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**Trump, Populism, and the Resilience
of the American Constitutional
System**

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TRUMP, POPULISM, AND THE RESILIENCE OF THE AMERICAN CONSTITUTIONAL SYSTEM

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A properly designed state, the Fathers believed, would check interest with interest, class with class, faction with faction, and one branch of government with another in a harmonious system of mutual frustration.

Richard Hofstadter

1. Introduction

The American constitutional system was designed to prevent both tyranny of the minority – the capacity of a small, but powerful subset of the nation to impose its will on the body politic – and tyranny of the majority – the ability of a narrow majority to run roughshod over the rights of the minority. Perhaps the tyrannical agent that the Framers feared most was a populist demagogue who would harness public opinion for personal political gain. As Elbridge Gerry remarked at the Constitutional Convention in Philadelphia in 1787, «demagogues are the great pests of our government, and have occasioned most of our distresses»¹. Indeed, the *Federalist Papers*, a series of essays written by James Madison, Alexander Hamilton, and John Jay to urge Americans to ratify the new Constitution, begin and end with warnings about

¹ E. GERRY, *Notes of the Secret Debates of the Federal Convention of 1787, Taken by the Late Hon Robert Yates, Chief Justice of the State of New York, and One of the Delegates from That State to the Said Convention*, May 30, 1787.

populist demagoguery. *Federalist 1* admonished that «of those men who have overturned the liberties of republics, the greatest number have begun their career by paying an obsequious court to the people; commencing demagogues and ending tyrants». *Federalist 85* concluded by urging quick ratification, rather than further amendments, because failing to embrace a spirit of moderation could result in anarchy, civil war, or demagoguery, the chief ills the constitutional system was designed to guard against².

The Framers' solution to the dangers of a populist demagogue was to create an intricate system of checks and balances that resembled the mixed constitution of the Roman Republic more than the pure separation of powers models of their Enlightenment forbearers³. The system was biased toward inertia and required the active cooperation of multiple actors across separated institutions to effect policy change. The end result, as the great historian Richard Hofstadter described it, was a «harmonious system of mutual frustration»⁴.

Thirty years ago, the constitutional scholar Jeffrey Tulis argued that «the founders' preoccupation with demagoguery may appear today as quaint, yet it may be that we do not fear demagoguery today because the founders were so successful in institutionally proscribing some forms of it»⁵. Donald J. Trump's meteoric rise to the presidency on a wave of populist anger has caused many to question whether the American constitutional system still blunts the impact of populist forces. Of course, populism has long gained periodic traction in American politics. Smaller populist third party movements enjoyed modest electoral success throughout the 19th century by mixing anti-immigration rhetoric with a pledge to battle the privileged elite on behalf of the masses. Perhaps the high-water mark of early populist fervor came in 1896 when William Jennings Bryan, accepting the nomination of both

² A. HAMILTON, *Federalist 1*, 1787; A. HAMILTON, *Federalist 85*.

³ For example, compare Polybius' description of the Roman Constitution in Book VI of *The Histories* with the classic Enlightenment description of a separation of powers regime in Montesquieu's description of the classic *trias politica*, separation of powers regime in *Spirit of the Laws*. In *Federalist 47*, Madison goes to great length to defend the constitutional system from charges that it violated the principle of separation of powers as espoused by Montesquieu and others. J. MADISON, *Federalist 47*, 1788.

⁴ R. HOFSTADTER, «The Founding Fathers: An Age of Realism,» in *The American Political Tradition and the Men Who Made It*, New York, 1989, p. 5.

⁵ J. TULIS, *The Rhetorical Presidency*, Princeton UP, 1987, 28.

the Democratic and Populist Parties, painted a messianic picture by railing against the monied interests and the gold standard monetary policy that undergird their economic power. «Having behind us the producing masses of this nation... and the toilers everywhere, we will answer their demand for a gold standard by saying to them: You shall not press down upon the brow of labor this crown of thorns; you shall not crucify mankind upon a cross of gold»⁶. The 20th century would bring its own populist movements of varying sorts from Louisiana's "Kingfish" Huey Long whose "Share Our Wealth" platform pledged massive redistribution, to the 1950s anti-communist crusade of Wisconsin Senator Joseph McCarthy, to the racially infused populism of Alabama Governor and quixotic presidential candidate George Wallace. More broadly, populist rhetoric has long been an important tool in the arsenal of even more traditional politicians from Franklin Roosevelt to Ronald Reagan⁷. But for more than two hundred years, the American constitutional system appeared remarkably resilient to populist insurgencies.

The constitutional fragmentation of power has played a key role in ensuring this remarkable stability. To be sure, American constitutionalism has been far from static. The constitutional order has evolved in important ways, for example the rise of a party state in the 19th century and of an administrative state in the 20th century, that have produced changes and created new governmental powers unimaginable to the Framers⁸. And yet, for most of American history the checks and balances system ensured a remarkable degree of institutional stasis. Because power is highly fragmented, major change usually requires the active participation of multiple political actors spread across different institutions, and these actors answer to different constituencies through a series of temporally staggered elections. Even presidents like Lyndon Johnson who are renowned for their political and legislative skill have suffered more setbacks and defeats in advancing their

⁶ W.J. BRYAN, *Heart to Heart Appeals*, Fleming H. Revel Company, 1917 [1896], 64.

⁷ For an historical assessment of presidential populism, see: T. BIMES and Q. MULROY, *The Rise and Decline of Presidential Populism*, in *Studies in American Political Development*, 18, n. 2/2004, 136 ss.

⁸ S. SKOWRONEK and K. ORREN, *The Adaptability Paradox: Constitutional Resilience and Principles of Good Government in Twenty-First Century America*, in *Perspectives on Politics*, 18, n.2/2019, 354 ss.

agendas than successes. While in important respects the pendulum of power has undoubtedly swung away from Capitol Hill and toward the White House over the course of the 20th and 21st centuries, and presidents have increasingly sought to advance their programmatic agendas unilaterally, bypassing Congress altogether, the system remains biased toward inertia⁹.

However, the very mechanism underlying this stability has also made it difficult for the federal government to forge comprehensive solutions to major policy crises from climate change to health care to immigration. The challenges posed by the fragmented power structure and super-majoritarian requirements embedded in the system are only exacerbated in a period of intense partisan polarization and frequent divided government in which a single party only rarely controls both chambers of Congress and the presidency. Policy has not whipsawed across successive governments led by different parties, and most institutional power grabs, even by wartime presidents, have ultimately borne limited fruit¹⁰. However, government has grown increasingly gridlocked and unable to act on a larger share of the public's most important priorities¹¹. These governing failures, in turn, helped set the

⁹ Empirical scholarship on the unilateral presidency began by focusing on the so-called "strategic model" in which presidents increasingly resorted to unilateral action in challenging political environments when legislative success was unlikely. See, for example: C. DEERING and F. MALTZMAN, *The Politics of Executive Orders: Legislative Constraints on Presidential Power*, in *Political Research Quarterly*, 52, n. 4/1999, 767 ss.; G. KRAUSE and D. COHEN, *Presidential Use of Executive Orders, 1953-1994*, in *American Politics Quarterly*, 25, n. 4/1997, 458 ss. However, many studies have found limited support for the hypothesis that presidents systematically resort to unilateralism to circumvent Congress in periods of divided partisan control of government; see: J. BAILEY and B. ROTTINGHAUS, *Reexamining the Use of Unilateral Orders: Source of Authority and the Power to Act Alone*, in *American Politics Research*, 42, n. 3/2014, 472 ss.; J. FINE and A. WARBER, *Circumventing Adversity: Executive Orders and Divided Government*, in *Presidential Studies Quarterly*, 42, n. 2/2012, 256 ss.; A. BOLTON and S. THROWER, *Legislative Capacity and Executive Unilateralism*, in *American Journal of Political Science*, 60, n. 3/2015, 649 ss.. More recently, Belco and Rottinghaus note that many unilateral actions, particularly in periods of unified partisan control of government, are actually cooperative with congressional majorities. M. BELCO and B. ROTTINGHAUS, *The Dual Executive: Unilateral Orders in a Separated and Shared Powers System*, Stanford UP, 2017.

¹⁰ D. KRINER, *After the Rubicon: Congress, Presidents, and the Politics of Waging War*, Chicago UP, 2010.

¹¹ S. BINDER, *Stalemate: Causes and Consequences of Legislative Gridlock*, Brookings Institution Press, 2004.

stage for a populist insurgency, which found its ultimate expression in the iconoclastic candidacy and presidency of Donald Trump¹².

Historically, American public opinion has oscillated back and forth on the question of gridlock, whether it wants reforms to break gridlock, or whether at least some measure of gridlock provides an important moderating influence¹³. But in challenging times of economic disruption, anti-system populist appeals may resonate particularly loudly. This is precisely what happened in the run-up to the 2016 presidential election. On the left, the self-described Democratic Socialist Senator from Vermont Bernie Sanders, who did not and still does not formally affiliate with the Democratic Party, launched a fiery and nearly successful primary challenge to former Secretary of State Hillary Clinton, the clear choice of the party establishment. Sanders elevated traditional Democratic calls for greater redistribution of wealth and combatting rising inequality to a new level, repeatedly haranguing against corporate greed, and pitting the top 1% against the rest of the nation. On the right – or perhaps more accurately, from some ideological space that defies easy characterization – the businessman, political neophyte, and Democrat-turned-Republican Donald J. Trump launched a successful hostile takeover of the Republican Party, leaving core elements of party orthodoxy smashed in his wake.

Transcending traditional ideological divides, Trump galvanized his supporters with populist appeals. Demonstrating a keen awareness of the fears and anger of many Americans, particularly white working-class Americans who felt alienated and ignored by elites in both parties, Trump crystallized their grievances and promised easy and blunt solutions¹⁴. But Trump is also a demagogue in the classical sense. He cast himself as set apart from the ruling class of Washington elites

¹² W. HOWELL and T. MOE, *Presidents, Populism, and the Crisis of Democracy*, Chicago UP, 2020.

¹³ For evidence that many Americans may prefer the moderating effect of divided government, see A. ALESINA and H. ROSENTHAL, *Partisan Politics, Divided Government, and the Economy*, Cambridge UP, 1995. For evidence that concerns about gridlock can lead to support for change, such as greater use of executive action to break gridlock, see D. CHRISTENSON and D. KRINER, “Constitutional Qualms or Politics as Usual? The Factors Shaping Public Support for Unilateral Action,” in *American Journal of Political Science*, 61, n.2/2017, 335 ss.

¹⁴ J. SIDES, M. TESLER, and L. VAVRECK. *Identity Crisis: The 2016 Presidential Campaign and the Battle for the Meaning of America*, Princeton University Press, 2018.

and promised to tear down the old power structure – to “drain the swamp” – and finally deliver for the American people. In his speech accepting the Republican nomination in 2016, Trump declared war on the system itself: «I have joined the political arena so that the powerful can no longer beat up on the people that cannot defend themselves. Nobody knows the system better than me, which is why I alone can fix it»¹⁵.

Trump’s unexpected electoral success on a crest of populist sentiment coincided with a second, much longer-term development in American politics: the rise of unilateral executive power. For more than fifty years, analysts have warned that an ascendant, even “imperial” presidency threatens to overwhelm the constitutional system of checks and balances¹⁶. The confluence of these developments triggered alarm bells from legal scholars, political scientists, and political analysts alike, with many warning that the United States, the world’s oldest constitutional democracy, is at risk of democratic backsliding. Trump’s active erosion of democratic norms, abuses of executive power, and strident populist rhetoric have fueled concerns about an authoritarian turn in American politics, including strong comparative analogues to “how democracies die”¹⁷.

As if responding to this collective angst, former Vice President Joe Biden made “restoring the soul of America” the central message of his 2020 campaign for the presidency. At its core, Biden’s message was a pledge to reject the politics of division that formed the basis of Trump’s political power. Following his famous glide down the golden escalator in June 2015, Trump launched his campaign by pitting “real” Americans against the other: « When Mexico sends its people, they’re not sending their best. They’re not sending you. They’re not sending you. They’re sending people that have lots of problems... They’re bringing drugs. They’re bringing crime. They’re rapists. And some, I assume, are good people»¹⁸. In office, President Trump repeatedly stoked racial division, fueled anti-immigrant sentiment, fanned the

¹⁵ D.J. TRUMP, *Donald Trump’s Speech at the Republican Convention, as Prepared for Delivery*, CNN, July 22, 2016.

¹⁶ For the classic statement of the imperial presidency thesis, see: A. SCHLESINGER JR., *The Imperial Presidency*, Houghton Mifflin, 1973.

¹⁷ S. LEVITSKY and D. ZIBLATT. *How Democracies Die*. Crown, 2018.

¹⁸ *Here’s Donald Trump’s Presidential Announcement Speech*, *Time*, June 16, 2015.

flames of violence that erupted during protests against racial injustice, and divided the nation into his supporters and opponents, even going so far during a presidential debate as to say that America's Covid-19 data looked a lot better if you excluded the "blue" states that routinely support Democrats¹⁹.

At first blush, it is easy to conclude that Biden's electoral victory in 2020 demonstrated the resilience of the American constitutional system. After all, James Madison himself wrote in *Federalist 51* «a dependence on the people is, no doubt, the primary control on the government»²⁰. And while a minority of Americans – strategically concentrated in a handful of swing states – bought Trump's siren song and ushered him into the White House in 2016, a much larger majority swept him out through their vote at the ballot box four years later. To many, Biden's electoral victory signaled that the American system had held.

But serious questions remain about the resilience of the American constitutional system. While Trump may have been defeated at the ballot box, to what extent did the system check Trumpism during his tenure in office? To what extent did Trump transform public policy, particularly though his use (or abuse?) of unilateral power? And apart from effecting any concrete shifts in policy, has Trump's iconoclastic presidency done lasting damage to the safeguards of American democracy? This essay addresses these questions in four parts. The first assesses the strength – and limitations – of the institutional checks and balances erected by the Framers in checking a populist president with authoritarian tendencies. The institutional inertia engrained in the system makes it hard for any president, even a populist president,

¹⁹ Trump's rhetoric drew a rare and scathing rebuke from former Defense Secretary Jim Mattis who publicly condemned Trump as the "first president in my lifetime who does not try to unite the American people – does not even pretend to try. Instead he tries to divide us. We are witnessing the consequences of three years of this deliberate effort." J. GOLDBERG, *James Mattis Denounces President Trump, Describes Him as a Threat to the Constitution*, *The Atlantic*, June 3, 2020.

²⁰ The *Federalist Papers* were written under the pseudonym *Publius*, and while most scholars agree that Madison wrote *Federalist 51*, some contend it was Alexander Hamilton. For the paper itself, see: A. HAMILTON or J. MADISON, *Federalist 51*, 1788. For a discussion of the debate over authorship and empirical evidence for Madison's authorship of *Federalist 51*, see: J. SAVOY, *The Federalist Papers Revisited: A Collaborative Attribution Scheme*, in *Proceedings of the American Society for Information Science and Technology*, 50, n. 1/2014, 1 ss.

to deliver on his promises legislatively. However, many of the same institutional structures that protect against rapid and major legislative change also leave the system vulnerable to presidents willing to use the office's unilateral powers to their fullest. The second part builds on Madison's observation that a dependence on the people is ultimately the primary check if the "auxiliary precautions" of institutional checks and balances are insufficient. It describes these checks and how they have constrained past impulses toward presidential aggrandizement.

The essay then directly examines the Trump legacy and how both the institutional and political checks fared when confronted by the severe stresses of his most unconventional presidency. Ultimately, how different was Trump's exercise of political power from that of his predecessors? In important respects, the system did indeed hold. Trump, a minority president whose policies often appealed to a large and vocal, but minority segment of the American people, largely failed to advance his core priorities through Congress. Populist fervor failed to overcome legislative inertia. However, in other important respects, the checks and balances system failed to operate as designed. Intense partisan polarization rendered most congressional Republicans partisan cheerleaders for the president rather than defenders of a co-equal branch of government. Predictably, legislative checks on Trump's exercise of the presidency's unilateral power were weak, though judicial and political constraints helped keep him largely at bay.

The essay concludes by discussing the broader implications of Trump and Trumpism for American democracy. While the constitutional system largely prevented Trump from effecting sweeping policy change, even via the exercise of unilateral power, Trump's assault on constitutional norms and checks on his power have been far broader. In office Trump, launched unprecedented public assaults on judicial independence and the free press, openly labeling the latter "enemies of the people"²¹. Even before the 2020 election, President Trump refused to commit himself publicly to a peaceful transfer of power, and since his electoral defeat he has refused to concede, attacking the result as illegitimate and rife with fraud absent any evidence, while filing a string of

²¹ On Trump's unprecedented public assault on the legitimacy of the courts, see: M. NELSON and J. GIBSON, *Has Trump Trumped the Courts?*, in *New York University Law Review*, 93/2018, 32 ss. For an analysis of Trump's assault on the press and its implications, see: R. ANDERSEN JONES and L. GROW SUN, *Enemy Construction and the Press*, in *Arizona State Law Journal*, 49/2017, 1301 ss.

frivolous and unsuccessful lawsuits to overturn the result. A full analysis of these attacks and their potential for contributing to what Aziz Huq and Tom Ginsburg call “constitutional retrogression” is beyond the scope of this paper²². Instead, the final part focuses on Trump’s direct, but oft-overlooked assault on congressional oversight – a critically important institutional check that also can trigger more informal political checks on executive aggrandizement. Trump’s unprecedented obstruction of congressional investigations in both the impeachment inquiry and throughout his two final years in office, an assault aided and abetted by the craven abdication of his co-partisans, could seriously weaken an important check and have lasting implications for the constitutional balance of power.

2. The Strength – and Limitations – of Institutional Checks and Balances

Populist demagogues offer easy solutions to complex problems. However, in the American constitutional system effecting major policy change is difficult – even for a populist president with authoritarian tendencies. The surest path to pursuing sweeping and enduring change is by writing it into law, and presidents do have some important points of leverage in the legislative process. Most directly, presidents have the power to veto legislation of which they disapprove. The veto is a somewhat blunt instrument of negative power. However, it can also be used proactively as Congress must factor in the veto power while crafting legislation, and presidents can publicly or privately threaten to extract policy concessions and bring the final legislation into closer alignment with administration preferences²³. Presidents also have con-

²² Notably, Trump’s assaults on the judiciary, press, and integrity of American elections map neatly onto the three core components of liberal democracy as defined by Huq and Ginsburg. A. HUQ and T. GINSBURG, *How to Lose a Constitutional Democracy*, in *UCLA Law Review*, 65, n. 1/2018, 78 ss. Moreover, as Francesco Bilancia argues, such attacks on the judiciary, media, and other «constitutional devices that filter majority views through such institutional sieves» are essential to the populist’s claim to «express the authentic voice of the people». See: F. BILANCIA, *Constitutional Roots of Democracy*, in *Costituzionalismo.it*, n. 3/2019, Parte II, 33 ss.

²³ C. CAMERON, *Veto Bargaining: Presidents and the Politics of Negative Power*, Cambridge UP, 2020; H. HASSELL and S. KERNELL, *Veto Rhetoric and Legislative Riders*, in *American Journal of Political Science* 60, n. 4/2016, 845 ss.

siderable agenda setting powers. The State of the Union Address gives them a national platform from which to lay out their programmatic vision for the country²⁴. And since 1921, the Budget and Accounting Act has required presidents to compile and submit to Congress an annual budget proposal to serve as a jumping-off point for the legislative budgetary process. Ultimately, however, the president's formal legislative powers are limited. Instead, presidents must leverage other vantage points, such as bargaining and public appeals, to influence legislative action in Congress²⁵.

The bulk of the legislative power, including the power of the purse, is entrusted to Congress. And because power within the legislature is so fragmented and diffused – both by constitutional design and by Congress' own logic of internal organization – moving major legislation can be a herculean task, even in favorable political environments²⁶. The American Congress is a bicameral legislature whose members represent different constituencies and are chosen in staggered elections. Because members of the House are elected every two years and by the smallest geographic constituencies (at least within the federal government), the Framers anticipated House members would be most responsive to popular fervor. The Senate, whose members serve six-year terms and represent entire states, was consciously designed to temper these impulses and provide a check on the House²⁷.

In addition, power within Congress itself is highly fragmented with congressional committees and subcommittees not only holding considerable power to shape the content of bills, but also to advance them through the legislative process – or to refuse to do so²⁸. While

²⁴ On the president's agenda-setting capacity more generally, see G. EDWARDS III and B.D. WOOD, *Who Influences Whom? The President, Congress, and the Media*, in *American Political Science Review* 93, n. 2/1999, 327 ss.

²⁵ R. NEUSTADT, *Presidential Power and the Modern Presidents*, Free Press, 1990; S. KERNELL, *Going Public: New Strategies of Presidential Leadership*, CQ Press, 1997.

²⁶ As Keith Krehbiel observed, one of the most important empirical realities that any theory of lawmaking in the United States must be able to explain is that legislative gridlock is the norm, and it is only broken episodically. K. KREHBIEL, *Pivotal Politics: A Theory of U.S. Lawmaking*. Chicago UP, 1998.

²⁷ Until the ratification of the 17th Amendment in 1913, Senators were originally indirectly elected and chosen by state legislatures. The Senate was initially envisioned as a check for states on the powers of the federal government.

²⁸ On the foundations of committee power, see: K. SHEPBLE and B. WEINGAST, *The Institutional Foundations of Committee Power*, in *American Political Science Re-*

there have been efforts to centralize some power back in the party leadership over the last quarter century, American parties in Congress remain weak compared to their parliamentary counterparts. And in the smaller and more individualistic Senate, power is more fragmented still, as best captured by the Senate rule allowing for unlimited debate. This gives a minority the opportunity to block most legislation by talking it to death, or more commonly by simply threatening to do so²⁹. The so-called “filibuster” can only be ended by a cloture vote, which requires the assent of sixty of the one hundred senators.

An old aphorism of American politics holds that the president proposes, the Congress disposes. But in most cases, Congress does little disposing. In short, bicameralism and a cumbersome legislative process with multiple veto points and high transaction costs stack the deck against any president seeking to effect major change legislatively.

While the Framers of the American Constitution assumed that Congress would be the most powerful branch of the new government – as *Federalist 51* argues, «in republican government, the legislative authority necessarily predominates» – both the Framers and the anti-Federalists, who opposed ratification of the Constitution, were innately concerned about the expansion of executive power³⁰. When James Wilson of Pennsylvania proposed at the Philadelphia convention that a single person should be the new chief executive, Virginia’s Edmund Randolph denounced the idea as “the foetus of monarchy”³¹. The enumerated powers of the presidency in Article II are decidedly modest. However, Article II, Section 1 opens with an ambiguous phrase, the vesting clause: «The executive power of the United States

view 81, n. 1/1987, 85 ss. On the rise of subcommittee government in the post-reform House, see: J. ZELIZER, *On Capitol Hill: The Struggle to Reform Congress and Its Consequences*, Cambridge UP, 2006.

²⁹ Aside from a cloture vote to end a filibuster, which requires 60 votes, the most important procedural mechanism to circumvent the de facto 60 vote requirement to move legislation in the Senate is the budget reconciliation process. Indeed, this is how President Trump and congressional Republicans were able to pass their major corporate tax cut legislation without securing Democratic votes. For an overview of the reconciliation process, see: Tonja Jacobi and J. VANDAM, *The Filibuster and Reconciliation: The Future of Majoritarian Lawmaking in the U.S. Senate*, in *U.C. Davis Law Review* 47, n. 1/2013, 261 ss.

³⁰ A. HAMILTON or J. MADISON, *Federalist 51*, 1788.

³¹ For a brief discussion, see: A. RUDALEVIGE, *The New Imperial Presidency: Renewing Presidential Power After Watergate*, Michigan UP, 2005, 19-24.

shall be vested in a President of the United States». But what does this imply? Does it grant presidents only the executive powers that are specifically listed and described in the remainder of Article II? Or does it imply some undefined residuum of power that is inherently executive that is entrusted to the president? Such battles of interpretation have fueled the now long-running debate over the “unitary executive theory” of presidential power. In its most extreme variants, proponents of the theory claim not only that the clause grants presidents broad unenumerated executive powers, but that these powers cannot be checked by the other branches at all³². Setting these debates aside, this vesting clause coupled with the “take care clause” (Article II, Section 3: «he shall take Care that the Laws be faithfully executed») provide the constitutional foundation underlying presidential claims of broad unilateral power to shape policy implementation.

Article II of the Constitution makes no reference to executive orders, proclamations, or any of the other unilateral tools that presidents have created over the centuries to advance their agendas unilaterally. However, throughout American history from Washington’s Proclamation of Neutrality, to Jefferson’s Louisiana Purchase, to Lincoln’s Emancipation Proclamation, presidents have moved unilaterally to advance key policy priorities with the stroke of a pen³³. And since a series of decisions in the 1930s, the Supreme Court has established that such executive actions, when issued pursuant to proper constitutional or delegated statutory authority, have the full force of law. Blocked by gridlock on Capitol Hill, presidents of both parties have repeatedly turned to their unilateral toolkit to advance key components of their policy agendas. So important has executive action become, Terry Moe and William Howell argue «it virtually defines what is distinctively modern about the modern American presidency»³⁴.

Unilateral action flips the standard dynamic of policymaking in America on its head. In lawmaking, the status quo bias dominates.

³² R. SLOANE, *The Scope of Executive Power in the 21st Century: An Introduction*, in *Boston University Law Review*, 88/2008, 341 ss.; J. GOLDSMITH, *Power and Constraint: The Accountable Presidency after 9/11*, W.W. Norton, 2012.

³³ P. COOPER, *By Order of the President: The Use and Abuse of Executive Direct Action*, Kansas UP, 2002; K. MAYER, *With the Stroke of a Pen: Executive Orders and Presidential Power*, Princeton UP, 2002.

³⁴ T. MOE and W. HOWELL, *The Presidential Power of Unilateral Action*, in *Journal of Law, Economics, and Organization*, 15, n. 1/1999, 132 ss., 133 ss.

Presidents can propose legislation to move policy closer to their preferences. But it requires affirmative action by Congress for policy to shift – and because multiple veto players must agree, most legislative initiatives are doomed to failure.

By contrast, when presidents act unilaterally policy does not remain fixed until and unless Congress and the cumbersome machinery of government moves. Presidents act first and alone, changing policy with the stroke of a pen and putting the onus on other institutional actors to undo that which they have wrought unilaterally.

Even scholars who emphasize the scope of the president's unilateral power readily acknowledge that it is not unbridled. It is only as great as other institutional actors, primarily Congress and the courts, allow. The Constitution entrusts to each the formal means to push back against presidential power grabs. First, consider Congress. The Constitution grants Congress a clear institutional means of redress: it can simply enact legislation restoring the status quo. However, in this context the systemic bias toward inertia advantages the president. Congressional opponents of a unilateral move will struggle to move legislation reversing course through a complicated legislative process riddled with transaction costs. Should legislation reversing an executive action survive and pass both chambers, it must confront a president wielding a veto pen. Overriding a veto, which requires a two-thirds vote of both the House and Senate, is no small feat.

Of course, we might expect – and indeed the Framers hoped – that most members would rise up against presidential power grabs and use the full arsenal of tools at their disposal to combat executive overreach. If presidents use unilateral action to execute an end-run around Congress, all members should have collective institutional incentives to push back. Indeed, this assumption is central to the logic underlying the constitutional checks and balances system as captured in *Federalist 51*. Ensuring the institutional means of resistance, alone, is insufficient. The system must also provide actors with the personal motives to resist encroachment by other actors. «But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition.

The interest of the man must be connected with the constitutional rights of the place»³⁵.

The logic of pitting ambition against ambition is clear. The problem, however, lies in the final sentence. The Framers did not anticipate the almost immediate rise of political parties. Party loyalty competes with and often overwhelms institutional loyalty, particularly in today's highly polarized polity with increasingly nationalized elections³⁶. As a result, the institutional incentives for members of Congress to push back against power grabs from a president of their own party are significantly weaker than the Framers intended. Because partisan incentives are at odds with and often overwhelm institutional incentives to defend congressional prerogatives – particularly in the contemporary era of intense partisan polarization – the veto renders most efforts at legislative redress futile³⁷.

Of course, Congress is not the only possible institutional check on unilateral executive overreach. Courts can also strike down executive actions that exceed delegated statutory or independent constitutional authority. When endeavoring to check presidential overreach, courts enjoy significant advantages. Many of the institutional barriers that cripple congressional attempts to overturn unilateral action are either less significant or irrelevant for the judiciary. Only a simple majority is needed to strike down a unilateral, and collective action dilemmas and transaction costs are also either much lower or absent. However, as Alexander Hamilton noted in *Federalist 78* the courts have no independent means to enforce their judgements³⁸. And should the courts strike down a presidential unilateral action, they must rely on the very actor they have just ruled against to implement their decision. The most comprehensive empirical assessment of the strength of the judicial check on the unilateral president paints a dour picture. Between 1942 and 1998, presidents issued more than 4,040 executive orders. Of

³⁵ A. HAMILTON or J. MADISON, *Federalist 51*, 1788.

³⁶ D. HOPKINS, *The Increasingly United States: How and Why American Political Behavior Nationalized*, Chicago UP, 2018.

³⁷ N. KATYAL, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, in *Yale Law Journal*, 115, n. 9/2018, 2314 ss.; N. DEVINS, *Presidential Unilateralism and Political Polarization: Why Today's Congress Lacks the Will and the Way to Stop Presidential Initiatives*, in *Williamette Law Review* 45/2008, 395 ss.

³⁸ A. HAMILTON, *Federalist 78*, 1788.

these, only 83 were ever challenged in federal courts. In these cases, presidents emerged victorious more than 80% of the time³⁹. These results suggest that the formal legal constraint imposed by the courts on presidential unilateral action may be limited⁴⁰.

Finally, apart from executive orders, proclamations, and memoranda, presidents can exert considerable influence over the course and content of public policy through their commanding position atop the administrative state⁴¹. The executive-centered administrative state began with Franklin Roosevelt and the New Deal, and while the two parties may once have battled over its scope, with Republicans seeking to curtail the administrative state and Democrats endeavoring to expand it, for decades presidents of both parties have viewed administrative and regulatory action as an important tool to pursue both liberal and conservative policy goals⁴². While Congress and the presidency compete for influence over bureaucratic policy implementation, presidents enjoy significant advantages, including placing political appointees who share their philosophy and political imperatives throughout the

³⁹ W. HOWELL, *Power Without Persuasion: The Politics of Direct Presidential Action*. Princeton UP, 2003, 152-157.

⁴⁰ For similar analysis warning about the frailty of judicial checks, see: B. ACKERMAN, *The Decline and Fall of the American Republic*, Harvard UP, 2010. More recently, there is increasing evidence – much anecdotal, but some empirical – that courts have provided a more robust check on executive power. For an overview, see D. CHRISTENSON and D. KRINER, *The Specter of Supreme Court Criticism: Public Opinion and Unilateral Action*, in *Presidential Studies Quarterly*, 47, n. 3/2017, 471 ss. An empirical analysis by Lee Epstein and Eric Posner tells a similar story of an increasingly assertive judiciary. Presidential success rates in cases before the Supreme Court peaked during the Reagan administration in the 1980s, but have declined considerably since then. While not all of these losses involved direct checks on unilateral executive power, however many did involve rulings against presidents' use of the executive branch's regulatory powers to advance their interests through the policy implementation process without requiring new legislation from Congress. L. EPSTEIN and E. POSNER, *The Decline of Supreme Court Deference to the President*, in *University of Pennsylvania Law Review*, 166, n. 4/2017, 829 ss. For a perspective that sees more evidence of continued legal constraint through practice-based law, see: C. BRADLEY and T. MORRISON, *Presidential Power, Historical Practice, and Legal Constraint*, in *Columbia Law Review*, 113/2013, 1097 ss.

⁴¹ For a classic discussion, see: R. NATHAN, *The Administrative Presidency*, Wiley, 1983.

⁴² S. MILKIS and N. JACOBS, "I Alone Can Fix It" Donald Trump, the Administrative Presidency, and Hazards of Executive-Centered Partisanship, in *The Forum*, 15, n. 3/2017, 583 ss.

bureaucracy, centralized review of agency regulations through the Office of Information and Regulatory Affairs, and centralized oversight of agency budgetary requests by the Office of Management and Budget, which is firmly lodged in the Executive Office of the President⁴³. The size and scope of the modern administrative state far exceeds the wildest imaginations of the Founders when they erected the constitutional system of checks and balances. The president's institutional advantages in this arena open the door for considerable mischief in the hands of a populist president.

Taken together, the frailty of the institutional checks on executive action has led many scholars to conclude that the constitutional system of Madisonian checks and balances is little match for the unilateral and administrative powers of the modern presidency⁴⁴. The Constitution's "parchment barriers", legal scholars Aziz Huq and Tom Ginsburg warn, provide little check against democratic "retrogression" fueled by an authoritarian executive⁴⁵.

3. A Dependence on the People: Political Checks and Balances

Institutionally, a populist or even authoritarian president might anticipate considerable resistance and frustration when trying to effect change legislatively, but considerable freedom to do so unilaterally or administratively. To be sure, some scholars suggest that the institutional checks are stronger than a narrow focus on Congress' ability to reverse unilateral policy shifts or the court's capacity and willingness to strike down presidential overreach would suggest. For example, even when Congress cannot reverse executive action legislatively, it has other tools in its arsenal, including budgetary, appointment-making,

⁴³ On the debate over who "controls" the bureaucracy, see: T. MOE, *An Assessment of the Positive Theory of "Congressional Dominance"*, in *Legislative Studies Quarterly*, 12/1987, 475 ss. For a discussion of OIRA and OMB as agents of presidential influence over bureaucratic action and rulemaking, see: E. PASACHOFF, *The President's Budget as a Source of Agency Policy Control*, in *The Yale Law Journal*, 12, n. 8/2016, 2182 ss.

⁴⁴ E. POSNER and A. VERMEULE, *The Executive Unbound: After the Madisonian Republic*, Oxford UP, 2010.

⁴⁵ A. HUQ and T. GINSBURG, *How to Lose a Constitutional Democracy*, in *UCLA Law Review*, 65, n. 1/2018, 78 ss.

and agenda-setting powers, that it can use to cause problems for presidents who push too far unilaterally (though collective action problems remain)⁴⁶. Similarly, presidents may sign executive orders and many other administrative actions with the stroke of a pen, but they rely on bureaucrats to implement those actions. Bureaucratic compliance is never guaranteed, and this may afford an important administrative check on executive action⁴⁷. However, there is another check, indeed the one that Madison identified as the primary control on government: politics and particularly public opinion.

Despite the frailty of institutional constraints, the increasing incentives to go it alone in an era of rampant partisan polarization, and an erosion of norms of institutional forbearance under which presidents exercised self-restraint in pushing the bounds of their unilateral authority as far as they could, empirically presidents issue surprisingly few major executive actions⁴⁸. Every year, presidents issue hundreds of executive orders, proclamations, memoranda and other types of unilateral directives. However, many are purely ceremonial, and many others that have at least some policy substance are nonetheless

⁴⁶ F. CHIOU and L. ROTHENBERG, *The Enigma of Presidential Power: Parties, Policies, and Strategic Uses of Unilateral Action*. Cambridge UP, 2017; J. CHAFETZ, *Congress' Constitution: Legislative Authority and the Separation of Powers*, Yale UP, 2017.

⁴⁷ In Richard Neustadt's seminal *Presidential Power*, much of the presidential bargaining in the case studies, perhaps ironically given the emphasis on congressional bargaining the book stimulated within the presidency literature, involves presidents bargaining (often unsuccessfully) not with Congressmen, but with officials in their own administration. R. NEUSTADT, *Presidential Power, the Politics of Leadership*, Wiley, 1960. For an empirical analysis of bureaucratic implementation of executive orders and evidence of noncompliance, see: J. KENNEDY, "Do This! Do That! And Nothing Will Happen": *Executive Orders and Bureaucratic Responsiveness*, in *American Politics Research*, 43, n. 1/2015, 59 ss.; A. RUDALEVIGE, *By Executive Order: Bureaucratic Management and the Limits of Presidential Power*, Princeton UP, 2021.

⁴⁸ Partisan polarization, commonly measured by the size of the ideological gulf between the median Democrat and Republican in Congress, has grown steadily and inexorably since the 1970s. See: N. McCARTY, K. POOLE, and H. ROSENTHAL, *Polarized America: The Dance of Ideology and Unequal Riches*, MIT Press, 2006. Polarization fuels gridlock on Capitol Hill, see: S. BINDER, *Stalemate: Causes and Consequences of Legislative Gridlock*, Brookings Institution Press, 2004. This, in turn, frustrates presidential legislative agendas, and incentivizes presidents to go it alone when possible. On the effects of polarization on presidential agendas, see: G. EDWARDS III, *Predicting the Presidency: The Potential for Persuasive Presidential Leadership*, Princeton UP, 2016. For an argument about the erosion of norms of forbearance in recent administrations, see: S. LEVITSKY and D. ZIBLATT, *How Democracies Die*, Crown, 2018.

far from threats to checks and balances that raise normative concerns about democratic governance. Setting a relatively low bar to label an executive action “significant”, a recent empirical analysis identified every executive action that received even a single mention anywhere in the *New York Times*, perhaps the national newspaper of record, within one year of issuance. From 1977 to 2018, presidents averaged only 15 such actions per year⁴⁹. Upon closer inspection, even many of these actions that did merit a modicum of national news attention were of limited substantive impact.

This yields a puzzle: why do presidents frequently forgo the opportunity to advance their agendas through executive action given the frailty of the formal institutional checks on this power? Public opinion may hold the key. When contemplating unilateral action, presidents anticipate more than the likelihood of a reversal by Congress or a defeat in court. They also consider the political costs of going it alone, particularly the reaction of public opinion. After all, the president’s support among the public is a critically important resource that influences both his legislative prospects in Congress and his and his party’s electoral fortunes at the ballot box⁵⁰. The immediate policy gains won through executive action may prove a Pyrrhic victory if it comes at the cost of an erosion in public support with long-term political consequences.

But how does this political check work? Some research suggests that many Americans are innately skeptical of unilateral action and recoil against presidents who resort to unilateralism too aggressively. This adverse reaction is strongest among those with the greatest commitment to norms emphasizing the rule of law⁵¹. Other studies suggest

⁴⁹ D. CHRISTENSON and D. KRINER, *Beyond the Base: Presidents, Partisan Approval, and the Political Economy of Unilateral Action*, in *Journal of Political Institutions and Political Economy* 1/2020: 79 ss.

⁵⁰ For the benefits of high public approval ratings when bargaining with Congress, see: M/ BECKMAN, *Pushing the Agenda: Presidential Leadership in US Lawmaking, 1953-2004*, Cambridge UP, 2010; B. CANES-WRONE and S. DeMarchi, *Presidential Approval and Legislative Success*, in *Journal of Politics*, 64, n. 2/2004, 491 ss. For the electoral benefits, for both the president and his would-be co-partisan successor, of a high approval rating, see: A. ABRAMOWITZ, *Will Time for Change Mean Time for Trump*, in *PS: Political Science and Politics* 49, n. 4/2016, 659 ss.

⁵¹ A. REEVES and J. ROGOWSKI, *Unilateral Powers, Public Opinion, and the Presidency*, in *Journal of Politics* 78, n. 1/2016, 137 ss.; A. REEVES and J. ROGOWSKI, *The Public Cost of Unilateral Action*, in *American Journal of Political Science*, 62, n. 2/2018, 424 ss.

that popular pushback may not be automatic, but it can be activated by public criticism of unilateral action from Congress or by speculation of legal challenges to an administrative action⁵². For example, even when Congress cannot enact legislation overturning an executive action, it can use the investigative power of its committees to shine a light on alleged wrongdoings and highlight presidential power grabs⁵³. If such charges resonate with the public, and research shows that congressional investigations systematically erode presidential approval ratings⁵⁴, then presidents could incur significant political costs from pushing their executive authority too far.

Consistent with the posited power of public opinion and political checks, research has shown that presidents are surprisingly more reticent to use their unilateral powers aggressively when they have low approval ratings and are most politically vulnerable – precisely the time when strategic models suggest they should resort to executive action⁵⁵. Moreover, when presidents do act unilaterally, more often than not they have historically taken actions that enjoy broad public support⁵⁶.

However, such political checks are informal. They depend on presidents reasoning that a careful use of unilateral power rather than its indiscriminate exercise is in their political interests. For most presidents, this political logic has urged restraint and the selective use of executive action. However, if a populist president with authoritarian leanings has a different political calculus, these informal political checks may prove less effective⁵⁷.

⁵² D. CHRISTENSON and D. KRINER, *Constitutional Qualms or Politics as Usual? The Factors Shaping Public Support for Unilateral Action*, in *American Journal of Political Science*, 61, n. 2/2017, 335 ss.; D. CHRISTENSON and D. KRINER, *Mobilizing the Public Against the President: Congress and the Political Costs of Unilateral Action*, in *American Journal of Political Science*, 61, n. 4/2017, 769 ss.; D. CHRISTENSON and D. KRINER, *The Specter of Supreme Court Criticism: Public Opinion and Unilateral Action*, in *Presidential Studies Quarterly*, 47, n. 3/2017, 471 ss.

⁵³ D. MAYHEW, *Divided We Govern: Party Control, Lawmaking, and Investigations, 1946-1990*, Yale UP, 1991; D. KRINER and E. SCHICKLER, *Investigating the President: Congressional Checks on Presidential Power*, Princeton UP, 2016.

⁵⁴ D. KRINER and E. SCHICKLER, *Investigating the President: Committee Probes and Presidential Approval, 1953-2006*, in *Journal of Politics*, 76, n. 2/2014, 521 ss.

⁵⁵ D. CHRISTENSON and D. KRINER, *Does Public Opinion Constrain Presidential Unilateralism?*, in *American Political Science Review* 113, n. 4/2019, 1071 ss.

⁵⁶ D. CHRISTENSON and D. KRINER, *The Myth of the Imperial Presidency: How Public Opinion Checks the Unilateral Executive*, Chicago UP, 2020.

⁵⁷ Alternately, Huq and Ginsburg suggest that the popular constraint on author-

4. Assessing the Resilience of Checks and Balances in the Age of Trump

Perhaps the most pressing question in American politics over the past four years was whether the constitutional safeguards would hold in the face of an unprecedented onslaught from a consciously disruptive populist president. On balance, these formal checks proved stronger than some feared, but weaker than many hoped. Similarly, in important respects Trump appears to have been less sensitive to, or at least to have had a radically different conception of the political costs from bold administrative action than his predecessors. However, even Trump was curtailed in his exercise of executive authority on multiple fronts by popular pressures. Trump undoubtedly stressed the system; but at least in the immediate term, checks against executive aggrandizement largely held, even as Trump trampled on long-standing democratic norms.

At least on one dimension – making it difficult for a populist leader with authoritarian tendencies to write his policy preferences into law – constitutional checks and balances bore the unprecedented strain rather well. During the 2016 campaign, Trump’s platform was remarkably short on specific issues he would address as president, let alone precise plans for how he would effect promised change. Instead, Trump ran more as a wrecking ball that would sweep away what he voraciously labeled a corrupt political system, as personified by his moniker for his opponent, “Crooked Hillary”. However, there were two key exceptions. From the moment Trump launched his campaign after gliding down the golden escalator in Trump Tower, he captured public fears and anger over illegal immigration. True to form for a populist demagogue, confronted with an enormously complicated policy problem, Trump offered an abidingly simple solution. To staunch illegal immigration, Trump pledged to build a great wall on the southern border – and Mexico, not the American taxpayer, would somehow pay for it.

A second issue that Trump clearly identified as a top priority was health care. Trump exploited public dissatisfaction with America’s

itarianism may have weakened even before Trump. For example, citing polling data suggesting that support for military interference in government has risen precipitously, Huq and Ginsburg warn «the popular support that works as democracy’s rebar, that is, may be eroding with alarming speed». A. HUQ and T. GINSBURG, *How to Lose a Constitutional Democracy*, in *UCLA Law Review*, 65, n. 1/2018, 78 ss., 81 ss.

costly health care system and took aim at the most important legislative accomplishment of his predecessor: the Affordable Care Act, or Obamacare. While the Affordable Care Act extended health insurance coverage to more than 20 million Americans and included a number of other important reforms, such as preventing health insurers from discriminating against those with pre-existing health conditions, millions of Americans still lacked access to affordable health insurance. And millions more who did have health insurance were concerned about its spiraling costs. On the campaign trail, Trump routinely bashed the Affordable Care Act as a socialist takeover of the American health care system that had caused prices to sky-rocket and American companies to slash jobs: in short, a “total disaster”. Trump’s solution was as simple as it was vague: he pledged to repeal Obamacare and replace it “with something terrific”⁵⁸.

Trump assumed the presidency under favorable political conditions, as the American political system goes. His party controlled both the House of Representatives and the Senate, making him the first Republican president to enjoy a period of unified partisan control of government since George W. Bush from 2003 to 2006. Of all of President Trump’s priorities, the political climate seemed most favorable for wiping away Obamacare. After all, during the latter years of the Obama administration, House and Senate Republicans had already passed the Restoring Americans’ Healthcare Freedom Reconciliation Act of 2015 to repeal key parts of the law. The only thing blocking them was President Obama’s veto pen. With that roadblock removed, the potential existed for quick action. But it was not forthcoming. Divisions within the Republican Party caucus quickly arose between those who favored unconditional repeal and those who argued some replacement was necessary to keep benefits that were particularly popular. While the House eventually and narrowly passed a bill to gut the ACA, it failed to garner even a simple majority vote in the Senate⁵⁹.

⁵⁸ J. DIAMOND, *Trump’s Immigration Plan: Deport the Undocumented*, “Legal Status” for Some, CNN, July 30, 2015. The official proposal, “Healthcare Reform to Make American Great Again,” on the Trump campaign website offered little more in the way of details.

⁵⁹ Senate leaders used a special procedure, budget reconciliation, to avoid a Democratic filibuster and allow the bill to pass with a simple majority vote. For additional details, see: M. LYNCH and J. SATURNO, *The Budget Reconciliation Process: Stages of Consideration*, Congressional Research Service, 2017.

Ultimately, the only legislative action on Trump's health care agenda was part of a decidedly non-populist bill – a rider to a major corporate tax cut. The 2017 \$1.5 trillion tax cut, at least in terms of substance, was decidedly antithetical to the President's populist message. The bill slashed corporate tax rates by 40% and the benefits of the individual tax cuts were concentrated overwhelmingly among high income earners⁶⁰. A provision of the bill eliminated the individual mandate portion of the Affordable Care Act, the tax penalty that individuals must pay if they do not have or purchase health coverage. The rest of the law, however, remained essentially intact.

Aside from the tax bill and a symbolically important, if substantively modest criminal justice reform bill, even with unified Republican control of government Trump compiled a decidedly modest record of legislative achievement with few major laws delivering on prominent campaign pledges⁶¹. Indeed, having abandoned his solemn pledge to have Mexico pay for the wall, Trump's efforts to secure funding from Congress, which controls the federal purse strings, was an abject failure that ultimately led to the first genuine government shutdown during unified partisan control of government in American history⁶².

Another element in the populist playbook – direct appeals to the public for political leverage – also systematically failed to afford Trump much influence over policy. Despite his unprecedented use of Twitter to take his messaging directly to his more than 80 million followers unfiltered by the mass media, a comprehensive analysis by George Edwards documents Trump's consistent futility in moving public opinion and marshaling it to advance his policy aims⁶³. In short, Trump enjoyed no more success than his predecessors in turning his mastery of the media, including social media, into an effective communication strategy to move mass opinion and build pressure for policy change.

⁶⁰ *Distributional Analysis of the Conference Agreement for the Tax Cuts and Jobs Act*, Tax Policy Center, 2017.

⁶¹ Measuring legislative productivity is a fraught exercise. However, most independent analysts concluded that the 115th Congress under Trump accomplished relatively little of substantive import. For example, see: D. DESILVER, *A Productivity Scorecard for the 115th Congress: More Laws than Before, But Not More Substance*, Pew Research Center, 2019; *The 115th Congress in Review*, GovTrack Insider, 2019.

⁶² D. MATTHEWS, *This is the First Real Government Shutdown Under One-Party Government, Ever*, Vox, January 20, 2018.

⁶³ G. EDWARDS III, *Changing Their Minds? Donald Trump and Presidential Leadership*, Chicago UP, 2021.

The legislative check on Trump's populist impulses was strengthened further at the ballot box because of another constitutional check and balance – temporally staggered elections. The 2018 midterms catapulted Democrats back to power in the House, allowing the once-again Speaker Nancy Pelosi to effectively block any and all of President Trump's legislative priorities.

However, just as Trump's quixotic legislative quest for wall funding reveals the constitutional roadblocks that thwart many if not most presidential legislative initiatives, the case illustrates how the same institutional features give presidents significant advantages when acting unilaterally⁶⁴. Faced with a government shutdown, President Trump caved in early 2019 and signed a budget deal that failed to include any money appropriated for the wall. However, Trump had not surrendered. Blocked in Congress, Trump swiftly moved to advance wall construction unilaterally. Citing authority given to the president both by the National Emergencies Act and Article II of the Constitution, on February 15, 2019 Trump issued a proclamation declaring a national emergency along the southern border and reprogramming \$8 billion appropriated for other purposes to accelerate construction of the wall⁶⁵. From a constitutional perspective, the proclamation was particularly troubling as Trump ordered unilaterally a policy course that Congress had explicitly considered and rejected legislatively, a move that under the *Youngstown v. Sawyer* framework should put presidential power "at its lowest ebb"⁶⁶. Both chambers quickly passed a resolution revoking the emergency declaration, with twelve Senate Republicans crossing the aisle and voting against the president. But Trump vetoed the resolution, and his veto was easily sustained by fellow Republicans⁶⁷.

Congressional opponents of the president's boldest administrative moves predictably were all but powerless to combat them legislatively,

⁶⁴ W. HOWELL, *Power Without Persuasion: The Politics of Direct Presidential Action*. Princeton UP, 2003.

⁶⁵ *Presidential Proclamation on Declaring a National Emergency Concerning the Southern Border of the United States*, *Whitehouse.gov*, February 15, 2019.

⁶⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 I.S. 579 (1952).

⁶⁷ The 1983 Supreme Court decision *INS v. Chadha* striking down the legislative veto significantly altered the National Emergencies Act, requiring a joint resolution (which can be vetoed) rather than a concurrent resolution to terminate an emergency declaration.

even direct assaults on perhaps the quintessential congressional power, the power of the purse. Partisan loyalties trumped institutional ones, in direct contradiction to the hopes of the Framers expressed in *Federalist 51*.

Predictably, there were virtually no successful legislative efforts to reverse any of Trump's other unilateral gambits that represented a less direct assault on Congress' institutional prerogatives, including withdrawing the United States from the Paris climate accords; withdrawing from the Trans Pacific Partnership trade pact; banning LGBTQ Americans from serving in the United States military; withdrawing from the Iran nuclear deal; curbing civil service protections and union power for thousands of federal workers; suspending asylum rights for those crossing the southern border; greenlighting pipelines and other energy and infrastructure projects; imposing steel and other tariffs in the name of national security; issuing a flurry of pardons, including of associates who protected him during the Mueller investigation; banning racial sensitivity training in federal agencies; and waging a frontal assault on a range of environmental regulations⁶⁸.

Despite lacking an independent enforcement power, in important respects the judicial check on Trump's most brazen actions was more resilient than that imposed by Congress. As discussed previously, legal challenges – let alone successful ones – to executive orders were historically exceedingly rare⁶⁹. Moreover, even some of the rare presidential defeats, such as the landmark ruling in *Youngstown Sheet & Tube Co. v. Sawyer* (1952), may have paradoxically bolstered presidential power in the long term by emphasizing the narrow circumstances in which

⁶⁸ For an in-depth examination of Trump's efforts to use both executive orders and regulatory shifts to pursue important policy changes in health care, climate change, and education, often with little support in Congress, see: F. THOMPSON, K. WONG, and B. RABE, *Trump, the Administrative Presidency, and Federalism*, Brookings Institution Press, 2020. President Trump leaned heavily on the administrative state to pursue an aggressive deregulatory agenda, particularly concerning the environment. In just four years, Trump rolled back more than 100 rules, terminating many administrative achievements of the Obama administration, such as the clean power plan and increased automobile gasoline mileage standards. N. POPVICH, L. ALBECK-RIPKA, and K. PIERRE-LOUIS. *The Trump Administration is Reversing More than 100 Environmental Rules. Here's the Full List*, *New York Times*, November 10, 2020.

⁶⁹ W. HOWELL, *Power Without Persuasion: The Politics of Direct Presidential Action*. Princeton UP, 2003, 152-157.

courts will not defer to presidential power⁷⁰. Yet, it took less than two weeks for President Trump to suffer his first legal defeat when a federal court blocked his first executive order instituting a travel ban on citizens from seven predominantly Muslim countries from entering the United States.

During his first year in office, Trump suffered an unprecedented string of defeats in court, with the judiciary either striking down or temporarily blocking the implementation of a series of executive actions including: successive travel bans; a ban on transgender individuals serving in the military; an amendment to the implementation of the Affordable Care Act exempting certain employers from the requirement to provide contraceptive coverage; a suspension of the Obama-era rule on emissions standards for oil and gas wells; a proclamation to curtail the rights of asylum-seekers; and various efforts to deny federal funding to “sanctuary cities” that refused to cooperate with federal authorities in identifying and potentially deporting illegal aliens within the United States.

Few of these judicial defeats explicitly curbed presidential power by ruling that Trump had exceeded the constitutional limits on executive authority. Rather, most of these defeats focused on the Trump administration’s failure to comply with the procedural requirements for pursuing policy change through the administrative state. For example, after initially wavering on the future of the Deferred Action for Childhood Arrivals program (DACA) – a program established by an Obama administration memorandum that shielded from deportation and granted temporary work permits to hundreds of thousands of individuals brought to the United States illegally as children who met various criteria – President Trump in September of 2017 ordered the Department of Justice to terminate the program. Opponents of the move immediately filed suit in federal court to block the

⁷⁰ For example, Justice Jackson’s famous concurrence in *Youngstown* determined that because Congress had explicitly considered but decided against giving Truman authority such as that used to seize the steel mills, presidential power in this case was at its lowest ebb. However, it raised the specter for broad judicial deference to presidential power claims in the “zone of twilight” when Congress neither explicitly authorized a presidential action nor explicitly prohibited it. See: G. SILVERSTEIN, *Imbalance of Powers: Constitutional Interpretation and the Making of American Foreign Policy*, Oxford UP, 1997; P. BELLIA, *Executive Power in Youngstown’s Shadows*, in *Constitutional Commentary* 19/2002, 87 ss.

administration's effort, and lower federal courts granted an injunction halting the move pending final disposition. After protracted legal battles, in June 2020 the Supreme Court struck down the administration's gambit on procedural, not constitutional grounds. Justice Roberts' opinion emphasized, «the dispute before the court is not whether DHS may rescind DACA. All parties agree that it may. The dispute is instead primarily about the procedure the agency followed in doing so». Having rushed the move with inadequate planning, the Court ruled that the administration had failed to comply with «the procedural requirement that it provide a reasoned explanation for its action»⁷¹.

The DACA case was far from an anomaly. Courts were particularly assertive in striking down the Trump administration's bold efforts to influence policymaking through the regulatory process. An analysis by the Institute for Policy Integrity found that the Trump administration lost more than 130 cases, or more than 80% of the time, when its regulatory actions were challenged in court⁷². In most of these defeats, courts ruled that the administration had failed to abide by the provisions and protocols of the Administrative Procedures Act, which govern the regulatory process⁷³.

On almost any metric, the federal judiciary has offered a stronger check on President Trump's exercise of executive and administrative power than has Congress. However, it is important not to overstate the strength and breadth of this judicial check. While Trump's de-regulatory agenda has faced considerable judicial resistance, many of his boldest unilateral gambits have ultimately survived judicial scrutiny, or even avoided it altogether, and Trump has significantly shaped swaths of policy through the regulatory process.

If the resilience of formal institutional checks against Trump is mixed, what of political checks? There are good *ex ante* reasons to be skeptical that they would be as effective in restraining Trump's

⁷¹ *Department of Homeland Security v. Regents of University of California*, 591 U.S. (2020).

⁷² *Roundup: Trump-Era Agency Policy in the Courts*, Institute for Policy Integrity, New York University School of Law, 2020.

⁷³ Moreover, the Trump administration's questionable efforts to evade cost-benefit analysis requirements may well limit its ultimate effectiveness in eliminating existing regulations while inviting future legal challenges. J. MASUR and E. POSNER, *Chevronizing Around Cost-Benefit Analysis*, in *Duke Law Journal*, 70/2021.

authoritarian impulses as they proved in checking the unilateral ambitions of his predecessors. From the beginning, Donald Trump embraced a different political calculus than almost all of his presidential forbearers. Of course, base mobilization politics – prioritizing appeals to core supporters over courting the median voter – is nothing new in American politics⁷⁴. However, most presidents still worry about the median voter and are wary of taking executive actions that threaten to erode their aggregate public support⁷⁵. Trump, the political neophyte, has long operated on a different set of assumptions. Even before the first voters headed to the polls in the 2016 Republican nominating process, Trump publicly marveled about the loyalty of his core supporters, boasting: «I could stand in the middle of 5th Avenue and shoot somebody and I wouldn't lose any voters, OK? It's, like, incredible»⁷⁶. Trump's bombastic claim produced laughs from some and gasps from others, but it offered an important glimpse into his political mind. Throughout the primaries and caucuses of the nominating process and then during the general election campaign, political pundits almost universally pontificated that Trump's base gave him a high floor of support, but that he also had a low ceiling⁷⁷. His base was rabid, but ultimately too small to win. Of course, Trump proved his doubters wrong and showed a remarkable capacity to turn out his base, including traditionally low

⁷⁴ For a good discussion of the relative electoral payoff of seeking to mobilize swing voters versus core supporters, see: S. HILL, *Changing Votes or Changing Voters? How Candidates and Election Context Swing Voters and Mobilize the Base*, in *Electoral Studies*, 48/2017, 131 ss.; T. HOLBROOK and S. McCLURG, *The Mobilization of Core Supporters: Campaigns, Turnout, and Electoral Composition in United States Presidential Elections*, in *American Journal of Political Science*, 49, n. 4/2005, 689 ss.

⁷⁵ A 50% public job approval rating has long been considered a critical “break-even point” for presidents seeking reelection. Candidates above the threshold tend to win; those below it are electorally endangered. For a classic exposition, see R. BRODY and L. SIGELMAN, *Presidential Popularity and Presidential Elections: An Update and Extension*, in *Public Opinion Quarterly*, 47, n. 3/1983, 325 ss. For an update with more recent data, see: J. JONES, *Presidential Job Approval Related to Reelection Historically*, *Gallup*, 2020.

⁷⁶ C. DWYER, *Donald Trump: “I Could... Shoot Somebody, and I wouldn't Lose any Voters”*, *NPR.com*, January 23, 2016.

⁷⁷ As just one example, see: N. COHN, *How Donald Trump Could Win, and Why He Probably Won't*, *New York Times*, December 15, 2015.

propensity voters⁷⁸. Once in office, Trump used his office's unilateral powers to pursue policies that would please his base to an unparalleled extent.

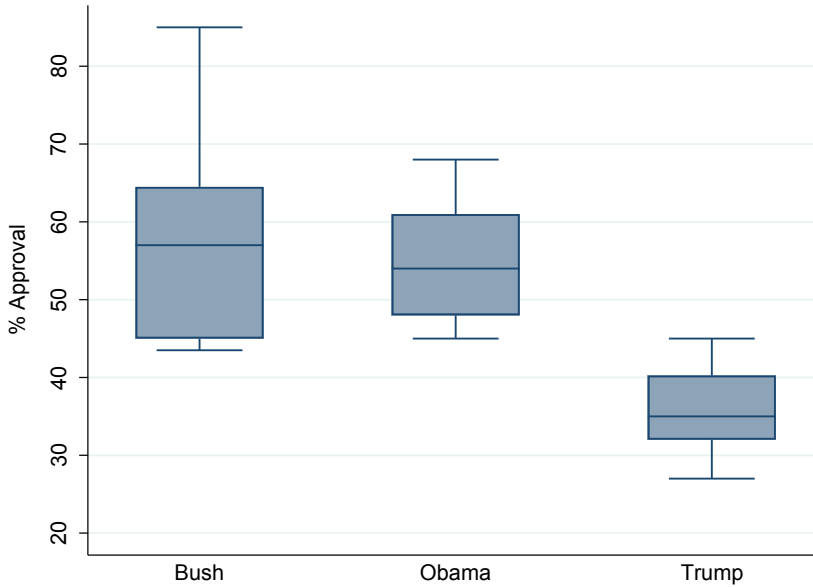
Perhaps the most distinguishing feature of Trump's exercise of the presidency's unilateral powers is the limited basis of popular support for his unilateral directives. If presidents are sensitive to the political costs they stand to incur by acting contrary to public opinion, most executive actions that they do take should enjoy broad public support. To test this hypothesis, recent research collected all available public opinion data from the archives of the Roper Center for Public Opinion Research concerning unilateral actions taken by the last three American presidents, George W. Bush, Barack Obama, and Donald Trump. Figure 1 shows the distribution of public support for the actions taken by each president for which polling data is available⁷⁹. The disjunction between Trump and his predecessors is unmistakable. The median executive action taken by Presidents Bush and Obama enjoyed strong majority support. Only a small number of actions taken by either president were not supported by a majority of Americans, and in no case did a majority of Americans disapprove of an action taken by either president⁸⁰. By contrast just over one in three Americans, 35%, approved of the median executive action taken by Donald Trump, and a majority explicitly disapproved.

⁷⁸ D. GALVIN, *Party Domination and Base Mobilization: Donald Trump and Republican Party Building in a Polarized Era*, in *The Forum*, 18, n. 2/2020, 135 ss.

⁷⁹ The data is taken from Christenson and Kriner, *The Myth of the Imperial Presidency*, and updated through President Trump's May 2020 executive order targeting the legal protections enjoyed by social media platforms under Section 230 of the Communications Decency Act of 1996. Before 2001, poll questions explicitly querying public support for executive actions were exceedingly rare; for example, a search of the Roper holdings yielded opinion data on only two unilateral actions taken by President Clinton during his eight years in office.

⁸⁰ The poll questions gave subjects three options: approve, disapprove; or neither/unsure.

Figure 1: Public Approval of Unilateral Actions Taken by Bush, Obama, and Trump



Whereas both Presidents Bush (43) and Obama exercised their unilateral power strategically, occasionally winning important policy victories they could not have achieved legislatively, both did so with a careful eye toward the reaction of the general public. Neither routinely pursued bold action that risked provoking a public backlash and the attendant political costs. By contrast, Trump consistently pursued unilateral gambits that played to his base, even at the cost of alienating the median voter. On this metric, Trump certainly appears less constrained by public opinion than his predecessors. At the very least, his political calculus is clearly different. Trump did not shy away from aggressive and controversial unilateral action, but rather frequently embraced it, provided that it appealed to his core supporters.

But from another perspective, Trump does not look all that exceptional. Empirical analysis of the frequency with which presidents issue significant executive actions – those that received at least one mention in the *New York Times* within one year of issuance – provides only modest evidence of Trumpian exceptionalism. Statistical analyses show that Trump issued modestly more significant executive orders

and other types of major unilateral directives than prior presidents, after controlling for a range of factors that past research has shown to influence executive order issuance. However, the differences are not overwhelming; many of these actions reversed moves taken by President Obama; and many others seemed superficially important, but were of little substantive impact⁸¹. Trump has used power differently, but not necessarily that much more frequently.

Finally, an examination of several high-profile cases reveals that even President Trump, at least in certain contexts, appears sensitive to the political costs of popular backlash. The best evidence with which to assess the influence of public opinion and political checks on presidential unilateralism would be to assemble a comprehensive database of all executive actions presidents considered taking, or even contemplated, and then analyze the factors that predict when presidents do act versus when they forgo a unilateral response. Unfortunately, many such cases will leave few observable traces, thwarting systematic analysis. However, the Trump administration produced several clear examples of the proverbial “dogs that didn’t bark” that clearly speak to the checking power of public opinion and political backlash. For example, during the 2016 campaign, Trump routinely promised as president to bring back waterboarding «and a hell of a lot worse» to interrogate suspected terrorists. Five days after Trump’s inauguration, the *Washington Post* leaked a draft executive order circulating in the White House that would follow through on Trump’s pledge by revoking two Obama-era executive orders banning torture and closing the terrorist detention center at Guantanamo; directing the CIA to consider reinstating “enhanced interrogation techniques”; and re-opening the door for the use of “black site” prisons overseas⁸². The leaked order unleashed an avalanche of vociferous criticism from Capitol Hill, including from

⁸¹ Another potential factor that might inflate Trump’s totals is the media’s penchant for (over)covering all things Trump. For the analyses, see: D. CHRISTENSON and D. KRINER, *The Myth of the Imperial Presidency*, Chicago UP, 2020; D. CHRISTENSON and D. KRINER, *Beyond the Base: Presidents, Partisan Approval, and the Political Economy of Unilateral Action*, in *Journal of Political Institutions and Political Economy*, 1/2020, 79 ss.

⁸² The draft order is “Detention and Interrogation of Enemy Combatants,” available on *New York Times*. For an analysis of what the order would and would not have done, see: J. GOLDSMITH, *Trump’s Self-Defeating Order on Interrogation, Lawfare*, January 25, 2017.

many of the president's fellow Republicans. In the face of the public firestorm, the administration backed down and never moved on the order, or on a watered-down version leaked by the *New York Times* several weeks later⁸³.

In the case of family separations at the southern border, Trump acted unilaterally despite some initial opposition. In May of 2018, the administration announced its implementation of a “zero tolerance policy” under which all adults apprehended along the Mexican border would be arrested and taken into federal custody. The policy made no exceptions for asylum seekers or family units⁸⁴. Within weeks, media stories illustrating the human trauma caused by the policy, including a *Washington Post* report on a Honduran man who committed suicide after being separated from his wife and children, captured public attention and stoked outrage. The popular backlash was fueled again by vocal criticisms of the administration's move from politicians across the political spectrum from House Speaker Nancy Pelosi and Texas Democratic Congressman Beto O'Rourke to Arizona Republican John McCain and former First Lady Laura Bush. Consistent with this surge of elite criticism, surveys also showed almost 70% of Americans opposed to the president's policy⁸⁵. On June 20, Trump executed an abrupt about-face, terminating his own policy shift via executive order. In these and other prominent cases, Trump's approach clearly demonstrate the continued power of public opinion and political checks to constrain unilateralism, at least in specific contexts.

A final characteristic of many of Trump's executive actions that speak both to his different political calculus and to the influence of

⁸³ For the second order, see: C. SAVAGE, *Draft Trump Order on ISIS Detainees and Guantanamo*, *New York Times*, February 8, 2017. For a discussion of another Trump reversal in which Trump backed off his threat not to impose legally mandated sanctions on Russia for election interference in the face of congressional outcry, see D. KRINER and E. SCHICKLER, *The Resilience of Separation of Powers? Congress and the Russia Investigation*, in *Presidential Studies Quarterly*, 48, 3/2018, 436 ss., 449 ss.

⁸⁴ *The Trump Administration's 'Zero Tolerance' Immigration Enforcement Policy*, *Congressional Research Service*, 2019.

⁸⁵ For an overview, see D. CHRISTENSON and D. KRINER, *The Myth of the Imperial Presidency*, 193-195. For experimental research showing the critical role that congressional criticism plays in spurring a popular backlash against unilateral action, see: D. CHRISTENSON and D. KRINER, *Mobilizing the Public Against the President: Congress and the Political Costs of Unilateral Action*, in *American Journal of Political Science*, 61, n. 4/2017, 769 ss.

political checks on his authoritarian instincts is that while many of Trump's actions appeared bold, the substantive effect of many such actions was significantly less than might initially meet the eye. Throughout his presidency, Trump made few efforts to hide his brazen exercise of executive power – more than any of his predecessors, he seemed to revel in publicizing it. But like much of his presidency writ large, many of these actions were more about showmanship than substance. Trump's belated unilateral response to the economic crisis precipitated by Covid-19 is a case in point. As a summer second wave of Covid-19 infections threatened the fragile economic recovery, President Trump proved unable to cut a deal with House Democrats and Senate Republicans on relief legislation. While the House passed a large package, the HEROES Act, Senate Republicans refused to take up the legislation and offered little in the way of compromise. As negotiations floundered, in August 2020 Trump signed four executive orders that he said would bypass Congress and deliver desperately needed emergency aid to millions of Americans. The only problem is that the orders had little tangible effect on policy, let alone on Americans' pocketbooks. Congress still controls the purse strings and writes the nation's tax laws; as a result, Trump's orders to extend unemployment insurance and temporarily cut (technically, "defer") payroll taxes did little more than create confusion among state and federal officials⁸⁶.

And then there are the almost purely symbolic actions that Trump has issued – actions that were consciously designed to invite controversy while exciting his base. For example, to push back against a movement to place a greater emphasis on the role of slavery and racism as a driver of American history, as encapsulated by the *New York Times Magazine's* "1619 Project", which proposed the year that the first African slave arrived in Virginia as the true founding of America, Trump issued an executive order to create a "1776 Commission", to explore ways to reaffirm the nation's traditional "birthday" based on the Declaration of Independence and to promote "patriotic education"⁸⁷. Or in the waning days of the 2020 election, Trump signed an

⁸⁶ For discussion and analysis, see E. COCHRANE, A. RAPPEPORT, and L. BROADWATER. *Trump's Orders on Coronavirus Relief Create Confusion*, *New York Times*, August 9, 2020; A. RUDALEVIGE, *Trump's Latest Executive Actions Have 3 Big Problems*, *Washington Post*, August 12, 2020.

⁸⁷ *Executive Order on Establishing the President's Advisory 1776 Commission*, *Whitehouse.gov*, November 2, 2020.

executive order that barred federal contractors from employing racial bias trainings that are “blame-focused”⁸⁸. Broadcasting populist bravado and showcasing strength for his base, not affecting tangible policy change, was Trump’s primary goal.

In these and similar cases, whether the tangible effects of Trump’s actions were so limited is because Trump was actually constrained – legally or politically – or because he simply had little interest in actually using (or abusing) his power to effect meaningful change is impossible to say. However, it is important to remember that the ultimate effect of many, though not of all of Trump’s actions was often less than it might superficially appear.

Finally, there is one more inherent check on the power of executive action: its relative impermanence. Laws are difficult to pass in the American system, and once enacted, they are difficult to rescind, as the battle over the Affordable Care Act so clearly demonstrated. By contrast policy shifts achieved unilaterally are more ephemeral. Trump succeeded in undermining and reversing many of President Obama’s most important unilateral accomplishments. And President-elect Biden will almost certainly return the favor, sweeping away as many of Trump’s actions as possible with the stroke of a pen. Regulatory changes are more resistant to change, hence the myriad of judicial defeats the Trump administration suffered because of its failure to follow the required procedures and protocols. However, here, too, given enough time, the Biden administration will undoubtedly start chipping away at Trump’s regulatory policy shifts.

In one sense, the policy legacy left by four years of Donald Trump is steep indeed – and it will be measured most dramatically by the hundreds of thousands of American deaths that resulted from his administration’s failed response to the Covid-19 pandemic. Similarly, the human suffering caused by Trump’s travel bans, family separations, immigration crackdowns, and other policies is tragic. But a broader assessment of Trump’s ultimate impact suggests that Trump’s unfocused approach to policymaking and lack of real ambition to effect sweeping change, coupled with the resilience of checks – both formal and political, to varying degrees – on Trump’s authoritarian tendencies and efforts to seize and wield political power limited his lasting mark on public policy.

⁸⁸ *Executive Order on Combatting Race and Sex Stereotyping*, *Whitehouse.gov*, September 22, 2020.

5. Ramifications for the Future of American Democracy

While Trump's ultimate impact on policy may prove limited, his chaotic four years in office may have lasting ramifications for American democracy. Many scholars and analysts alike have focused on the severe damage Trump inflicted on long-standing democratic norms. His unprecedented efforts to overturn the results of the free and fair election that saw him lose to Joe Biden in both the Electoral College and the popular vote – by more than 7 million ballots in the latter – has only added an exclamation mark to the assault on democratic norms Trump launched throughout his presidency. These attacks are dangerous – they fuel polarization and even rising tribalism that had begun before Trump and grossly accelerated since. One might even say that Trump's open defiance of the peaceful transition of power cuts to the core of democracy itself.

However, the core focus of this essay is on the institutional and political checks on presidential power over policymaking, including the continued vitality of checks on the president's superficially seemingly unbridled exercise of unilateral executive power. Steven Levitsky and Daniel Ziblatt have argued that an erosion of a key democratic norm, institutional forbearance – avoiding actions that while technically legal or constitutional permissible violate the spirit of such constraints – has emboldened unilateralism and threatened the safeguards of American democracy⁸⁹. Critically, Levitsky and Ziblatt argue the erosion of this norm began long before Trump. However, as discussed previously, politics and public opinion nonetheless have constrained presidents' exercise of their office's broad powers to effect policy change unilaterally, even as these norms have weakened⁹⁰. Throughout American his-

⁸⁹ For example, Levitsky and Ziblatt call out Obama's 2010 memorandum raising fuel efficiency standards for cars and his 2012 memorandum establishing the Deferred Action for Childhood Arrivals program as examples of an erosion of the norm of institutional forbearance. Moreover, they date the beginning of this erosion to decades earlier. S. LEVITSKY and D. ZIBLATT, *How Democracies Die*, Crown, 2018, 162-163. For a similar argument, see Mark Tushnet's analysis of "constitutional hardball." M. TUSHNET, *Constitutional Hardball*, in *John Marshall Law Review* 37/2003, 523 ss.

⁹⁰ Consider Franklin Roosevelt's court packing plan, a case that Levitsky and Ziblatt put forward as an important instance where norms held. But as their discussion makes clear, it was politics – not norms – that caused FDR to back down. The move engendered significant political pushback from both Democrats and Republicans in Congress, and it was broadly unpopular with average Americans. In the face of this

tory, presidents have taken unilateral action to advance their agendas when in their political interests and eschewed unilateralism, even when they could have warded off efforts to reverse it, when the anticipated political costs are high.

From this perspective, what is most troubling about the Trump presidency is not the further weakening of norms of forbearance, but Trump's very different political calculus that encouraged him to pursue unilateral actions that appealed to his base, but not to the median voter. If Trump's calculus of political interest is embraced more broadly by his successors, it would severely weaken the political checks on unilateral action and open the door for the Framers' feared tyranny of the minority in a new form.

Perhaps the most direct threat is Trump's frontal assault on a core institutional and political check on executive aggrandizement: his war on congressional oversight, an assault aided and abetted by the institutional dereliction of his fellow Republicans on Capitol Hill. Congress scholar David Mayhew has argued that «beyond making laws, Congress probably does nothing more consequential than investigate alleged misbehavior in the executive branch»⁹¹. By shining a light on executive misconduct, congressional critics can battle the president and his administration in the court of public opinion, and both activate and intensify the strength of the political check described previously. Critically, congressional investigations are not subject to the same transaction costs, super-majoritarian requirements, and veto points that cripple efforts at legislative redress. Congress can investigate when it cannot legislate. And throughout American history, Congress has consistently employed investigations with great effect in reining in a wayward president⁹². One of the most important ways investigations have

pressure, Roosevelt backed down. Although not an example of anticipated unilateral action, the case highlights the role of politics rather than norms alone in checking presidential power grabs.

⁹¹ D. MAYHEW, *Divided We Govern: Party Control, Lawmaking, and Investigations, 1946-1990*, Yale UP, 1991, 8.

⁹² For an in-depth analysis of more than 100 years of investigative activity and the pathways through which investigations have materially influenced American politics and policymaking, see: D. KRINER and E. SCHICKLER, *Investigating the President: Congressional Checks on Presidential Power*, Princeton UP, 2016. As Huq and Ginsburg note, a limitation on the investigative check is that minority parties in the United States have limited ability to gain access to information and commence hearings. However, empirically Kriner and Schickler document that divided government

done so is by systematically eroding public support for the president and energizing a popular check on presidential overreach⁹³.

Yet, for investigative oversight to be effective, Congress must gain access to information and use it to battle the administration in the public sphere. Presidents and Congress have sparred over the scope of the investigative power and Congress' access to information since the very first congressional investigation in 1792. However, a series of Supreme Court cases in the early 20th century firmly established Congress' right to superintend the executive branch and affirmed its broad powers to acquire the necessary information to do so⁹⁴. While most administrations have occasionally chafed at congressional requests for testimony or subpoenas for documents, the Trump administration waged unconditional war on Congress' oversight powers. The Trump administration's widespread assertions of executive privilege, repeated refusals to comply with congressional subpoenas for testimony, and blanket refusals to turn over documents – even in the context of a formal impeachment inquiry when Congress' constitutional powers are at their highest – set a dangerous precedent and threaten to render Congress' investigative power as ineffective as its legislative check on executive overreach. While the most salient example, the White House's war on Congress' oversight powers went far beyond its refusal to cooperate with the impeachment inquiry. Its record of almost total obstruction encompasses a much broader effort to thwart a range of House inquiries into alleged administration improprieties, from the president's personal finances and possible violations of the Emoluments Clause, to evidence of obstruction detailed in the Mueller Report, to allegations that lax security clearance procedures jeopardized national security.

Confronted with this brazen assault on a core congressional power, Democrats – for whom partisan and institutional incentives rein-

has not silenced investigative action in the more individualistic Senate where minority members enjoy greater rights, even in periods of high polarization. Moreover, routine presidential midterm losses and the high frequency of divided government – every president since Carter has experienced it for at least part of his term – ensure that all administrations will face moments of potential investigative pressure.

⁹³ D. KRINER and E. SCHICKLER, *Investigating the President: Committee Probes and Presidential Approval, 1953-2006*, in *Journal of Politics* 76, n. 2/2014, 521 ss.

⁹⁴ For an historical overview of the investigative power and court affirmations of it, see: D. KRINER and E. SCHICKLER, *Investigating the President: Congressional Checks on Presidential Power*, Princeton UP, 2016, 9-17.

forced one another – fought back as best they could. However, for almost every Republican partisan loyalty quashed institutional loyalty. Setting aside the question of whether to vote first to impeach and then to convict President Trump and remove him from office, Republicans almost uniformly refused to do anything to defend the legislature’s institutional prerogatives from Trump’s onslaught. Witnesses refused to appear before committees and subpoenas were ignored with impunity. Far from defending Congress’ oversight power – so critical to the long-term balance of power across the branches – House Republicans during the impeachment process uniformly rallied behind their party leader, even storming the secure location where depositions were taking place to demand greater opportunities to defend the president. Senate Republicans then weakened congressional power further still.

One individual who had refused to appear before House impeachment investigators, former National Security Adviser John Bolton, sent shock waves through the political system in January 2020 by publicly communicating his willingness to testify before the Senate during the impeachment trial⁹⁵. Media reports leaked that Bolton’s forthcoming book would corroborate many of the core claims of impeachment prosecutors about Trump’s abuse of power and obstruction of justice. Yet only two Republicans – Mitt Romney and Susan Collins – voted to allow calling witnesses. In the impeachment inquiry and in a range of other investigations into alleged wrongdoing, congressional Republicans marched in lockstep with the administration, even as its obstructionist tactics neutered Congress’ investigative power and de-legitimized their authority as legislators.

This institutional surrender could have consequences lasting far beyond the Trump presidency. Meekly acquiescing to Trump’s unprecedented obstruction has set a dangerous precedent that could cripple Congress’ investigative oversight powers for the foreseeable future. If presidents can count on iron-clad support from their co-partisans as they all but eviscerate Congress’ powers of oversight, then future presidents will have strong incentives to follow in Trump’s footsteps. This could seriously undermine the political checks on presidential overreach that historically have counter-balanced the weakness of formal

⁹⁵ House investigators asked Bolton to testify voluntarily, fearing that a protracted legal battle over a formal subpoena would delay the process indefinitely. Bolton declined to appear.

institutional checks. If Congress cannot gain access to the information it needs to shine a light on presidential overreach, then the popular check risks being weakened to the point that it is no more effective than Congress' all but futile efforts at legislative redress.

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ABSTRACT

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Il saggio si occupa dell'attitudine alla resilienza che il sistema dei controlli istituzionali e politici è riuscito a sviluppare a fronte degli impulsi populistici e degli istinti autoritari emersi durante la presidenza Trump. La cosiddetta inerzia istituzionale ha infatti frenato in più occasioni la radicale agenda legislativa di Donald Trump. Il Presidente USA ha adottato un gran numero di *executive orders* per compiacere la sua base elettorale, ma la capacità di reazione del sistema giudiziario e dei controlli politico-istituzionali hanno fortemente limitato il tentativo di implementazione unilaterale dell'agenda politica di governo. La presidenza Trump ha messo in crisi in più occasioni istituti e regole della democrazia costituzionale, ma è la costante aggressione alla funzione di controllo politico del Congresso ad aver minacciato nella forma più pericolosa gli equilibri istituzionali ed il sistema di *checks and balances* che caratterizzano il costituzionalismo statunitense.

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This essay assesses the resilience of both institutional and political checks on Donald Trump's populist impulses and authoritarian instincts. Institutional inertia frustrated Trump's legislative agenda. While Trump issued an unprecedented number of orders that delighted his base but alienated the median voter, a combination of judicial pushback and political checks limited his ability to advance his agenda unilaterally. Trump has broken cherished democratic norms; but it is his assault on congressional oversight and political checks that most threatens the constitutional balance of power.



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