

10-2024

## Donald Trump and the Collapse of Checks and Balances

David M. Driesen  
*Syracuse University College of Law*

Author(s) ORCID Identifier:

 <https://orcid.org/0000-0002-5698-346X>

---

### Recommended Citation

David M. Driesen, *Donald Trump and the Collapse of Checks and Balances*, 77 SMU L. REV. F. 199 (2024)

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review Forum by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

# SMU Law Review Forum

Volume 77

2024

199-218

## DONALD TRUMP AND THE COLLAPSE OF CHECKS AND BALANCES

*David M. Driesen\**

### INTRODUCTION

The Supreme Court recently decided to immunize the President from criminal charges for official misconduct.<sup>1</sup> That decision raises questions about whether anything remains of the checks and balances that might prevent a president from establishing an autocracy.

In the *Youngstown* case, Justice Jackson explained that “Party loyalties . . . extend [the President’s] effective control into branches of government other than his own.”<sup>2</sup> Partisan division can make this effective control lethal to democracy, rendering the courts and Congress useless or worse in checking a president aiming to establish an autocracy.<sup>3</sup>

This Essay analyzes Donald Trump’s erosion of checks and balances during his presidency and how President Trump will likely seek to complete their collapse if he regains power. Its First Part shows that congressional willingness to check presidential abuses of power declined during Trump’s presidency and will likely get much weaker in a second term. It also shows that President Trump figured out how to evade checks and balances from Congress in his first term and examines his plans to further usurp congressional powers. Part Two looks at the judicial role in facilitating or checking presidential power through a lens sharpened by an effort to understand how checks and balances might collapse.

---

DOI: <https://doi.org/10.25172/slrf.77.1.7>

\* University Professor, Syracuse University. I thank Laura Dickinson for extremely helpful comments and Garrison Funk for research assistance but take full responsibility for any errors.

1. See *Trump v. United States*, 144 S. Ct. 2312, 2331 (2024) (6–3 decision) (creating immunity from criminal prosecution for criminal acts “within the outer perimeter of” the President’s “official responsibility”).

2. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

3. See DANIEL ZIBLATT & STEVEN LEVITSKY, *HOW DEMOCRACIES DIE* 9 (2018) (explaining how political polarization can defeat democracy’s “guardrails”); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2321–25 (2006) (explaining that congressional representatives are usually more loyal to their political party than to Congress as an institution).

This Essay's analysis enables us to see how events that most observers experience as a series of disconnected dramatic clashes over policy (or that largely escape notice altogether) have partially collapsed the constraints that constitutional democracy depends upon, and how this collapse will likely accelerate if Trump becomes President again.

## I. THE COLLAPSE OF CONGRESSIONAL CONSTRAINT

This Part evaluates the extent to which Congress has proven and will prove willing to exercise its powers to check President Trump. And it will examine the extent to which President Trump collapsed separation of powers by evading congressional constraints in his first term and what sorts of evasion we can expect in a second.

During President Trump's presidency, Congress sometimes checked presidential abuse of executive power. For example, congressional opposition helped end an illegal policy of discouraging immigration by separating children from their parents.<sup>4</sup> Congress also opposed President Trump's efforts to build a wall on the southern border by limiting funding and passing a joint resolution to stop Trump from invoking emergency powers to circumvent the funding limitation.<sup>5</sup>

Yet, President Trump found ways to avoid congressional constraints found in the Constitution. This Part's treatment of evasion focuses on how he did so unilaterally, leaving treatment of judicial decisions hindering or aiding the collapse of checks and balances to the next Part. But an important point about the judicial role merits emphasis here. Congress cannot enforce its acts against the President. When it tries to constrain presidential abuse, its efforts will fail if the courts refuse to enforce legislation. Congress can, for example, cut off funding of executive branch measures it disapproves of, but it cannot prevent the President from using the money anyway. It necessarily relies on the courts for that.

### A. DEFEATING THE SENATE CONFIRMATION CHECK

A president wishing to rule as a dictator instead of faithfully executing law requires the aid of officials willing to do his bidding.<sup>6</sup> Complete presidential control over the executive branch of government aids the establishment of dictatorship.<sup>7</sup> The Senate, as part of the legislative branch, should have an

---

4. Miles Parks et al., *Trump Signs Order to End Family Separations*, NPR (June 20, 2018, 11:51 AM), <https://www.npr.org/2018/06/20/621798823/speaker-ryan-plans-immigration-votes-amid-doubts-that-bills-can-pass> [<https://perma.cc/YYL3-RCXQ>] (explaining that Trump's order to end family separations came days before Congress was scheduled to vote on the issue).

5. *Sierra Club v. Trump*, 379 F. Supp. 3d 883, 892–95 (N.D. Cal. 2019), *aff'd* 963 F.3d 874 (9th Cir. 2020), *vacated as moot sub nom. Biden v. Sierra Club*, 142 S. Ct. 46 (2021).

6. See TOM GINSBURG & AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* 105 (2018) (explaining that autocratic leaders rarely personally violate individual rights but rely on the willingness of elements of the bureaucracy to “capitulate”).

7. See DAVID M. DRIESEN, *THE SPECTER OF DICTATORSHIP: JUDICIAL ENABLING OF PRESIDENTIAL POWER* 4–5 (2021) (explaining that complete head of state control over the executive branch of government “constitutes the heart of what an autocracy is”); *cf.* GINSBURG & HUQ, *supra* note 6, at 102–07, 150 (discussing the role of civil servants and norms of agency

interest in preventing “obsequious” instruments of presidential “pleasure” (paraphrasing Alexander Hamilton) from obtaining appointments, thereby defeating presidential control of executive officers as a means of establishing an autocracy.<sup>8</sup>

President Trump, however, often defeated the check provided by the need for Senate confirmation of key officeholders during his first term through unilateral appointment of acting officials, often after removing Senate-confirmed incumbents.<sup>9</sup> This evasion proved especially significant with respect to the components of the Department of Homeland Security involved in policing immigration. The Constitution authorizes the President to combat public disorder by sending the militia at the request of a state government.<sup>10</sup> When rioters attacked Portland, Oregon’s federal building, Oregon officials did not seek federal help as they suggested that this “assistance” would simply fan the flames they were trying to extinguish.<sup>11</sup> President Trump sent “help” anyway, in the form of paramilitary units tasked with policing immigration. These paramilitary units scooped up and briefly detained citizens having nothing to do with the Federal Building, and even beat a veteran who questioned their authority.<sup>12</sup> All of the heads of the units involved in this paramilitary action against Oregon citizens were “Officers of the United States” who are supposed to be subject to Senate confirmation.<sup>13</sup> But none of the people who led this

---

independence in protecting democracy and the dismantling of bureaucratic independence as part of a drive to autocracy).

8. THE FEDERALIST No. 76 (Alexander Hamilton).

9. See Nina A. Mendelson, *The Permissibility of Acting Officials: May the President Work Around Senate Confirmation?*, 72 ADMIN. L. REV. 533, 539 (2020) (noting that about two-thirds of the way into Trump’s administration about one-third of “key” posts were not filled with Senate-confirmed officials); Anne Joseph O’Connell, *Actings*, 120 COLUM. L. REV. 613, 643, 650–55 (2020) (analyzing how Trump has “used more acting secretaries than confirmed secretaries” and evaded Senate confirmation for subcabinet positions more often than his predecessors).

10. U.S. CONST., art. IV, § 4; cf. *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 29–32 (1827) (recognizing the President’s authority as commander in chief to “call forth” a state militia in an emergency). See generally WILLIAM C. BANKS & STEPHEN DYCUS, *SOLDIERS ON THE HOME FRONT: THE DOMESTIC ROLE OF THE AMERICAN MILITARY* (2016).

11. See, e.g., Bill McCarthy, *The Federal Government Crackdown in Portland: What You Need to Know*, POLITIFACT (July 22, 2020), <https://www.politifact.com/article/2020/jul/22/federal-government-crackdown-portland-what-you-nee/> [<https://perma.cc/9NRX-Y2AT>] (stating that federal agents’ “crackdown” was “against the wishes of Oregon’s elected leaders”).

12. See *Index Newspapers LLC v. City of Portland*, 480 F. Supp. 3d 1120, 1142–46 (D. Or. 2020) (discussing evidence that federal forces attacked journalists and legal observers); Katie Shepherd & Mark Berman, *‘It Was Like Being Preyed Upon’: Portland Protestors Say Federal Officers in Unmarked Vans Are Detaining Them*, WASH. POST (July 17, 2020, 8:24 PM), <https://www.washingtonpost.com/nation/2020/07/17/portland-protests-federal-arrests/> [<https://perma.cc/XG9C-ABV3>]; John Ismay, *A Navy Veteran Had a Question for Feds in Portland. They Beat Him in Response.*, N.Y. TIMES (July 22, 2020), <https://www.nytimes.com/2020/07/20/us/portland-protests-navy-christopher-david.html> [<https://perma.cc/QB8Y-AUPD>] (noting that Christopher David was beaten and suffered a fractured hand after attempting to ask officers about the constitutionality of their actions); Jonathan Levinson & Conrad Wilson, *Federal Law Enforcement Use Unmarked Vehicles to Grab Protesters Off Portland Streets*, OR. PUB. BROAD. (July 16, 2020, 7:46 PM), <https://www.opb.org/news/article/federal-law-enforcement-unmarked-vehicles-portland-protesters/> [<https://perma.cc/2LVQ-P73F>] (noting that officers detained individuals away from federal property who were not engaging in criminal activity).

13. David M. Driesen, *Making Appointment the Means of Presidential Removal of Officers of the United States*, 26 LEWIS & CLARK L. REV. 315, 316–17 (2022) (explaining that the heads of DSHS, ICE, USCIS, and CBP hold positions subject to Senate confirmation).

liberty attacking invasion of Portland were Senate-confirmed.<sup>14</sup> Rather, President Trump put them in place unilaterally and often illegally as “acting” officials after the President removed Senate-confirmed officials whom he had previously appointed.<sup>15</sup> President Trump has thus demonstrated how a president can defeat constitutional checks and balances to physically attack political opponents: remove Senate approved officials and appoint lackeys unilaterally to do one’s own bidding, all while evading the obstacle of Senate confirmation.<sup>16</sup> If Democrats control the Senate or Senate Republicans reject nomination of officials that are loyal to Trump instead of the law, President Trump will likely again appoint acting officials unilaterally to evade the confirmation check.<sup>17</sup>

Steve Bannon has announced that Trump plans to invoke the Insurrection Act to take down anti-Trump demonstrators if he is elected.<sup>18</sup> And Trump has obliquely confirmed this, saying that he would establish a dictatorship for a day.<sup>19</sup> If Trump succeeds in getting armed men to shoot or detain peaceful protestors at the outset of his presidency, he will have done a lot to intimidate potential opposition to an effort to establish a dictatorship.

President Trump can use his authority to appoint acting officials to take control over entities that could use authority ostensibly provided by the Insurrection Act.<sup>20</sup> He could then characterize demonstrations against him as rebellions and order the demonstrators to go home. If they did not, his forces could presumably arrest or attack demonstrators. If he could not persuade the military to abuse Insurrection Act authority in this way, he might again deploy immigration agencies, characterizing them as “armed forces,” which he has authority to use against rebellions.<sup>21</sup>

If the Republicans control the Senate, they may choose to rubber stamp appointment of officials that are dedicated to establishing Trump’s dictatorship and hostile or indifferent to the rule of law. Thus, the Senate appointments

---

14. *Id.* at 317 & n.8.

15. *See id.* at 318–19 (providing details on the histories of the relevant officials).

16. *See id.* at 319 (explaining that the Portland case illustrates the general principle that removal followed by unilateral appointment of acting officials can make Senate confirmation “a sham”).

17. *See* PROJECT 2025 PRESIDENTIAL TRANSITION PROJECT, MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 136 (2023) [<https://perma.cc/4UWP-C8AA>] (recommending “an aggressive approach to Senate-confirmed leadership positions” in DHS by using acting appointments); O’Connell, *supra* note 9, at 617 & n.1, 643 (explaining that Trump had more acting than confirmed cabinet members, and quoting his admission that he liked the “flexibility” of acting appointments).

18. *See, e.g.*, Isaac Arnsdorf et al., *Trump and Allies Plot Revenge, Justice Department Control in a Second Term*, WASH. POST (Nov. 7, 2023, 1:27 PM), <https://www.washingtonpost.com/politics/2023/11/05/trump-revenge-second-term/> [<https://perma.cc/4YA6-ABUP>] (stating that Trump associates are “drafting plans to potentially invoke the Insurrection Act on his first day in office to allow him to deploy the military against civil demonstrations”).

19. Jill Colvin & Bill Barrow, *Trump’s Vow to Only Be a Dictator on ‘Day One’ Follows Growing Worry Over His Authoritarian Rhetoric*, ASSOCIATED PRESS (Dec. 7, 2023, 7:58 PM), <https://apnews.com/article/trump-hannity-dictator-authoritarian-presidential-election-f27e7e9d7c13fabbe3ae7dd7f1235c72> [<https://perma.cc/R2JQ-G4KZ>] (quoting Donald Trump) (“[O]ther than day one . . . I’m not a dictator.”).

20. 10 U.S.C. § 252.

21. *See id.*

constraint can collapse either because the President's overweening influence causes the Senate to not check the President as intended by the Constitution, or because the President evades the constraint. Either way, it fails.

## B. IMPEACHMENT

The ultimate check on presidential abuse of power is impeachment. But Thomas Jefferson expressed doubt that impeachment would provide a significant constraint on abuse of presidential power because of the personal loyalty the President could command.<sup>22</sup> President Trump's experience with impeachment seems to have demonstrated this view's accuracy.

The House of Representatives impeached President Trump twice. It impeached him the first time for withholding arms from Ukraine to force a country facing a soon to be realized threat of military invasion from Russia to investigate Joe Biden.<sup>23</sup> This abuse followed Trump's effort to get the Department of Justice (DOJ) to investigate Biden and other political opponents.<sup>24</sup> The second impeachment followed Trump's attempt to resist the peaceful transition of power by sparking an invasion of the Capitol.<sup>25</sup>

In the two impeachment proceedings, Congress showed that loyalty to party may trump loyalty to democratic institutions and the rule of law in Congress. Republicans in the Senate defeated both efforts to remove Trump from office.<sup>26</sup> Yet, both parties threatened to impeach President Nixon during the last presidential attack on fair elections and independent prosecution, when allies of the Nixon administration burglarized the office of his opposition's party in a search for dirt and Nixon fired top DOJ officials to prevent subsequent investigation.<sup>27</sup> The contrast between these two cases suggests that institutional loyalties can overcome partisan division in Congress to check especially egregious conduct at times. But during times of partisan division, Congress may fail to restrain even egregious and obvious autocratic conduct.

This dependence of effective congressional restraint of presidential abuse of power on bipartisan allegiance to the rule of law suggests that partisan division can threaten democracy's survival.<sup>28</sup> When partisans view a possible loss of an election as irredeemable, elected officials may cease to function as restraints on autocratic behavior and may even aid the establishment of dictatorship to protect party interests. Many Republican Senators failed to perform their duty under the Constitution's removal provision precisely because they saw barring Trump

---

22. Letter from Thomas Jefferson to Adamantios Coray (Oct. 31, 1823), NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founds.archives.gov/documents/Jefferson/98-10-02-3837> [<https://perma.cc/KV2Q-X3EY>].

23. H.R. Res. 755, 116th Cong. (2019).

24. See, e.g., Isaac Arnsdorf et al., *supra* note 18 (discussing both Trump's unsuccessful efforts to get the DOJ to go after his political opponents during his first term and his plans to succeed at doing so in his second).

25. H.R. Res. 24, 117th Cong. (2021).

26. Library of Congress, *ArtII.S4.4.9 President Donald Trump and Impeachable Offenses*, CONST. ANNOTATED, [https://constitution.congress.gov/browse/essay/artII-S4-4-9/ALDE\\_00000035/](https://constitution.congress.gov/browse/essay/artII-S4-4-9/ALDE_00000035/) [<https://perma.cc/72VV-D998>] (noting how Trump was not convicted in either impeachment proceeding).

27. See Driesen, *supra* note 13, at 336–41.

28. See *id.* at 338–39, 359–60.

from running as likely to produce an election loss for themselves and their party.<sup>29</sup> It is possible that they see such a loss as likely to prove permanent, because demographic change is strengthening the hands of minorities in elections and because economic inequality has eroded support for the Republican Party's traditional advocacy of big business interests.<sup>30</sup>

### C. VERY RECENT SIGNS OF THE DEATH OF CONGRESSIONAL CHECKS

There are signs that the willingness of Congress to check presidential power may collapse altogether in a second Trump term. Trump's political power as a mere candidate has already led to a partial collapse of one of the prerequisites for vibrant separation of powers: a Congress willing to enact the policies favored by a majority of elected representatives into law. Far right lawmakers supportive of the ex-President made Kevin McCarthy's speakership untenable.<sup>31</sup> After he resigned, some Republican lawmakers reportedly favored electing a somewhat moderate majority leader who might cooperate with Democrats to pass bipartisan legislation enjoying majority support.<sup>32</sup> President Trump signaled his disapproval and this effort to have a speaker who might permit the majority of the House's members to shape legislation died.<sup>33</sup>

President Trump endorsed Jim Jordan for Speaker.<sup>34</sup> But the House, in a secret ballot, rejected him, apparently due to threats of violence aimed at

29. See, e.g., Ryan Goodman & Josh Asabor, *In Their Own Words: The 43 Republicans' Explanations of Their Votes Not to Convict Trump in Impeachment Trial*, JUST SEC. (Feb. 15, 2021), <https://www.justsecurity.org/74725/in-their-own-words-the-43-republicans-explanations-of-their-votes-not-to-convict-trump-in-impeachment-trial/> [<https://perma.cc/4LPG-PUGG>] (discussing the reasons given by all 43 Republican Senators for voting not to convict Trump in his second impeachment trial).

30. Cf. Talmon Joseph Smith, *Wrestling With Inequality, Some Conservatives Redraw Economic Blueprint*, N.Y. TIMES (Sept. 5, 2023), <https://www.nytimes.com/2023/09/05/business/economy/economy-republicans-inequality.html> [<https://perma.cc/J542-JXXW>] (noting that more than half of low-income Republicans support higher taxes on the wealthy and that more conservatives support policies aimed at assisting the middle class).

31. Scott Wong & Sahil Kapur, *Rep. Kevin McCarthy, the Ousted Speaker, Announces He's Leaving Congress*, NBC NEWS (Dec. 6, 2023, 12:33 PM), <https://www.nbcnews.com/politics/congress/rep-kevin-mccarthy-ousted-speaker-announces-leaving-congress-rcna128139> [<https://perma.cc/C9S3-V4CV>] (noting McCarthy's diminished presence following his ousting as Speaker of the House).

32. See Lisa Mascaro et al., *Tom Emmer Withdraws Bid for House Speaker Hours After GOP Nomination*, PBS NEWS (Oct. 24, 2023, 5:55 PM), <https://www.pbs.org/newshour/politics/tom-emmer-withdraws-bid-for-house-speaker-hours-after-gop-nomination> [<https://perma.cc/UH62-L4S4>] (noting that Emmer won an initial vote for Speaker of the House and that some Democrats saw him as "a potential partner in governing the House").

33. Brett Samuels, *Trump Comes Out Against Emmer for Speaker: 'Would be a Tragic Mistake'*, THE HILL (Oct. 24, 2023, 2:41 PM), <https://thehill.com/homenews/campaign/4272938-trump-emmer-speaker-tragic-mistake/> [<https://perma.cc/NKS6-F3B9>] (noting that Trump called Emmer a "RINO" and stated that his voters would not support him).

34. Farnoush Amiri & Jill Colvin, *Donald Trump Endorses Jim Jordan to Succeed Kevin McCarthy as House Speaker*, ASSOCIATED PRESS (Oct. 6, 2023, 10:58 AM), <https://apnews.com/article/trump-speaker-mccarthy-capitol-hill-432f89f6826b2b4f51990ae4b4d293fb> [<https://perma.cc/4F86-HK5H>].

Republican members of Congress who did not support his candidacy.<sup>35</sup> Instead, the House chose another Trump-endorsed candidate, Mike Johnson, who had spearheaded Trump's attack on the 2020 election through lawsuits.<sup>36</sup>

The Speaker of the House has the ability to block legislation because he generally controls what matters come to a vote in the House.<sup>37</sup> In the wake of Johnson's election, Congress struggled to enact a budget, failed, for several crucial months, to provide funding to aid Ukraine, and did not pass a bipartisan compromise on immigration reform which appeared to enjoy majority support in Congress.<sup>38</sup> Johnson's use of his post to thwart immigration reform apparently stemmed from Trump's desire to avoid progress on that front during Biden's term, lest it undermine Trump's effort to use the "border security" issue to beat Biden—now Vice President Harris—in the 2024 election.<sup>39</sup> Trump's influence over the choice for Speaker demonstrates how, even as a mere candidate for President, he holds enough control of the House to use it as an instrument of advancing his own desire for power at the expense of its policymaking role as an independent branch of government.

#### D. PARTY LINE VOTES IN A SECOND TERM

If Donald Trump is re-elected President, the extent of his control over Congress will depend on whether his party gains control over Congress. If his party fails to gain control of Congress, Congress may occasionally act to check him. But absent a political transformation sufficient to make impeachment a viable option, congressional influence may be quite limited.

If the opposition party has control over both houses of Congress, it might appear that Congress could pass legislation to check President Trump's power.

---

35. See CST Editorial Board, *In U.S. House Speaker Battle, Threats Aimed at Lawmakers Undermine Democracy*, CHI. SUN TIMES (Oct. 22, 2023, 11:00 AM), <https://chicago.suntimes.com/2023/10/22/23925840/politics-violence-threats-house-speaker-vote-jim-jordan-democracy-republicans-editorial> [<https://perma.cc/9B8U-CL7W>] (detailing death threats received by Republican representatives who voted against Jim Jordan for Speaker).

36. Lisa Mascaro et al., *Mike Johnson, a Staunch Louisiana Conservative, is Elected House Speaker as GOP Moves Past Chaos*, ASSOCIATED PRESS (Oct. 25, 2023, 6:00 PM), <https://apnews.com/article/house-speaker-republicans-emmer-mccarthy-54352a64be041cd445bda8df28b24f03> [<https://perma.cc/2JGG-QP9H>].

37. See, e.g., Scott Bomboy, *The Speaker of the House's Constitutional Role*, NAT'L CONST. CTR. (Oct. 4, 2023), <https://constitutioncenter.org/blog/the-speaker-of-the-houses-constitutional-role> [<https://perma.cc/TRV7-4LN3>] (explaining the Speaker controls the order of all institutional business on the House floor).

38. Morgan Rimmer & M.J. Lee, *Johnson Refuses to Commit to Putting an Immigration Deal on the House Floor, if it Passes the Senate*, CNN (Jan. 17, 2024, 10:58 PM), <https://www.cnn.com/2024/01/17/politics/johnson-immigration-deal-house-senate/index.html> [<https://perma.cc/2KDG-LEC5>]; Scott Wong et al., *Speaker Johnson Faces Ukraine Aid Dilemma and a Threat to His Job as Congress Returns*, NBC NEWS (Apr. 8, 2024, 7:00 AM), <https://www.nbcnews.com/politics/congress/house-republicans-ukraine-israel-aid-speaker-johnson-job-rcna146569> [<https://perma.cc/WY2L-TTDS>] (acknowledging that internal strife from Republicans, stemming from fears of being ousted by voters over allegiances to President Trump, has prevented a Ukraine aid bill).

39. See Ellie Houghtaling, *Mike Johnson Finally Admits Why He's Killing the Border Deal*, THE NEW REPUBLIC (Jan. 30, 2024, 11:03 AM), <https://newrepublic.com/post/178564/mike-johnson-admit-killing-border-deal-help-trump> [<https://perma.cc/MLR5-TKNT>] (echoing Speaker Johnson's assertion he has spoken with Trump "at length" regarding border security deal strategy in Congress).



But President Trump could veto ordinary legislation.<sup>40</sup> For that reason, Congress sometimes restrains presidential power through policy riders (substantive laws included in budget bills).<sup>41</sup> This forces the President to choose between vetoing the federal budget and accepting some restraints on his power.

A Congress with a substantial Republican minority in the Senate or a majority in the House, however, is unlikely to check a Trump presidency in a second term as it sometimes did in his first term. With the party largely purged of those who favor institutions over the cult of personality surrounding Trump, Republican members of Congress may very well line up to support Trump no matter how egregiously he violates democratic norms. Congress will largely cease to function as a check on presidential power because of partisan polarization.

If Republicans control both houses of Congress, we may well see Congress augment the President's power. That is what we have seen in other countries when an autocratic leader becomes the head of state: lock step voting to support whatever the leader wants.<sup>42</sup> Hungary, Turkey, and even Russia, all have parliaments. But those parliaments act as instruments to further the autocrat's power, rather than as institutions that check the head of state's power.

The history of how autocrats subjugate democracies and Trump's own statements and actions suggest that Trump, with the aid of Congress, will then seek to pursue several important objectives. He will seek to use the power of Congress to tilt the electoral playing field in his favor, facilitate subjugation of opposition media, and consolidate his personal power over the executive branch of government to enable protection of political supporters and persecution of political opponents.

Some of his staunchest supporters have created the "Project 2025 Presidential Transition Project" and announced plans to use legislation to consolidate power in this way.<sup>43</sup> They have called for a cut-off of federal funding to public

---

40. Cf. *Sierra Club v. Trump*, 379 F. Supp. 3d 883, 895 (N.D. Cal. 2019), *aff'd*, 963 F.3d 874 (9th Cir. 2020), *vacated as moot sub nom. Biden v. Sierra Club*, 142 S. Ct. 46 (2021) (explaining how Congress passed a joint resolution terminating Trump's declaration of a national emergency to justify overcoming funding limitations on his building a wall on the southern border, but that Trump vetoed it).

41. See, e.g., *Legislative Process 101- Policy "Riders"*, INDIVISIBLE, <https://indivisible.org/resource/legislative-process-101-policy-riders> [https://perma.cc/BM9S-M3UG] (Policy riders are "'strings attached' to appropriations bills that must become law." In one form, policy riders are an "extraneous appropriation of funds, such as Trump's request for funding for a U.S.-Mexican border wall, attached to an appropriations bill that is necessary to continue funding the government.").

42. See, e.g., WOJCIECH SADURSKI, *POLAND'S CONSTITUTIONAL BREAKDOWN* 132–35 (2019) (describing the "party line[]" votes and hardball tactics in the Polish legislature that were used by the majority political party to effectively—and literally—silence legislative opposition to an autocratic executive).

43. President Trump has sought to distance himself from Project 2025. But numerous Trump appointees participated in creating it; the agenda generally aligns with what Trump has said and done; and its biggest funders are connected to both President Trump and his running mate in the 2024 Election, Ohio Senator J.D. Vance. See Josh Dawsey & Hannah Knowles, *Democrats Focus Attacks on Right-Wing Project 2025 Pushed by Trump Allies*, WASH. POST (July 8, 2024, 10:48 AM), <https://www.washingtonpost.com/elections/2024/07/08/project-2025-trump-election/> [https://perma.cc/47F2-76PW]; Alison Durkee, *JD Vance's Ties to Project 2025 Explained Ahead of Tonight's VP Debate*, FORBES (Oct. 1, 2024, 1:22 PM),

broadcasting.<sup>44</sup> Project 2025 also calls for the transfer of the Federal Election Commission's litigation authority to the DOJ, which President Trump can control.<sup>45</sup> Hungary's autocratic President Viktor Orbán (whom Trump admires) has his prosecution service falsely accuse opposition politicians of corruption on the eve of elections, only to drop charges later to avoid having to prove the charges in court.<sup>46</sup> Trump's baseless corruption charges against opposition candidates and his record of pushing the DOJ to investigate political opponents in his first term suggest that he would use this power in much the same way during a second term.<sup>47</sup> His supporters also recommend legislation forcing online platforms to broadcast hate speech, foreign propaganda, and blatant lies in support of the Trump regime.<sup>48</sup> And they plan to seek legislation shortening the FBI Director's term, which would make it easier for Trump to appoint an FBI Director who would investigate political opponents and stop investigations of Trump's supporters.<sup>49</sup>

We have witnessed a substantial erosion of Congress as a source of constraint on presidential power, to the point where it would not bar a president who spurred a physical attack on the Capitol from running again. If President Trump wins a second term, the little bit of checking we have seen in the past is likely to end. In fact, Congress might instead become an active agent in consolidating the concentration of effective power in the President.

## II. THE JUDICIARY

President Trump has attempted what autocrats always attempt—the capture of the judiciary.<sup>50</sup> Autocratic court packing helps defeat checks on the executive branch to facilitate destruction of the rule of law.<sup>51</sup> This Part starts with some evidence that President Trump has effectively packed the Court with supporters.

---

<https://www.forbes.com/sites/alisondurkee/2024/10/01/jd-vances-ties-to-project-2025-explained-ahead-of-tonights-vp-debate/> [<https://perma.cc/23BF-Y5JN>].

44. Project 2025, *supra* note 17, at 246–48.

45. *Id.* at 863–66.

46. Driesen, *supra* note 7, at 106–07.

47. Gram Slattery et al., *Donald Trump Wants to Control the Justice Department and FBI. His Allies Have a Plan*, REUTERS (May 29, 2024, 3:07 PM), <https://www.reuters.com/world/us/donald-trump-wants-control-justice-department-fbi-his-allies-have-plan-2024-05-17/> [<https://perma.cc/52X4-VK85>] (noting that “Donald Trump’s allies are assembling proposals to curtail the Justice Department’s independence and turn the nation’s top law enforcement body into an attack dog for conservative causes”).

48. See PROJECT 2025, *supra* note 17, at 847–50 (calling for using the FCC to limit immunity when an Internet provider engages in content moderation, and legislation prohibiting most forms of content moderation by social media platforms).

49. While President Trump appointed the incumbent FBI Director, Christopher Wray, Wray has resisted politicizing law enforcement, and his term does not expire until 2027. See, e.g., Jaclyn Diaz, *FBI Director Wray Grilled as House GOP Members Allege ‘Politicization’ of the Agency*, NPR (July 12, 2023, 6:02 PM), <https://www.npr.org/2023/07/12/1186993033/fbi-director-house-hearing-christopher-wray> [<https://perma.cc/ARA5-AZGZ>]. While President Trump could remove Director Wray, doing so might trigger political resistance as the Senate approved him by a 92–5 vote.

50. See GINSBURG & HUQ, *supra* note 6, at 186 (pointing out how courts are “often one of the first victims in an eroding democracy”).

51. See *id.* (noting that properly functioning courts “can prevent charismatic populists from dismantling other checks on their authority”).

It explains that Trump carried out a far more extensive assault on the rule of law in his first term than is generally appreciated and assesses the courts' performance in advancing or checking that project. It closes with an analysis of the Supreme Court's role in eroding checks and balances through broad structural decisions.

#### A. COURT PACKING

In functioning democracies, judicial appointments often require supermajorities of the legislative branch or the support of independent actors like other judges or prosecutors.<sup>52</sup> These appointment processes tend to produce fair-minded independent judges who produce widely respected opinions. Partisan division in judicial decisionmaking suggests undue political influence on outcomes. The institutional arrangements that produced independent apex courts function as checks on judicial abuse of power and ensure that top courts function as fair and independent tribunals instead of instruments of the autocrat's party. Courts behaving as instruments of a political party imply a functional collapse of separation of powers.

The United States for a long time had a supermajority requirement for judicial appointments, created by the filibuster rules in the Senate.<sup>53</sup> The collapse of that rule cleared the way for partisan appointments that lacked widespread support in Congress. The collapse of similar rules in other countries has led to the selection of judges who back the establishment of autocracy.<sup>54</sup>

President Trump appointed ideologues to the bench and announced that he had made a willingness to overturn *Roe v. Wade* into a litmus test.<sup>55</sup> He also appointed judges whose ideology and experience tend to make them hostile to checks on presidential power. The most obvious example of this is Brett Kavanaugh, who wrote favorably about absolute immunity for the President while in office, even for criminal conduct.<sup>56</sup> If President Trump has a second term, we can expect efforts to complete his capture of the judiciary.

---

52. See DRIESEN, *supra* note 7, at 114–19 (discussing supermajority requirements for appointments and judicial councils in Hungary, Poland, and Turkey, prior to and after their turns to autocracy); EUR. COMM'N FOR DEMOCRACY THROUGH L. (VENICE COMM'N), REP. ON THE INDEP. OF THE JUD. SYS., PART I: THE INDEP. OF JUDGES 5–9 (2010), <https://rm.coe.int/1680700a63> [<https://perma.cc/PK7U-62S9>] (discussing the use of judicial councils and other mechanisms for appointing judges in Europe).

53. See, e.g., DRIESEN, *supra* note 7, at 96–97.

54. See *id.* at 114–19 (discussing how Turkey, Hungary, and Poland defeated mechanisms to ensure appointment of judges with multiparty support in favor of judges backing the autocrat's party).

55. Barbara Sprunt, *Trump Downplays Roe v. Wade Litmus Test as He Considers a Supreme Court Nominee*, NPR (July 1, 2018, 3:25 PM), <https://www.npr.org/2018/07/01/625100343/trump-downplays-roe-v-wade-litmus-test-as-he-considers-a-supreme-court-nominee> [<https://perma.cc/6U6Z-83XG>] (noting that Trump ignored aids asking him not to use *Roe v. Wade* as a litmus test for conservative justices).

56. Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1460–61 (2009) (stating that criminal prosecution for acts in office should be delayed until after the President leaves office).

## B. THE WEAKENED RULE OF LAW

The rule of law is a notoriously tricky concept to define. But the concept surely includes the notion that the executive branch of government itself must carry out the law's policies and must do so in a way that does not favor one political party.<sup>57</sup> The judiciary in a well-functioning democracy advances the rule of law by checking executive branch actions that violate the law.<sup>58</sup>

President Trump's first term began with a flurry of executive orders that, taken collectively, constituted a rather comprehensive attack on the rule of law, as I have shown elsewhere.<sup>59</sup> Throughout his administration he sought to force executive branch officials to undermine the rule of law, partly by implementing these executive orders and partly by trying to use the law as a tool to protect supporters and attack opponents. This attack began before Trump could appoint a single judge and progressed during a period when his influence on the judiciary grew.

The federal courts countermanded the sanctuary cities executive order, which clearly contravened the Supreme Court's anti-commandeering doctrine, but erected procedural barriers to avoid making rulings directly challenging many of President Trump's personal attacks on the rule of law.<sup>60</sup> The courts also failed to constrain rather bold violations of the Constitution's Emoluments Clauses—important checks on presidential corruption.<sup>61</sup>

The Supreme Court failed to stymie an order important to Trump's effort to create an autocracy—his effort to ban Muslims from entering the United States beginning one week after taking office.<sup>62</sup> Autocrats in other countries frequently mobilize fear and hatred of outsiders to motivate voters to choose them over candidates committed to liberal democracy. Trump not only deployed this tactic, but he also implemented immigration policies that, in many respects, copy those

---

57. See, e.g., THE FEDERALIST NO. 70 (Alexander Hamilton) (discussing the importance of an independent Executive).

58. See, e.g., THE FEDERALIST NO. 78 (James Madison) (noting that the separation of the judiciary from the Executive is essential to the preservation of liberty).

59. See David M. Driesen, *President Trump's Executive Orders and the Rule of Law*, 87 UMKC L. REV. 489, 514 (2019).

60. Compare *San Francisco v. Trump*, 897 F.3d 1225, 1244 (9th Cir. 2018) (striking down the sanctuary cities executive order), with *California v. Trump*, 613 F. Supp. 3d 231, 254 (D.D.C. 2020) (finding that states did not have standing to challenge the executive order forbidding promulgation of regulations without rescinding two additional regulations). See also *Columbus v. Trump*, 453 F. Supp. 3d 770, 802 (D. Md. 2020) (dismissing much of plaintiffs' complaints against an executive order requiring sabotage of the Affordable Care Act).

61. See *Citizens for Resp. & Ethics in Wash. v. Trump*, 953 F.3d 178, 200 (2d Cir. 2020), vacated as moot *Trump v. Citizens for Resp. & Ethics in Wash.*, 141 S. Ct. 1262, 1262 (2021) (reversing District Court dismissal of Emolument Clause claims for lack of subject matter jurisdiction); *In re Trump*, 958 F.3d 274, 329 (4th Cir. 2020) (*en banc*) (declining to issue an order to dismiss complaint against President Trump's profiteering from his hotel in Washington D.C.), vacated as moot *sub nom. Trump v. District of Columbia*, 141 S. Ct. 1262, 1262 (2021) (vacating judgment of the Fourth Circuit Court of Appeals and remanding with instructions to dismiss as moot after the end of President Trump's term); *Blumenthal v. Trump*, 949 F.3d 14, 16 (D.C. Cir. 2020) (holding that members of Congress lacked standing to challenge Trump's violation of the Foreign Emoluments Clause).

62. See *Trump v. Hawai'i*, 585 U.S. 667, 676–80, 733 (2018) (describing the relevant orders).

of Hungary's autocratic leader Victor Orbán.<sup>63</sup> The lower courts did check President Trump's effort to mobilize hatred through arbitrary executive action, striking down three successive travel bans.<sup>64</sup> The Supreme Court, however, refused to apply traditional Establishment Clause principles against actions based on religious animus and upheld the third travel ban, thus weakening constitutional checks against using religious animus and fear of terrorism to motivate support for autocracy.<sup>65</sup> The Supreme Court's approach to this case suggests that the President can subvert constitutional rights if he conjures up a national security justification, thus allowing the Court's view of separation of powers to authorize invasions of liberty.<sup>66</sup>

In this case, the Court also introduced a procedural irregularity that it frequently employed throughout the Trump administration to thwart lower court efforts to check Trump's abuses of powers—treatment of lower court injunctions as emergencies warranting Supreme Court intervention, often before final rulings in the district courts or courts of appeal.<sup>67</sup> The Court has since made such hitherto rare interventions so common and politically predictable as to raise questions about the Court's functional independence from the Republican Party.

While the federal courts usually did not stop President Trump's executive orders assaulting the rule of law, they did reverse a huge number of individual actions taken to advance Trump's many illegal policies. Trump suffered an extraordinary aggregate reversal rate of 77% of regulatory cases and an astonishing 90% in his immigration policy cases.<sup>68</sup> But the courts could not ensure that President Trump carried out the law's policies since administrative law only authorizes reversals and remands, not usually orders to take specific actions.<sup>69</sup>

Prior to President Trump's appointments, the Roberts Court occasionally checked autocratic moves by President Trump. For example, President Trump's Department of Commerce put a citizenship question into the census, which would tend to create an undercount of Democratic voters, potentially tilting the

---

63. See David M. Driesen, *Trump's Role Model*, PROJECT SYNDICATE (July 30, 2019), <https://www.project-syndicate.org/commentary/trump-orban-immigration-policy-aids-autocracy-by-david-m-driesen-2019-07> [<https://perma.cc/98VR-M3VW>].

64. *Hawai'i*, 585 U.S. at 676–82 (describing the lower court rulings); *cf. id.* at 732–37 (Sotomayor, J., dissenting) (discussing Trump's statements showing anti-Muslim animus).

65. *Compare Hawai'i*, 585 U.S. at 699–710 (applying rational basis scrutiny to executive orders alleged to violate the Establishment Clause and therefore upholding them), *with id.* at 729–46 (Sotomayor, J., dissenting) (applying traditional Establishment Clause principles to the executive orders and finding that anti-Muslim animus makes them unconstitutional).

66. *See id.* at 703–05 (stating that separation of powers concerns justified deferential review of presidential actions and applying this principal to defeat constitutional rights).

67. See Stephen I. Vladeck, *Essay: The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 135–144 (2019) (discussing Supreme Court rulings on requests for early interventions in the travel ban cases and other cases).

68. Brittany Davis Noll, "Tired of Winning": *Judicial Review of Regulatory Policy in the Trump Era*, 73 ADMIN. L. REV. 353, 356–57, 390 (2021) (demonstrating that agencies usually win about 70% of their cases but that Trump had an aggregate win rate of 23%, and only a 10% win rate in immigration cases).

69. *Agency Enforcement Actions Authorized by Law*, JUSTIA (May 2024), <https://www.justia.com/administrative-law/enforcement-actions/> [<https://perma.cc/K2C2-SUBL>] (explaining the constraints of administrative agency enforcement authority).

apportionment of congressional seats to President Trump's party. The Court rejected this effort to tilt the electoral playing field as based on a pretext by a five-to-four vote.<sup>70</sup> Trump's supporters advocate trying this again now that Trump has appointed more Justices.<sup>71</sup>

Even after President Trump added judges who did not enjoy the sort of bipartisan support necessary for judicial appointments in well-functioning democracies, the courts did not always rubber-stamp Trump's initiatives. The federal courts acted to thwart autocracy immediately after the 2020 presidential election, rejecting more than fifty challenges to its result.<sup>72</sup> Thus, the lower courts often acted to protect the rule of law, but usually only in a piecemeal fashion. The Supreme Court often thwarted lower court efforts, but not in the election cases.

### C. CHECKS AND BALANCES

President Trump not only attacked much of the United States Code through executive orders and individual agency actions; his administration also sought to attack key structural constraints on his power.<sup>73</sup> The Supreme Court usually acted to augment presidential power in these cases, thereby contributing to the erosion of checks and balances.

#### *i. Defeating the Power of the Purse*

During Trump's first term, the Supreme Court stymied a rare congressional effort to use the power over the purse to stop the President from abusing executive power. Scholars consider Congress' power over the purse as the key congressional check on presidential power.<sup>74</sup> But the Supreme Court's actions reveal that a determined president with substantial support from a partisan Supreme Court can defeat this power on the rare occasions when Congress overcomes partisan division to exercise it.

As part of Trump's effort to stoke hatred of immigrants to garner support in the 2016 presidential election, he pledged to "build a great, great wall" on the southern border to keep out Mexicans, whom Trump characterized as "rapists"

---

70. *Dep't of Com. v. New York*, 588 U.S. 752, 782–85 (2019) (upholding the District Court's ruling that the rationale for adding the citizenship was a mere pretext).

71. PROJECT 2025, *supra* note 17, at 680.

72. Joseph Tanfani & Simon Lewis, *As Trump Pushes Baseless Fraud Claims, Republicans Pledge Tougher Voting Rules*, REUTERS (Dec. 21, 2020, 12:44 PM), <https://www.reuters.com/article/us-usa-election-voting-rules-insight-idUSKBN28V1DN/> [<https://perma.cc/75WR-3HS5>] (noting that state and federal justices have dismissed more than 50 suits alleging election fraud and other irregularities). *Cf.* *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 370–72 (Pa. 2020), *cert. denied sub nom.* *Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732 (2021) (granting a three-day extension of the deadline for receipt of absentee ballots based on the Free and Equal Elections Clause of Pennsylvania's Constitution).

73. *See, e.g., Seila Law LLC v. Consumer Fin. Prot. Bureau (CFPB)*, 591 U.S. 197, 209 (2020) (noting that the government agreed with petitioner's claim that the CFPB's structure violated the Constitution).

74. *See* Kate Stith, *Congress' Power of the Purse*, 97 YALE L. J. 1343, 1343–44 (1988) (characterizing Congress' power over the purse as "the Constitution's most significant check on Executive power").

and criminals.<sup>75</sup> Congress, however, proved skeptical of Trump's wall construction plans and provided only one quarter of the funding he requested.<sup>76</sup> Trump precipitated a government shutdown by refusing to sign a budget bill that did not contain sufficient funding for his wall.<sup>77</sup> After that phase of this constitutional crisis ended, Trump announced that he planned to build the wall anyway.<sup>78</sup> He declared a national emergency and sought to use statutory authority to divert funds to support "military construction projects" when an emergency requires projects to support the deployment of armed forces and to tap funds from a counternarcotics program.<sup>79</sup> This provides an example of the use of "autocratic legalism," where elected autocratic leaders use bogus legal rationales to try and legitimize the defeat of checks and balances.<sup>80</sup> Congress countered by putting language in the 2019 appropriations act prohibiting augmentation of funds for the wall from other sources and by passing a joint resolution to terminate Trump's national emergency.<sup>81</sup>

The lower courts that discussed the merits of this controversy found Trump's rationales likely unlawful.<sup>82</sup> But the Supreme Court stymied efforts by the lower courts to enjoin President Trump's effort to usurp the power of the purse through a hitherto extraordinary intervention before the courts of appeal had weighed in on the merits of these challenges to Trump's abuse of emergency powers.<sup>83</sup>

75. Amber Phillips, "They're Rapists." *President Trump's Campaign Launch Speech Two Years Later Annotated*, WASH. POST (June 16, 2017, 1:43 PM), <https://www.washingtonpost.com/news/the-fix/wp/2017/06/16/theyre-rapists-presidents-trump-campaign-launch-speech-two-years-later-annotated/> [<https://perma.cc/T3MN-XHA4>].

76. *Sierra Club v. Trump*, 379 F. Supp. 3d 883, 892–94 (2019), *aff'd* 963 F.3d 874 (9th Cir. 2020), *vacated as moot sub nom.* *Biden v. Sierra Club*, 142 S. Ct. 46 (2021).

77. *Id.* at 892.

78. *See id.* at 893 (quoting Trump as saying that the wall "[would] get built one way or another").

79. *See id.* at 895–96.

80. *See* SADURSKI, *supra* note 42, at 19 (explaining that Poland's autocratic party, *Prawo i Sprawiedliwość*, adheres to legal provisions but deprives them of "canonical, traditional, or even plausible interpretations of their meanings"). *See generally* Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545 (2018) (discussing a broader concept of autocratic legalism).

81. *See Sierra Club*, 379 F. Supp. 3d at 894–95.

82. *See id.* at 908–23; *Trump v. Sierra Club*, 963 F.3d 847, 886–87 (9th Cir. 2020); *California v. Trump*, 963 F.3d 926, 946 (9th Cir. 2020); *El Paso Cnty. v. Trump*, 408 F. Supp. 3d 840, 856 (W.D. Tex. 2019), *rev'd on other grounds*, 982 F.3d 332, 347 (5th Cir. 2020); *Washington v. Trump*, 441 F. Supp. 3d 1101, 1115–23 (W.D. Wash. 2020), *vacated as moot*, 2022 U.S. App. Lexis 1838 (9th Cir. 2022); *cf.* *United States House of Representatives v. Mnuchin*, 976 F.3d 1, 15 (D.C. Cir. 2020), *vacated as moot sub nom.* *Yellen v. U.S. House of Representatives*, 142 S. Ct. 332 (2021) (holding that the House of Representatives had standing to challenge Trump's usurpation of its funding authority and reversing the contrary district court decision); *D.C. Ctr. for Biological Diversity v. Trump*, 453 F. Supp. 3d 11, 33 (D.C. Cir. 2020) (dismissing on standing grounds tied to the political question doctrine).

83. *See Trump v. Sierra Club*, 140 S. Ct. 1 (2020) (mem.); *see also Biden v. Sierra Club*, 142 S. Ct. 46 (2021) (mem.) (terminating the Ninth Circuit's decision on the merits as moot). The stay ruling in *Trump v. Sierra Club* caused the Fifth Circuit to stay the injunction issued in *El Paso County v. Trump* as well. *See El Paso Cnty. v. Trump*, No. 19-51144, 2020 U.S. App. Lexis 567, at \*2 (5th Cir. Jan. 8, 2020) (per curiam).

President Trump and his supporters have announced a plan to further usurp Congress's power over the purse—a key constraint on presidential power.<sup>84</sup> Project 2025 advises President Trump to impound federal funds to kill off programs that Congress has created but that his party dislikes.<sup>85</sup> Presidential assumption of the power of the purse would collapse the separation of powers.

*ii. Weakening Congressional Oversight Authority*

Traditionally, Congress has enjoyed the power to check abuse of power in the executive branch through oversight of the executive branch. Although the executive branch has generally complied with such requests for witnesses and documents, making enforcement cases against the executive branch rare, the courts have routinely enforced congressional subpoenas investigating executive branch compliance with the law.<sup>86</sup> And presidents have voluntarily complied with subpoenas or negotiated exceptions when vital state interests demanded some degree of secrecy.<sup>87</sup> Congressional oversight uses public exposure as a means of checking presidential misconduct.<sup>88</sup> It produces information that can enable voters to assess whether an incumbent President is doing a good job when voting in a subsequent election, making elections a potentially effective constraint on presidential abuse of power.

President Trump, however, broke the tradition of complying with presidential subpoenas, regularly rejecting congressional requests for information.<sup>89</sup> The

---

84. Jeff Stein & Jacob Bogage, *Trump Plans to Claim Sweeping Powers to Cancel Federal Spending*, WASH. POST (June 7, 2024, 6:00 AM), <https://www.washingtonpost.com/business/2024/06/07/trump-budget-impoundment-congress/> [https://perma.cc/NJ25-FVCJ].

85. See PROJECT 2025, *supra* note 17, at 436, 615 (giving several examples of how a future conservative president can freeze or impound Congressionally appropriated funds).

86. See *McGrain v. Daugherty*, 273 U.S. 135, 150–55, 177–78 (1927) (upholding arrest of a former Attorney General's brother for failure to testify before the Senate when it was investigating alleged failure to enforce antitrust law); *Sinclair v. United States*, 279 U.S. 263, 274 (1929) (upholding conviction of witness who failed to answer questions about oil leases on federal land); *cf. In re Chapman*, 166 U.S. 661, 681–82 (1897) (upholding conviction of a citizen who refused to answer questions about alleged corruption of the Senate with respect to tariff legislation); *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 492–93, 504–07 (1975) (approving a subpoena demanding bank records as part of a study of the operation of the Internal Security Act of 1950); *Hutcheson v. United States*, 369 U.S. 599, 610–11 (1962) (upholding conviction of witnesses who refused to answer questions about misuse of union funds); *Quinn v. United States*, 349 U.S. 155, 164 (1955); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 228–34 (1821) (upholding the imprisonment and punishment of a person accused bribing a member of Congress). *But see* *Watkins v. United States*, 354 U.S. 178, 215–16 (1957) (invalidating conviction of a citizen who failed to answer some questions of the House Committee on Un-American Activities based on the vagueness of the committee's charge); *Kilbourn v. Thomas*, 103 U.S. 168, 204–05 (1880) (prohibiting a house investigation of a private citizen). See generally C.S. Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. PA. L. REV. 691 (1926).

87. See *Trump v. Mazars USA, LLP*, 591 U.S. 848, 858–61 (2020) (discussing the history of presidential negotiation and compliance with congressional requests).

88. Todd Garvey et al., *Congressional Oversight and Investigations*, CONG. RSCH. SERV. (Dec. 13, 2022), <https://crsreports.congress.gov/product/pdf/IF/IF10015> [https://perma.cc/46AP-JDB3] (stating that an important purpose of congressional oversight is to check the power of the executive branch).

89. See David M. Driesen, *Stealth Executive Privilege: Trump v. Mazars*, JURIST NEWS (July 28, 2020, 7:30 PM), <https://www.jurist.org/commentary/2020/07/david-driesen-trump-mazars/> [https://perma.cc/9WVB-64TL] (discussing Trump's resistance to subpoenas even in the impeachment context); *Trump Administration Oversight Precedents*, CO-EQUAL (2024),



courts generally did not enforce subpoenas in a timely manner.<sup>90</sup> In *Trump v. Mazars*, the Supreme Court rewarded his defiance, abolishing this check on presidential power, at least when it comes to obtaining private information from the President himself. Henceforth, *Mazars* suggests, Congress can only obtain presidential information to inform contemplated legislation.<sup>91</sup> Furthermore, *Mazars* authorizes federal judges to block information Congress seeks to inform legislation if the Court finds the sought information unnecessary.<sup>92</sup> One can anticipate that an increasingly captured judiciary may weaken congressional oversight authority by making political judgments against the release of information sought based on claimed plans to legislate. Comparative law and politics scholars consider vigorous legislative oversight of the executive branch as so fundamental to democracy that some ratings used to assess whether countries have a working democracy give a numerical score to the vigor of legislative oversight.

*iii. Consolidation of Power to Use the Executive Branch to Defeat the Rule of Law*

*Seila Law LLC v. Consumer Financial Protection Bureau*<sup>93</sup> undermines a key check on autocratic power, the requirement that the head of state only remove officials for cause. That decision authorizes the President to remove individual heads of agencies without cause, even when statutes signed by former presidents only authorize for-cause removal.<sup>94</sup> For-cause removal provisions allow a president to remove officials who fail to properly implement the law.<sup>95</sup> Removal without cause allows the President to remove officials who resist illegal orders. For that reason, the principle of complete presidential control over the executive branch of government aids creation of autocratic government.<sup>96</sup>

The ability of a president to remove a law-abiding official provides an incentive for that official to “fear and obey” the President.<sup>97</sup> It will have this effect even when the President issues an illegal order or asks that official to

---

[https://cdn.prod.website-files.com/5cd036eb776bf651fcf12ee9/66182596c0e171aac41a7027\\_Trump%20Administration%20Oversight%20Precedents.pdf](https://cdn.prod.website-files.com/5cd036eb776bf651fcf12ee9/66182596c0e171aac41a7027_Trump%20Administration%20Oversight%20Precedents.pdf) [https://perma.cc/G39Y-B3LA].

90. See, e.g., *Trump v. Mazars USA, LLP*, 39 F. 4th 774, 779–80 (D.C. Cir. 2022) (finally resolving a 2019 House Oversight Committee request for President Trump’s financial records after Trump left office); Comm. on the Judiciary of the U.S. House of Representatives, 973 F. 3d 121, 122–23 (D.C. Cir. 2020) (2–1) (dismissing a case seeking enforcement of a subpoena against the White House Counsel for lack of a cause of action).

91. See *Mazars*, 591 U.S. at 869.

92. *Id.* at 869–71; see also Driesen, *supra* note 89 (pointing out that *Mazars* provides more protection to the President than it does when has a valid claim of executive privilege).

93. See generally 591 U.S. 197 (2020).

94. See *id.* at 213 (holding that for cause removal protection “violates the separation of powers”).

95. See Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 6 (2021) (explaining that the traditional formulation of for-cause removal embraces removal for “an officer’s failure to faithfully execute statutory duties”).

96. See DRIESEN, *supra* note 7, at 156–68 (explaining in detail how full implementation of the unitary executive theory leads to autocracy).

97. See *Seila Law*, 591 U.S. at 213–14.

selectively enforce the law in ways that benefit regime supporters and harm regime opponents.

*Seila Law* expands the range of officials that President Trump can remove for obeying the law. It held that he may remove single heads of agencies for political reasons, whether sound or nefarious.<sup>98</sup> So, Trump could defeat the operation of laws administered by single heads of agencies formerly protected from arbitrary removal by firing an incumbent and then replacing the removed official with an acting official of his choosing. He could use this technique, for example, to expansively enforce consumer protection law against political opponents while protecting his corrupt supporters from its application.<sup>99</sup>

But *Seila Law* invites further expansion of presidential power to support authoritarian aims. It suggests that independent agencies not explicitly protected by prior precedent must give up their independence.<sup>100</sup> And it suggests that the President can fire any employee with administrative or policymaking responsibility, which may provide a means of encouraging selective enforcement of laws or disabling their operation.<sup>101</sup>

Trump's supporters have made plans in a document called Project 2025 to seize control over more federal agencies and employees to advance "the President's agenda."<sup>102</sup> President Trump's conduct in his first administration and his statements regarding a second term suggest that his agenda features using the federal government to seek revenge against political opponents.<sup>103</sup> An autocrat can use the powers of just about any federal agency to protect supporters and harass opponents.

Autocrats usually seize control over formerly independent electoral commissions, media authorities, and prosecution services so that they can tilt the electoral playing field, encourage supportive media, undermine critical media outlets, and persecute opponents while protecting criminal supporters. *Seila Law* provides tools to end the independence of the Federal Election Commission (FEC) and the Federal Communication Commission (FCC)—both of which, unlike the DOJ—have formal independence under existing statutes. Project 2025 lays out plans to seize control over these agencies to carry out these missions.

During Trump's first term, he abused his authority to ensure paralysis at the FEC. Trump protected himself and his allies from FEC investigation into

---

98. See *id.* at 214; David M. Driesen, *Political Removal and the Plebiscitary Presidency: An Essay on Seila Law LLC v. Consumer Financial Protection Bureau*, 76 NYU ANN. SURVEY AM. L. 707, 710 (2021) (pointing out that a president with "political removal authority can discharge government for legitimate or illegitimate reasons").

99. Cf. Vianna Davila, *Here Are the Organizations That Ken Paxton Targeted Using Consumer Protection Laws*, TEX. TRIBUNE (May 30, 2024, 6:00 AM), <https://www.texastribune.org/2024/05/30/texas-ken-paxton-consumer-protection-law-investigations/> [<https://perma.cc/2GQ3-PU3F>] (discussing the Texas Attorney General's use of consumer protection law to target "organizations whose work conflicts with his political views").

100. See *Seila Law*, 591 U.S. at 215–17 (suggesting that independent agencies that exercise any executive power are unconstitutional and limiting *Humphrey's Executor*).

101. See *id.* at 218 (suggesting inferior officers must be removable at will unless they exercise "no policymaking or administrative authority").

102. PROJECT 2025, *supra* note 17, at 20 (echoing the statement that "it is the President's agenda that should matter to the departments and agencies").

103. See Slattery et al., *supra* note 47.

accusations of campaign finance violations by declining to nominate FEC commissioners, thereby depriving the agency of a quorum and preventing it from functioning.

During his first term, President Trump repeatedly asked the DOJ and the Internal Revenue Service (IRS) to investigate his political opponents.<sup>104</sup> While they initially pushed back, DOJ or the IRS ultimately investigated or audited Hilary Clinton and John Kerry, along with journalists and prominent officials who investigated Trump's ties to Russia.<sup>105</sup> This harassment forced Trump's targets to spend substantial sums on accountants and lawyers, but judges rejected the handful of lawsuits and indictments generated by the Trump vendetta.<sup>106</sup> Project 2025 seeks to simultaneously continue FEC's paralysis, which will protect Trump, while transferring its civil litigation authority to the DOJ, which Trump could then unleash on political opponents.<sup>107</sup>

President Trump, if he follows the example of the autocrats he admires, will find ways to weaken or disable opposition media, partly by capturing the media authority. Trump has repeatedly sought to discredit the media, thereby preparing the ground for government efforts to reign in independent media.<sup>108</sup> In his first term, Trump allies brought libel suits against opposition media and critics, a frequent tactic of autocrats, but often an unsuccessful one under existing U.S. libel law.<sup>109</sup> Trump also sought to repress dissent by getting the DOJ to seek an order preventing publication of a book by John Bolton, Trump's national security advisor, and securing an investigation of major media outlets publishing stories critical of Trump (forcing them to spend substantial sums on lawyers).<sup>110</sup> Project 2025 recommends compromising the FCC's independence. It advises Trump to "instruct" the FCC to cut off benefits currently enjoyed by National Public Radio, Pacifica, and other independent, noncommercial media outlets—including access to lower ends of the FM spectrum and exemption from licensing fees.<sup>111</sup> *Seila Law's* precepts aid efforts to destroy the FCC's independence so that it can decrease access to and impair the finances of independent media.

---

104. See RICHARD L. ABEL, *HOW AUTOCRATS ABUSE POWER: RESISTANCE TO TRUMP AND TRUMPISM* 104–05 (2024).

105. Michael S. Schmidt, *As President, Trump Demanded Investigations of Foes. He Often Got Them.*, N.Y. TIMES (Sept. 21, 2024), <https://www.nytimes.com/2024/09/21/us/politics/trump-investigations-enemies.html> [<https://perma.cc/6G4H-4ALZ>].

106. See *id.*

107. PROJECT 2025, *supra* note 17, at 863–65.

108. Chris Cillizza, *Here's Donald Trump's Most Lasting, Damaging Legacy*, CNN (Aug. 30, 2021, 7:06 PM), <https://www.cnn.com/2021/08/30/politics/trump-legacy-fake-news/index.html> [<https://perma.cc/R7XB-MNU5>] (analyzing the trend between Trump's "fake news" rhetoric and the 50% drop in Republican trust of national news organizations).

109. David Hudson, *How Trump and Nunes Use Defamation Lawsuits to Silence Their Critics*, FIRST AMEND. WATCH AT N.Y. UNIV. (June 30, 2020), <https://firstamendmentwatch.org/how-trump-and-nunes-use-defamation-lawsuits-to-silence-their-critics/> [<https://perma.cc/TZZ8-APYS>] (explaining how Trump and his allies used libel suits to attack media critics).

110. See Schmidt, *supra* note 105.

111. See PROJECT 2025, *supra* note 17, at 247–48.

*iv. Checks on Violent Insurrection*

Ominously, the Supreme Court defeated a key check against armed insurrection in the Constitution—a prohibition on former federal officials who swore an oath to support the Constitution from again taking office after engaging in insurrection.<sup>112</sup> Now, President Trump and his supporters are free to lead armed uprisings against future electoral results without fear of losing power under this provision.<sup>113</sup> The Court’s ruling paves the way for autocratic rule supported by insurrectionists in Congress. It leaves open the possibility of Congress reinstating the constitutional check that the Court stripped away through enactment of an enforcement mechanism.<sup>114</sup> But the partisan division that characterizes a society ripe for autocratic takeover makes such a measure unlikely.

In *Trump v. United States*, the Court went further, creating a new immunity for presidents using their official positions to commit crimes.<sup>115</sup> As the dissent points out, the President can now presumably order Navy Seals to assassinate a political rival, organize a military coup, or take a bribe in exchange for a pardon—all without fear of criminal liability.<sup>116</sup>

More prosaically, this decision—along with *Seila Law*’s endorsement of the principle that government officials should “fear and obey” the President—lays constitutional groundwork for Trump’s plans to persecute political opponents in his second term. While a customary constitutional norm (with formal counterparts in other functioning democracies) has long prohibited presidents from involvement in decisions about whom to investigate and prosecute, the immunity decision affirms that the President “may discuss potential investigations and prosecutions with his Attorney General” and immunizes him from criminally abusing that authority.<sup>117</sup> The broad immunity established in *Trump v. United States*, combined with the decimation of the impeachment mechanism by partisan extremism, makes it unlikely that the remains of checks and balances will survive a second Trump term.

---

112. See *Trump v. Anderson*, 601 U.S. 100, 106–08 (2024) (preventing the Colorado Supreme Court from enforcing Section 3 of the 14th Amendment against President Trump). See generally Tom Ginsburg et al., *Democracy’s Other Boundary Problem: The Law of Democratic Disqualification*, 111 CAL. L. REV. 1633 (2023) (reviewing the use of disqualification to protect democracies both here and abroad).

113. *Anderson*, 601 U.S. at 110 (holding that state courts may not enforce Section 3’s requirement of disqualification against those running for federal offices). This suggests that states cannot enforce the presidential term limit, perhaps making it unenforceable.

114. See *id.* at 117 (stating that Congress may enforce Section 3 against federal officeholders and candidates).

115. *Trump v. United States*, 144 S. Ct. 2312, 2347 (2024).

116. See *id.* at 2371 (Sotomayor, J., dissenting).

117. *Id.* at 2335; cf. ABEL, *supra* note 104, at 105 (discussing the norm against presidential involvement in investigations).

CONCLUSION

Checks and balances, while not yet completely gone, have collapsed to a significant degree. President Trump and his supporters have plans to erode them further. All of this conforms to the patterns seen in other societies where an autocratic leader gets elected and then impairs or destroys a functioning democracy with the aid of his political party and a captured Court.