacy are unusual, and seem to go far beyond what past Presidents have found to be appropriate. However, criticisms of President Trump's legitimate use of the appointment power, and his wholesale adherence to Federalist Society candidates, is more complicated when compared with more aggressive uses of ideological screening by the Reagan administration, or Nixon's use of executive branch resources to investigate and

Senators Fast-Track Judicial Nominees, CNN (Dec. 15, 2017), <https://perma.cc/TF4P-KC9A>.

229. See *supra* text accompanying note 48.

230. See Tillman, *supra* note 53.

231. See GEYH, *supra* note 227.

232. See Nahal Toosi, *Is Trump's Twitter Account a National Security Threat?*, POLITICO (Dec. 13, 2017, 5:06 AM), <https://perma.cc/KGX2-EH7V>.

233. See *id.*; see also Nash, *supra* note 36.

234. Personal attacks on judges have more than just a purely legal impact. Law professor Maureen Johnson discusses the ways in which these types of attacks by the President can lead to "trickle-down bullying," in which the public perceives the conduct of the President and changes the way they behave towards others, or affirms their previous behavior. Johnson notes the increase in hate crimes committed after the 2016 election, including towards immigrants, and she advocates for an increased role by the judiciary in countering these types of attacks by setting a positive example for the public through "responsible rhetoric in both judicial advocacy and judicial decision-making." See Maureen Johnson, *Trickle-Down Bullying and the Truly Great American Response: Can Responsible Rhetoric in Judicial Advocacy and Decision-Making Help Heal the Divisiveness of the Trump Presidency?*, 25 AM. U. J. GENDER SOC. POL'Y & L. 445, 457–60 (2017).

pressure justices off of the Court. Overall, as rules of appropriate interactions between the judiciary and the President are not set in stone, Presidents, to some extent, have been able to make up the rules as they go along. Ultimately, it is up to the public and the legal community to stand up for the integrity of the judiciary and to express disapproval when the President goes beyond the norms and historical practice of past Presidents.