This article by PCI Board Member Pete McCloskey appeared in the Huffington Post on February 23, 2017.

Judicial Supremacy

On February 12th, presidential adviser Stephen Miller attacked the historic independence of the Judiciary, saying:

"We have a judiciary which has taken far too much power and become, in many cases, a supreme branch of government."

Miller is dead wrong. Since 1804, the Supreme Court has been the supreme branch of government, with power, under the Constitution, to invalidate the actions of both Congress and the President.

Miller was attacking the 9th Circuit Court's ruling that Trump's Executive Order banning admission of people from seven countries was in violation of Congress' determination that in banning the entry of certain persons, "no person shall receive any preference or priority or be discriminated against because of race, nationality, place of birth, or place of residence." The Supreme Court has ruled that the Constitution provides 'that one religious denomination cannot be officially preferred over another."

Trump's Order plainly discriminated between Muslims and Christians.

For over 200 years, the Supreme Court has been recognized as the final arbiter of what the President and Congress are empowered to do under the Constitution. It's called the Principle of Judicial Supremacy.

In 1803, former Federalist, Chief Justice John Marshall, declared an Act of Congress unconstitutional in the famous case of Marbury v, Madison, In the following year, 1804, in the case of Little v. Barreme, he declared an act of the President to be in contravention of the powers granted him by Congress and ordered it set aside. The case arose under a law enacted by Congress intended to allow the President to prevent ships carrying contraband into French ports. Carrying out an order of Federalist President John Adams, a US warship seized a ship carrying contraband *out of* a French port. Chief Justice Marshall ruled that in granting the power to seize ships going *into* French ports, the Congress did not intend to give the President the power he had exercised, invalidated the President's Order, and ordered the ship returned to its owners.

That power of the Courts to hold Acts of Congress or the President unlawful under the Constitution, has lasted until today. That power is one of the essential checks and balances of the Constitution, as important as free speech, a free press and the right of assembly to protest grievances.

Miller's words are not the first time Donald Trump has challenged the independence of the Judiciary. He bitterly attacked a Judge of Mexican ancestry who had ruled against

the Trump University. He has referred to Judges as “alleged Judges,” and blamed his problems on “the whole court system.”

Even to his Supreme Court nominee, Neil Gorsuch, Trump’s attacks on judges are ”disheartening and demoralizing,” as stated to Connecticut Senator Richard Blumenthal in a pre-confirmation hearing discussion. Hopefully lawyers around the country, conservative as well as “federalists,” will rise in objection to the words of Miller and his employer, President Trump.

The danger of a President who considers any judicial ruling against himself as casting discredit on the judiciary and who disavows the very principle of judicial independence is obvious. If we are to be “a nation of laws, not of men,” then the Courts’ right to declare unconstitutional the acts of a President is an essential element.

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