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The most disturbing aspect of the first three weeks of the Donald Trump presidency has been his utter disdain for the Constitution and the rule of law. One of the most basic aspects of the rule of law is that no one, not even the president, is above the law. Yet, Trump has claimed that no one has the authority to review his actions and has attacked the courts that have done so. Trump’s claim, that he alone gets to decide and that his actions are unreviewable, should frighten us all and should be met by loud and universal rebuke by judges, lawyers and law professors.

The lawyers for Trump explicitly argued to the 9th U.S. Circuit Court of Appeals that the president’s decisions as to matters of immigration are unreviewable by any court. The Court of Appeals forcefully rejected that claim. The judges wrote: "[T]he government has taken the position that the President’s decisions about immigration policy, particularly when motivated by national security concerns, are unreviewable, even if those actions contravene constitutional rights and protections. ... There is no precedent to support this claimed unreviewability, which runs counter to the fundamental structure of our constitutional democracy."

Long ago, in Marbury v. Madison, in 1803, the Supreme Court ruled that courts can review the actions of Congress and the president to ensure their compliance with the Constitution. Chief Justice John Marshall explained that the Constitution exists to limit government power and its limits are meaningless unless they are enforced. The Supreme Court concluded that "it is emphatically the province and duty of the judicial department to say what the law is."

Trump’s claim of unreviewability is chilling. Does that mean that if he explicitly banned immigration of all Muslims from entering the country that no court could review the action? Judge William Canby repeatedly asked that question at the oral argument last week, and the attorney for the United States claimed even that would be unreviewable. What if the government rounded up all Muslim non-citizens in the United States, including those lawfully present? What if the government even tried to deport citizens who it deemed dangerous? The president’s unreviewability claim has no stopping point and is the essence of unchecked dictatorial power.
The 9th Circuit cited numerous cases where courts have reviewed the constitutionality of presidential actions in immigration and foreign policy. There is no basis in the Constitution or precedent for Trump’s claim that he can act without review or check by anyone. Trump’s executive order on immigration violates a basic constitutional principle: the government cannot presume that a person is more dangerous because of his or her race or religion.

Trump’s attack on the judges who ruled against him also is very disturbing. After federal district court Judge James L. Robart issued a temporary restraining order against the travel ban, Trump tweeted, “The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!” Trump then expressed contempt for the deliberations of the three-member appellate court convened to review Robart’s order, calling the legal argument “disgraceful,” and remarking that a “bad high school student would understand this.”

Presidents, of course, can disagree with court rulings and have done so before. Courts enjoined many of President Barack Obama’s executive orders, including Deferred Action for Parents of Americans and a limit on pollution from coal-fired plants. But he never said that the decisions were by “so-called judges” or were “ridiculous” or “disgraceful.” No president ever has used language like this before.

This seems a clear attempt to undermine the legitimacy of the courts. Trump does not want to be checked by anyone. He has said that he is in a “running war” with the media, and Trump’s adviser, Stephen Bannon, has instructed the press to “keep its mouth shut and just listen for while.”

I fear the day when Trump says that he does not care what a court declares and will command his government to ignore a court order. That has not happened yet and hopefully will not. But given his disdain for courts, it is not hard to imagine that occurring. Then there truly will be nothing to protect any of us from being rounded up by the government and held without recourse. That truly will be the moment of an unprecedented constitutional crisis.

But our profession cannot wait until then to speak out. It is urgent that those in the legal profession, Republican and Democrat alike, condemn Trump’s claim of unreviewability of his actions and his attack on the judiciary. Long ago, President Andrew Jackson wrote: “All the rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous Judiciary.”

Now, more than ever, we need that independent and virtuous judiciary. And the bright spot in the first three weeks of the Trump presidency has been how the courts — such as the federal district court in Washington and the 9th Circuit — have been truly “independent and virtuous.”