

What Will the Federal Government's Resistance to President Trump Look Like?

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- Daniel Correa, [Civil Dissent by Obedience and Disobedience: Exploiting the Gap Between Official Rules and Societal Norms and Expectations](#), 8 *Wash. U. Jurisprudence Rev.* 219 (2016) (responding to Jessica Bulman-Pozen & David E. Pozen, [Uncivil Obedience](#), 115 *Colum. L. Rev.* 809 (2015)).
- Jennifer Nou, [Bureaucratic Resistance From Below](#), *Yale Journal of Regulation Notice & Comment* (Nov. 16, 2016).
- Jennifer Nou, [Taming the Shallow State](#), *Yale Journal of Regulation Notice & Comment* (Feb. 28, 2017).

How should one respond to injustice, illegitimacy, or broader threats posed by a *democratic* governmental regime? Although readers may lump these items together, the commas and “or” matter here, for they are not all the same and the proper response to each may differ. One common answer to some or all of them is *civil disobedience*. Another, rendered more problematic by the democratic nature of the regime and perhaps by the relative lack of courage of the professional-managerial class, is open rebellion. A third possible response, [Jessica Bulman-Pozen](#) and [David E. Pozen](#) argued in a valuable, important, and still under-examined 2015 article, is *uncivil obedience*: a conscientious, communicative, reformist act of strict “conformity with . . . positive law,” “in a manner that calls attention to its own formal legality, while departing from prevailing expectations about how the law will be followed or applied.”

One might apply some of the same questions to this very jot. The general custom at Jotwell is to talk about *recent* “things” we “like lots,” and usually only about one article one at a time. The rule extends to articles published in the past two years, but most jots focus on recent or forthcoming articles. Given my own perverse tendencies, many of my past jots have more or less followed Jotwell’s “rules,” while pushing their limits. (And they have talked about doing so, which may violate another Jotwell “rule,” one that applies to legal scholarship more generally: talk about the article or topic itself, not the process or motives *behind* it. A law review article that began “This Article is intended to advance the current causes of the Democratic Party,” or “This Article is meant to demonstrate my worthiness for promotion” would be refreshingly candid, and might suggest some interesting things about legal scholarship, but this sort of thing is just not done. An article that got even more “meta” about the nature or role of the article, in order to poke at legal scholarship more generally, would be just as suspect, and the letters complaining about it would invariably begin, “Dear Prof. Schlag.”) Here I talk about *three* “articles” falling within the time limit. But two are scholarly blog posts, and the third involves a bank-shot, because behind it lies that 2015 article by Bulman-Pozen and Pozen, now verging on being too “old” for Jotwell. And all three articles raise the question whether this jot belongs in the constitutional law section or under legal theory or administrative law.

I have done all this on the grounds that extraordinary times call for extraordinary measures. Is this jot a form of uncivil obedience, of civil disobedience, or of rebellion? Is it justified in the circumstances? Even if these are extraordinary times, are extraordinary measures called for *here*, in the context of a system and website that operates as usual?

Behind all this, obviously, is President Donald Trump: that extraordinary figure whose extraordinary actions have called forth—demanded, many would insist—extraordinary responses from citizens and scholars alike. Many of the most prominent responses to the new regime have come from citizens, albeit often fairly elite ones: marches, “days without [X],” lawsuits, and the usual collection of group letters, petitions, and op-eds. In that context, it is clearer that thinking about modes of response and resistance to this administration, including resistance *within* the executive branch, has a strong constitutional law component. (Anyway, as Adrian Vermeule recently [observed](#), administrative law “is sublimated constitutional law just as constitutional law is sublimated theology.”)

Invoking Trump as a justification will no doubt win instant forgiveness for skirting or breaking various “rules,” both in the real world and in academia. As these thoughtful articles—two of them fortunately written *before* a sense of Trump-derived urgency began shaping and distorting public and academic discourse—demonstrate, however, it is unclear when, whether, and how such behavior should be treated forgivingly. Strategies of resistance shaped in response to exigent circumstances do not necessarily disappear when those circumstances do, and in the meantime they encourage retaliatory counter-strategies. And many citizens’—and academics’—passionate dislike of the administration may lead them to accentuate the positive aspects of these rule-breaking strategies while minimizing or ignoring the negative. This is thus simultaneously a good, bad, and necessary time to think both about both how resistance forms not only *to* but *within* the very organs of a constitutional regime, and about the potential dangers of those strategies.

Begin with *Uncivil Obedience*. Many acts of resistance to the Trump presidency have involved civil disobedience, although sometimes without the transparency and willingness to accept legal consequences that is often thought of as a hallmark of civil disobedience. For Bulman-Pozen and Pozen, “In important respects, uncivil obedience is the mirror image of civil disobedience . . . Instead of explicit law-breaking, it involves subversive law-*following*” (emphasis added), or “subversive legalism.” It can be a useful form of protest and resistance. It certainly demands recognition. But it demands not only applause, but also thoughtful, critical examination: “The basic dilemma that uncivil obedience poses for public law values . . . is no less substantial than the dilemma posed by civil disobedience. At the same time, uncivil obedience plays a distinct role within the operations of government that demands critical engagement on its own terms.”

The article provides several categories of uncivil obedience, some of which are particularly relevant for present purposes. One is “working to rule” by employees. Instead of striking, they engage in “hyperbolic compliance with authoritative demands,” doing “exactly what they are told to do,” in a “rigid” manner that slows the usual pace of operations and makes normal functioning and the achievement of the employer’s purposes less likely. Among the employees who may work to rule or observe compliant but “slow-walking” tactics are civil servants. Another example also involves government: minority obstructionism within the Senate, in which rigid insistence on, and use of, every available *legal* tactic—quorum calls, filibusters, requiring that lengthy bills be read aloud from beginning to end, and so on—“def[ies] longstanding conventions” while “emphasiz[ing] the formal legality of the[] obstructionism.” A third is federalism, “the most fecund source of legislative uncivil obedience” in the United States. In addition to simple resistance to federal law, states may “adopt measures that trumpet their technical consistency with federal law while at a deeper level subverting it.” Finally, and perhaps less relevant for our purposes, there is “full enforcement,” the strict enforcement of laws that are generally enforced reasonably (or unreasonably and selectively), as a way of “upending rather than perfecting the existing sociolegal order.” Enforcing every petty traffic offense, against rich and poor alike, might serve to raise questions about the customary unequal application of those laws, or create powerful new constituencies of opponents so as to undermine them altogether. The authors quote President Grant: “I know no method to secure the repeal of bad or obnoxious laws so effective as their stringent execution.”

Remember that the definition of uncivil obedience includes several factors that help it correspond to civil disobedience. In particular, uncivil obedience is said to require that the action “communicate[] criticism of a law or policy,” that it have “the significant [reformist] purpose of changing or disrupting that law or policy,” and that it do so “in a manner that calls attention to its own formal legality,” suggesting some degree of openness. Some acts of uncivil obedience, such as an organized and announced “work to rule” program, may meet those criteria. Others may not. When a Senate minority—Republican for some of the last administration, Democratic currently—uses all its tools to stymie the majority and prevent the administration from turning its policies into enacted law, it is often vocal about it, but is it reformist or protest-oriented? Certainly it is not reformist as to those rules itself: whether it thinks (or thought, until recently) the filibuster is unjust or not, it is happy to use it. It is not using “procedural privileges in novel ways to challenge those privileges themselves.” And is a *covert* “work to rule” practice really a communicative act of uncivil obedience?

Bulman-Pozen and Pozen call such examples “indirect uncivil obedience,” and make clear that the line between direct and indirect is “blurry.” To me, such an extension of the basic idea tends to demonstrate the dangers of over-

extending the labeling and description of a phenomenon. There is no doubt that *Uncivil Obedience* performs a useful function, one that is increasingly popular, even trendy, in the legal literature: that of identifying and taxonomizing a common but frequently under-remarked social, legal, and/or political phenomenon with important implications for law. But identifiers and taxonomizers of such phenomena should be wary of bringing too much under their umbrella. It can be useful to identify an important phenomenon, but counter-productive to insist too much on its universality or breadth of application, especially by introducing “variants” that raise questions about whether they fit within the definition—or raise questions about the definition itself, and perhaps, by extension, the whole phenomenon.

Thus, in his article *Civil Dissent by Obedience and Disobedience*, Daniel Correa critiques several aspects of Bulman-Pozen and Pozen’s project, and ultimately asks whether the whole concept should be “considered a non-starter for any serious normative assessment.” He does so in part by focusing on custom. Working to rule achieves its power because it ignores the basic function of the workplace: to *work*, to actually function properly. Driving no faster than the speed limit, although the custom is to drive at or somewhat above the speed limit, similarly makes reasonable coordination and use of the roads difficult or impossible, at least as long as the custom of driving slightly over the speed limit is widespread, coordinated, and generally respected by law enforcement. Doing so is only “provocative” if there is “some competing norm vying for obedience.” To Correa, this means that it is ultimately really *disobedience*—to the norm on the ground, if not the law on the books—that is doing the work here. He concludes that “the label ‘uncivil obedience’ should be discarded and the phenomenon the label purports to describe investigated as a form of civil disobedience.” (A similar point is made in a thoughtful [response](#) to Bulman-Pozen and Pozen by [Daniel Markovits](#). Despite praising the article, he argues that “the practices that BP&P identify as uncivil obedience on closer inspection overwhelmingly remain perfectly *civil* after all, at least insofar as they really do involve law-following. These practices become uncivil only when and because they turn out, on closer inspection, to involve *disobedience*.” The phenomenon, on this view, is less clear and apparent than the authors suggest, although the article is still useful insofar as it “reveals a deep structural instability in the normative order at which the protest takes aim.”)

Correa argues also that the uncivil obedience label is particularly “troublesome” when its authors try to “squeeze” it “into lawmaking practices.” Doing so distracts from “what really appears to be at issue: best lawmaking practices in a democratic society and political accountability.” *Some* members of a Senate minority engaging in legal obstruction may have uncivil obedience in mind, or say they do. But some of those are merely engaged in “political posturing,” and the rest are just doing party and institutional politics. Attaching a fancy global label to this conduct “creates a real risk [of] sleight of hand political maneuvering.”

One of the great virtues of *Uncivil Obedience* and its responses is that they came *before* the rise of Trump and the change in political regimes. They thus identified a potentially useful phenomenon before the felt necessities of the time[s]” could affect and perhaps distort their analysis. But this work has taken on a new level of importance in the current moment. That is certainly true for those who deplore Trump and are determined to resist him, but it is also true for those who are at least ambivalent about him, not to mention the few who simply want to identify and analyze the current moment as scholars or observers.

Before the election, while many focused worriedly on what Trump might do *to* the civil service, [some writers](#), such as [Eric Posner](#) (and, less impressively, [myself](#)), began asking how civil servants might respond *to* a Trump administration that would be, in an important sense, their own administration. It hardly took a crystal ball to ask this question, but it was asked surprisingly rarely—maybe because many in the professional-managerial class still thought his election impossible, or perhaps because they were driven by strong emotion rather than analytical calm.

Whether the executive bureaucracy, inside and outside of cabinet departments and other agencies, comprises a “fourth branch” of government or not, it clearly has many tools at its disposal to respond to and resist the head of the executive branch within which it sits. Since the election, both before and after the transfer of power itself, we have in fact seen variety of forms of resistance on the part of the civil service. President Truman famously [observed](#) of incoming President Eisenhower, “He’ll sit here, and he’ll say, ‘Do this! Do that!’ *And nothing will happen*. Poor Ike—it won’t be a bit like the Army. He’ll find it very frustrating.” And in a recent [piece](#) on the civil service, Professor Daniel

Hemel quotes, [via](#) Chief Justice Roberts, President Kennedy saying to a constituent, “I agree with you, but I don’t know if the government will.” We are now witnessing that phenomenon on steroids. The executive branch and the substantial civil service attached to it is definitely not *The Apprentice*. It barely resembles even the standard organizational chart one might remember from a class on separation of powers.

Jennifer Nou, a regulatory expert at the University of Chicago, has been remarking perceptively on this possibility both before and after the inauguration, in a pair (I hope they will become a series) of posts at the blog of the *Yale Journal of Regulation*. Even before the inauguration, Nou offered “a catalogue of tactics that civil servants have historically used to defy their superiors, both covertly and overtly.” They include slowdowns, using the agency process to build records that “will make it more difficult for the administrator to reverse [a] decision in good-faith,” cooperation with Inspectors General, lawsuits, resignations, and leaks. To this we might add, perhaps as a species of uncivil obedience, former Acting Attorney General Sally Yates’s refusal to enforce the initial administration executive order on travel, on the grounds that the refusal was “informed by my best view of what the law is after consideration of all the facts.” (Given that she served at the pleasure of the president, we might also think of this as a form of implicit noisy withdrawal.) Post-inauguration, Nou argues that the level of bureaucratic resistance to the Trump administration seems “unprecedented” in its “open defiance” of the President. She notes that this defiance invites “the inevitable crackdown from above,” and catalogues some forms the crackdown might take, such as reductions in force, prosecutions of leakers, and simply cutting the bureaucracy out of the consultation and decision-making loop.

But much of this can be difficult to accomplish, or have negative consequences for the administration itself. Tenure protections for civil servants constitute one of the most obvious barriers to executive-branch crackdowns. But other methods will create more interesting separation-of-powers dynamics and consequences. The clumsiness of the initial executive order on travel resulted in large measure from the loop-cutting method adopted by the West Wing. That in turn gave courts ample ammunition to be highly skeptical of the order, both because of its poor drafting and because it made it more difficult for the administration to point to the kinds of information-building and consultative methods that might justify judicial deference to the executive branch. By ensuring that no one in the bureaucratic ranks could hamstring the executive order, the White House in the end gave the judicial branch a leg up in doing just that. In short, “civil servants have a lot of artillery with which to lead yet another round of counter-attacks.”

Nou’s commentaries raise at least two important questions. First, how much of the civil service resistance to Trump can be characterized as “uncivil obedience,” of the kind described by Bulman-Pozen and Pozen, and how much of it is closer to civil disobedience or outright rebellion? *Some* of this conduct may be usefully illuminated by Bulman-Pozen and Pozen’s taxonomy. We can expect civil servants in this administration to insist rigidly on formal procedures that limit executive branch energy and action, to obey every jot and tittle of the “law” and rely on every protection and limit afforded them, to clock out at 5 when they might have burned the midnight oil in the service of a president or agenda they favored. We *might* see them interpreting and enforcing new rules advanced in a top-down form from the White House so rigidly as to heighten their absurdity and injustice and expand the range of affected constituencies who might complain. While we certainly will see open defiance of the administration by Democratic-governed states, not least for reasons of electoral politics, we might also see them using existing federal law to convert “cooperative federalism” into a means of resistance.

But some of these forms of resistance raise the questions of uncivil obedience presented by Correa (and Markovits). If the civil service tirelessly exploits the gap between formal rules and the actual norms that normally drive agency employee action—including the basic principle that the civil service is a part of the executive branch and exists to effectuate its policies—then much of its work will be driven by *disobedience*, not obedience. Other forms of resistance—leaking, in particular, but also the purported creation of “shadow” agency Twitter sites and other anonymous means of ignoring the org chart and communicating directly to the public—have nothing to do with “strict conformity with . . . positive law,” and are best characterized either as civil disobedience or, more accurately, resistance and rebellion, since they do not involve the transparency or willingness to accept the consequences of one’s disobedience that typify classical civil disobedience.

And some conduct may look like uncivil obedience at first, but is likely better seen as covert resistance and rebellion. The political journalist T.A. Frank, for instance, [observes](#) that [efforts](#) in the waning days of the Obama administration to collect and preserve intelligence concerning potential Russian hacking around the presidential election included, as *The New York Times* puts it, “keep[ing] the reports at a relatively low classification level to ensure as wide a readership as possible across the government.” This action is defended by the paper’s anonymous sources as an attempt to make sure the evidence was not buried or destroyed. But, as Frank quite rightly notes, it also inevitably “ensures the leaks keep coming and that the list of suspects remains infinite.” (The *Times*, which relies heavily these days on anonymous sources, failed to mention this obvious possibility. Perhaps the sources insisted on this as a condition of the leaks. At the least, the omission points to the dangers of self-serving accounts by leakers.) It is hard to describe this conduct as either uncivil obedience or civil disobedience.

The second question is what risks as well as rewards are involved in these varied forms of intra-branch resistance. Many have and will continue to applaud the bureaucracy’s resistance to its own administration. It will blunt the edge of the administration’s work and energy and in some cases may defeat its plans outright. As the example of the executive order on travel suggests, in other cases the resistance will hand ammunition to *other* branches of government, such as the judiciary. That will either allow judicial overrule of administrative actions, or require the administration to soften its policies, go through proper processes, and bring the bureaucracy back into the loop if it wants to succeed at all. In short, it will force the partial domestication of the administration.

But Nou writes that “[t]here are thorny legal and moral questions” involved in these forms of resistance. The potential costs of resistance, including dismissal, prosecution, and retaliatory reduction of the administrative state, “may help ensure that what resistance remains is more often evidence of a canary in a coal mine than a bureaucracy run amok.” But the more stringent, successful, and covert the resistance is and remains, the greater the risk that “ultimately the loser here is the administrative state itself,” and that “the institution of the presidency” will be “weakened in the long term.” If a casualty of the resistance to Trump—however justified or necessary that resistance may be—is “the civil service’s professional ethos and respect for democratically-elected superiors,” then the consequences are likely to last well beyond this administration.

The benefits of governmental resistance *to* the government—to *this* government, anyway—*might* be well worth the costs. And it is possible that the most dangerous tools will be put back on the shelf once Trump’s tenure in office is over, or once (or, rather, *if*) he is tamed, more or less. (That depends in part, however, on whether the “resistance’s” goal is to domesticate Trump’s presidency—or to end it. What the resistance’s goal is and whether there is any consensus on it is an open question; and the judiciary’s willingness to reject deference and restrain the president even *after* he had issued an executive order that purported to follow more of the usual organizational norms suggests that for at least some individuals, mere domestication is not the real goal.) Nou’s examples are historical as well as speculative, after all, and Bulman-Pozen and Pozen likewise drew on existing practice in describing “uncivil obedience.” Despite these historical examples of resistance, the Republic still stands. It is thus possible that these examples, and current civil service resistance practices, either are not cause for undue alarm or are necessary in the circumstances. On a somewhat different note, neither positive nor negative as such, perhaps they are an extreme example of “nothing new to see here”—of a civil service that has long been as much its own creature as a creature of the executive branch, and that reveals the complexities of *intra*-branch rather than *inter*-branch aspects of the constitutional separation of powers.

Whatever the case, these resistance practices demand wide-ranging academic analysis, of a sort that neither ignores nor is driven solely by present exigencies. Whatever havoc it may wreak with Jotwell’s usual customs, we should be grateful that the study (and critique) of uncivil obedience came along when it did—“BT,” as it were—and that Nou continues the job in a calm fashion “AT.” We need much more of this.

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