

## REVISITING AMERICA'S GUARDRAILS

*Andrea Scoseria Katz\**

### ABSTRACT

*A familiar story is being observed in countries ranging from Brazil to Australia, the United States, and Poland as elected executives deploy a populist threat narrative to politicize the rule of law and entrench themselves in power. Out of the academy, a growing literature proposes a menu of “guardrails” for shoring up democracy from backsliding or decline. Some see guardrails in society and culture, calling for rebuilding civic norms of tolerance. Others call for stricter rules in administering elections, to prevent undue influence. Others call for greater judicial intervention, tasking courts with striking down enactments that threaten the constitution or the democratic order itself. In this Article, I explore a different approach, what I call the bureaucratic remedy, in which independent actors are seeded through the administrative state to prevent the politicization of the rule of law. This includes officials like election monitors, ombudsmen, public prosecutors, and inspectors general.*

*Within the American legal academy, the debate over the future of American democracy is now vibrant, a stunning reversal of Americans' long held faith in their institutions. Yet, as this Article argues, America's defenses against democratic backsliding are likely to remain weak unless suggestions like norm following, election reform, and judicial review are supplemented with deeper institutional reforms to the civil service. The reason is that, as scholars have shown, backsliding almost always begins with a takeover of the civil service. Norms and state-level electoral reforms cannot change this, and courts, however important, often lack capacity to stop backsliding for two reasons. In the early stages, backsliding takes place in procedurally “lawful” ways, and judges usually lack substantive criteria for what constitutes unacceptable politicization. At late stages, courts themselves become politicized or coopted, leaving them ill-equipped to reverse rule of law decline. Preventing politicization of the civil service before it begins helps make sure that, in being responsive to the presidency, government does not cease to be responsive to the rule of law.*

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\* Associate Professor of Law, Washington University in St. Louis, School of Law. Andrea.katz@wustl.edu.

## TABLE OF CONTENTS

I. Introduction .....	578
II. Anatomy of a Near Collapse: The Trump Presidency and Fallout.....	586
III. Militant Democracy 2.0: An Expanding Menu of Guardrails.....	594
IV. Conclusion.....	601

## I. INTRODUCTION

If one were to start drafting a constitution from scratch in 2022, would it look like ours? Almost assuredly not. Once the gold standard of democratic constitutions imitated the world over by brand new republics from Latin America to Eastern Europe, the U.S. Constitution has fallen out of date and out of favor with constitution writers. Observers have catalogued a world turn away from American constitutional provisions on structural federalism, presidentialism, and rights.<sup>1</sup> Even judicial review—the crown jewel of America’s rights-protecting regime—is nowhere mandated by our Constitution, and although it has spread the world over, most constitutions today choose to locate that power not in a Supreme Court, but in a court of more limited constitutional jurisdiction.<sup>2</sup>

America’s eighteenth century Constitution is an outlier in another important way. It lacks guardrails against democratic erosion that newer regimes feature. Consider it first-generation technology, or, as Tom Ginsburg and Aziz Huq put it, “a quill in a world of smartphone styluses. Stylish, elegant, yet not eminently practicable.”<sup>3</sup>

Across the world, the story of democratic erosion is playing out in similar fashion in countries as diverse as Brazil, Australia, Russia, France, Hungary, and the United States. Condensed down to its basic elements, the story goes like this:<sup>4</sup>

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1. David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 785–92 (2012).

2. Alec Stone Sweet, *Constitutional Courts*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 816, 816–29 (Michel Rosenfeld & András Sajó eds., Oxford Univ. Press 2012).

3. TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 206 (Univ. of Chi. Press 2018) [hereinafter HOW TO SAVE A CONSTITUTIONAL DEMOCRACY].

4. For a particularly parsimonious and neat rendition of this story on which this section relies, see DAVID M. DRIESEN, THE SPECTER OF DICTATORSHIP: JUDICIAL

Step One: A democratically elected president (or prime minister) starts to talk of an ominous, rising threat to the nation—say, an economic downturn, terrorist threats, or a crush of refugees at the border. To “meet the threat,” the President organizes a swift, coordinated response, centralizing control over multiple government agencies.<sup>5</sup> This can include financial or taxation agencies, national security, public prosecutors, the military, and even independent bodies like courts.

Step Two: The President's influence over the government spreads. In the legislature, the President's program is advanced by lockstep party-line vote over vigorous minority protest.<sup>6</sup> Expert civil servants start to resign, and their younger, less experienced and more zealous replacements push forward the presidential agenda using agency resources. Elites in the private sector decide to go along with (or at least refuse to criticize) the movement's less savory aspects. A cooperative media apparatus repeats and diffuses the threat lens, spreading fear and ultimately driving a kind of coerced public consent to the ongoing concentration of executive power.

Step Three: The levers of democratic government, now coopted, are now turned against democracy. The “rule of law” is politicized and undermined, as justice departments or ministries instruct prosecutors to jail political opponents and immunize the President's allies.<sup>7</sup> The “electoral playing field” is tilted to insulate the incumbent from losing future elections:

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ENABLING OF PRESIDENTIAL POWER 119–20 (Keith J. Bybee ed., Stan. Univ. Press 2021). See other versions of this story in RICHARD SNYDER, *ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY* (graphic ed., Ten Speed Press 2016); E.J. DIONNE, JR., NORMAN J. ORNSTEIN & THOMAS E. MANN, *ONE NATION AFTER TRUMP: A GUIDE FOR THE PERPLEXED, THE DISILLUSIONED, THE DESPERATE, AND THE NOT-YET DEPORTED* (Saint Martin Press 2017); *RULES FOR RESISTANCE: ADVICE FROM AROUND THE GLOBE FOR THE AGE OF TRUMP* (David Cole & Melanie Wachtell Stinnett eds., New Press 2017); DAVID ROTHKOPF, *AMERICAN RESISTANCE: THE INSIDE STORY OF HOW THE DEEP STATE SAVED THE NATION* (PublicAffairs 2022); NAOMI KLEIN, *NO IS NOT ENOUGH: RESISTING TRUMP'S SHOCK POLITICS & WINNING THE WORLD WE NEED* (Haymarket Books 2017); STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (Broadway Books 2018); *CONSTITUTIONAL DEMOCRACY IN CRISIS?* (Mark A. Graber, Sanford Levinson & Mark Tushnet eds., Oxford Univ. Press 2018); *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY*, *supra* note 3; *WHEN DEMOCRACY TRUMPS POPULISM: EUROPEAN AND LATIN AMERICAN LESSONS FOR THE UNITED STATES* (Kurt Weyland & Raúl Madrid eds., Cambridge Univ. Press 2019); *CAN IT HAPPEN HERE?: AUTHORITARIANISM IN AMERICA* (Cass R. Sunstein ed., HarperCollins 2018).

5. See DRIESEN, *supra* note 4.

6. See *id.* at 120.

7. See *id.*

ballots may be suppressed, voters intimidated at the polls, opposition candidates barred from running, or election results falsified.<sup>8</sup> Finally, “the space for public debate” is shrunk: the individual citizen is barraged with false information, threats of unseen enemies, or manipulated depictions of the political opposition as elitists or seditionists.<sup>9</sup> Propaganda—fear, not fact-based—is hard to rebut, and the spectacle of concentrated power is frightening and intimidating. Eventually, the possibility for independent will formation, even democracy itself, is dismantled.<sup>10</sup>

Variations on this same story, sometimes called the “authoritarian playbook,” can be seen in many contexts these days, albeit to varying degrees.<sup>11</sup> For instance, in the decades since the fall of the Iron Curtain, Russia has disintegrated into full-blown electoral authoritarianism, while in the United States, “constitutional rot” can be seen only at the margins of the system.<sup>12</sup> But of course, as recent events have made clear, the problem is far from limited to weak democracies or regions of the globe. In 2020, the United States skated perilously close to constitutional crisis during the fallout from the presidential election.<sup>13</sup> More deeply, over decades the United States has witnessed troubling indices of democratic decline in areas corresponding to the authoritarian playbook, including:

- The growth of the President’s powers, especially via de facto delegation of policymaking authority from Congress, whose relative and absolute decline has been underway since the early twentieth century;<sup>14</sup>

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8. *See id.*

9. *See id.*

10. *See id.* at 119–20.

11. *See* Jennifer Dresden, Aaron Baird & Ben Raderstorf, *The Authoritarian Playbook*, PROTECT DEMOCRACY (June 15, 2022), <https://protectdemocracy.org/project/the-authoritarian-playbook-media/> [<https://perma.cc/5CVP-J9QJ>].

12. *Freedom in the World 2021: Russia*, FREEDOM HOUSE, <https://freedomhouse.org/country/russia/freedom-world/2021> [<https://perma.cc/TC5T-EHSP>]; JACK M. BALKIN, *THE CYCLES OF CONSTITUTIONAL TIME* (Oxford Univ. Press 2020) (discussing how “constitutional rot” in the United States has stopped short of full-blown crisis).

13. *See* Amanda Taub, *The Jan. 6 Attack Was a Crisis. So Why Wasn’t It More of a Scandal?*, N.Y. TIMES (Aug. 10, 2022), <https://www.nytimes.com/2022/08/10/world/jan-6-scandal-polarization.html>.

14. *See generally* PETER M. SHANE, *DEMOCRACY’S CHIEF EXECUTIVE: INTERPRETING THE CONSTITUTION AND DEFINING THE FUTURE OF THE PRESIDENCY* (Univ. of Cal. Press 2022); PETER M. SHANE, *MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* (Univ. of Chi. Press 2009) [hereinafter

- The manipulation of election rules, both in a spate of state electoral maps gerrymandered along party lines to favor incumbents and, at the national level, the unprecedented presidential conspiracy to overturn the results of the 2020 election through lawsuits, recounts, suppressing ballots, recruiting state legislatures and legislators to block the results, and even encouraging violence against Congress itself;<sup>15</sup>
- The politicization of neutral institutions like courts, prosecutors, and the armed forces.<sup>16</sup> This is not limited to former President Donald Trump, though he typified it strongly; under President Trump, national policy was tailored to suit his personal interests (i.e., the Ukraine military aid scandal) and subordinates were fired who took a rule of law stance against his orders (i.e., Kirstjen Nielsen, Jeff Sessions, and James Comey).<sup>17</sup> Critically, after the Capitol insurrection of January 6th, 2021, questions arose for the first time in decades about the neutrality of the Capitol police and the military more broadly;<sup>18</sup>
- The trustworthiness of the media has been called into question, largely at political instigation. A polarized media predates President Trump, but he did heighten rhetorical attacks on journalists, whom he called “enemies of the people;”<sup>19</sup>

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MADISON'S NIGHTMARE]. On this phenomenon of executive delegation more generally, WILLIAM E. SCHEUERMAN, *LIBERAL DEMOCRACY AND THE SOCIAL ACCELERATION OF TIME* (John Hopkins Univ. Press 2004).

15. RICHARD L. HASEN, *ELECTION MELTDOWN* (Yale Univ. Press 2020); PIPPA NORRIS, *WHY AMERICAN ELECTIONS ARE FLAWED (AND HOW TO FIX THEM)* (Cornell Univ. Press 2017).

16. *See generally* PETER BAKER & SUSAN GLASSER, *THE DIVIDER: TRUMP IN THE WHITE HOUSE, 2017–2021* (Doubleday 2022); BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (Belknap Press 2013).

17. Alex Wigglesworth, *From ‘Nut Job’ to ‘Slimeball’: A Timeline of Trump’s Insults Aimed at Comey*, L.A. TIMES (Apr. 15, 2018, 8:29 PM), <https://www.latimes.com/politics/la-na-pol-trump-comey-insults-20180415-htmlstory.html> [<https://perma.cc/96DP-BUB2>]; Dana Milbank, *Opinion: Kirstjen Nielson’s Attempt to Suck Up to Trump Ended Badly. It Always Does*, WASH. POST (Apr. 8, 2019, 6:19 PM), [https://www.washingtonpost.com/opinions/kirstjen-nielsens-attempt-to-suck-up-to-trump-ended-badly-it-always-does/2019/04/08/7d982baa-5a38-11e9-9625-01d48d50ef75\\_story.html](https://www.washingtonpost.com/opinions/kirstjen-nielsens-attempt-to-suck-up-to-trump-ended-badly-it-always-does/2019/04/08/7d982baa-5a38-11e9-9625-01d48d50ef75_story.html).

18. JEFFREY P. CROUCH, MARK J. ROZELL & MITCHEL A. SOLLENBERGER, *THE UNITARY EXECUTIVE THEORY: A DANGER TO CONSTITUTIONAL GOVERNMENT* (Univ. Press Kan. 2021). On politicization of these offices under President Trump, *see* CAROL LEONNIG & PHILIP RUCKER, *I ALONE CAN FIX IT* (Penguin Press 2021).

19. Brett Samuels, *Trump Ramps Up Rhetoric on Media, Calls Press ‘the Enemy of*

- Finally, the democratic will-formation so crucial to democracy is under threat from deep cultural divisions, as well as “fractured publics” consuming news with an ideological slant and, in the age of social media, from untrustworthy, unvetted sources.<sup>20</sup>

For many observers, the remedy requires a reassertion of American rule of law values, civility, and comity in public discourse, or simply just listening to one another.<sup>21</sup> Others argue that the problem lies in our two political parties, too ideologically sorted and intransigent to govern effectively or halt the worrisome course of executive delegation.<sup>22</sup> More far-reaching critiques of the status quo see a need for an institutional remedy. Some of the most important critiques recommend reforms to support American elections, including the use of paper ballots, nonpartisan audits of results, and the development by election law scholars of nonpartisan protocols for resolving vote counting disputes.<sup>23</sup>

Others turn to the Judicial Branch, arguing that U.S. federal courts must abandon doctrines of avoidance and deference, and invalidate government actions that threaten the democratic order.<sup>24</sup>

The main argument of this Article is that, however important, these suggestions are incomplete because backsliding almost always begins with a takeover of the civil service, as scholars of democracy have shown.<sup>25</sup> Norms

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*the People*’, THE HILL (Apr. 5, 2019, 2:21 PM), <https://thehill.com/homenews/administration/437610-trump-calls-press-the-enemy-of-the-people/> [https://perma.cc/9Q3J-PXX7]; See also MARVIN KALB, ENEMY OF THE PEOPLE: TRUMP’S WAR ON THE PRESS, THE NEW MCCARTHYISM, AND THE THREAT TO AMERICAN DEMOCRACY (Brookings Inst. Press 2018).

20. See EZRA KLEIN, WHY WE’RE POLARIZED 139–50 (Avid Reader Press 2020); MICHIKO KAKUTANI, THE DEATH OF TRUTH: NOTES ON FALSEHOOD IN THE AGE OF TRUMP (Crown Press 2018).

21. See CARLOS LOZADA, WHAT WERE WE THINKING: A BRIEF INTELLECTUAL HISTORY OF THE TRUMP ERA (Simon & Schuster 2020); Eric A. Posner, *The Dictator’s Handbook, US Edition*, in CAN IT HAPPEN HERE?, *supra* note 4, at 1, 1–17; Noah Feldman, *On “It Can’t Happen Here”*, in CAN IT HAPPEN HERE?, *supra* note 4, at 157, 170–73; Cass R. Sunstein, *Lessons from the American Founding*, in CAN IT HAPPEN HERE?, *supra* note 4, at 57, 78–79.

22. See BALKIN, *supra* note 12; Kim Lane Scheppele, *The Party’s Over*, in CONSTITUTIONAL DEMOCRACY IN CRISIS?, *supra* note 4, at 495; DAVID KAROL, PARTY POSITION CHANGE IN AMERICAN POLITICS (Cambridge Univ. Press 2009).

23. AD HOC COMM. FOR 2020 ELECTION FAIRNESS & LEGITIMACY, FAIR ELECTIONS DURING A CRISIS 6–7 (UCIL 2020).

24. See, e.g., DRIESEN, *supra* note 4.

25. See, e.g., *id.*

and state-level electoral reforms cannot halt this process, and courts, however important, often lack capacity to stop the takeover, because of two factors, indeterminacy and lack of capacity. Identifying symptoms of democratic loss in real time is difficult because onlookers may lack awareness of what these are, and because differences in our values obscure the meaning of events that can lead, down the road, to democratic decline.<sup>26</sup> The second problem is that courts may not be equipped to stop the democratic slide once it has proceeded sufficiently (and dangerously) far.<sup>27</sup>

Take the example of a president (or prime minister) set on firing public prosecutors who do not confirm to his or her personal whims. It is clear at this point that norms of self-restraint have been violated, but are these justiciable?<sup>28</sup> Perhaps, say if the law specified that no prosecutor may be fired for “political” motives. But judicial standards of improper “politicization” of government bodies are squishy, not to mention hard to prove as an evidentiary matter!<sup>29</sup> In other contexts, statutes legislating a mass exodus of judges *have* triggered judicial scrutiny: in 2019, the EU’s highest court invalidated one such statute passed by the Polish legislature, reasoning that it was an attack on judicial independence, upon which a democratic constitution depends.<sup>30</sup> However, the Court of Justice for the European Union (CJEU) has left many others like it in place, and in practice, once a country has reached the point where courts are ruling on the fate of other courts, the balance of powers has grown delicate, to say the least. In countries like Hungary, Poland, Turkey, and Venezuela, where judicial independence came into the crosshairs of organized legislative majorities, by the time courts *did* fight back, they were met with further reprisals.<sup>31</sup>

26. See Nancy Bermeo, *Debate: Questioning Backsliding*, J. DEMOCRACY, Oct. 2022, at 155, 156 (discussing that even scholars have difficulty measuring democratic decline).

27. See DRIESEN, *supra* note 4, at 144.

28. See, e.g., MADISON’S NIGHTMARE, *supra* note 14 (arguing that a sound constitutional culture requires, among other things, norms of restraint in the exercise of power).

29. See, e.g., *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (finding that the President has absolute immunity from damages suits arising out of firing decisions).

30. Jennifer Rankin, *EU Court Rules Poland’s Lowering of Judges’ Retirement Age Is Unlawful*, THE GUARDIAN (June 24, 2019, 10:45 AM), <https://www.theguardian.com/world/2019/jun/24/eu-court-rules-polands-lowering-of-judges-retirement-age-unlawful> [<https://perma.cc/M3U6-JSLR>].

31. For case studies of these episodes on Venezuela, see David Landau, *Constitution-Making and Authoritarianism in Venezuela: The First as Tragedy, the Second as Farce*, in CONSTITUTIONAL DEMOCRACY IN CRISIS?, *supra* note 4, at 161, 161–

The outlook is both better and worse in the United States. On the one hand, the Supreme Court is one of the most powerful courts in the world, with the power to stand up to the political branches and have them obey its rulings, in no small part because lifetime appointment for federal judges is protected by the Constitution itself.<sup>32</sup> Yet the United States has no supranational judicial backstop like the CJEU and no specialized constitutional court like Germany; and a polarized America has begun to view judicial independence with increasing suspicion given a politicized appointments process.<sup>33</sup> More to the point, according to many, the Supreme Court's approach to democracy decline has been exactly backward: even with signs that the President is the "most dangerous branch," the Court has practiced a strong form of deference to the presidency for years, if not decades.<sup>34</sup> The Court often refuses to hear cases it deems overly "political" in content, and a thicket of judge-made laws on standing means that many plaintiffs who believe themselves to be personally offended by presidential action—fired public employees, disgruntled soldiers sent abroad to fight and die, election watchers concerned with political gerrymandering—are left with no court to hear their claims.<sup>35</sup> The Supreme Court has been an active cheerleader of a strong presidency, refusing to curb presidential growth, and along the way, making it more difficult for Congress to snatch back powers it may have frittered away.<sup>36</sup> Hiring and firing is an area where the

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76. On Hungary, see Gábor Halmai, *A Coup Against Constitutional Democracy: The Case of Hungary*, in CONSTITUTIONAL DEMOCRACY IN CRISIS?, *supra* note 4, at 243, 243–56. On Poland, see Wojciech Sadurski, *Constitutional Crisis in Poland*, in CONSTITUTIONAL DEMOCRACY IN CRISIS?, *supra* note 4, at 257, 257–76. And on Turkey, see Ozan O. Varol, *Stealth Authoritarianism in Turkey*, in CONSTITUTIONAL DEMOCRACY IN CRISIS?, *supra* note 4, at 339, 339–54.

32. U.S. CONST. art. III, § 1.

33. A recent Gallup poll found that 74 percent of Republicans, but just 13 percent of Democrats, approve of the Supreme Court's recent performance. Mohamed Younis, *Democrats' Approval of Supreme Court at Record-Low 13%*, GALLUP (Aug. 2, 2022), <https://news.gallup.com/poll/395387/democrats-approval-supreme-court-record-low.aspx> [<https://perma.cc/7TYV-QYQ9>]. See also STEPHEN BREYER, *THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS* (Harv. Univ. Press 2021). This book is also symptomatic of an increasingly anxious court.

34. Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996).

35. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Smith v. Trump*, 731 F. App'x 8 (D.C. Cir. 2018) (upholding dismissal for want of justiciable question); *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

36. See *Myers v. United States*, 272 U.S. 52 (1926) (holding that Congress cannot insert itself into removals of federal officials); *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) (holding that Congress cannot create a unicameral legislative veto



President's discretion is treated as plenary over attempts by Congress to protect the civil service from politicization.<sup>37</sup> These trends have worsened over the last thirty years under the leadership of Chief Justices William Rehnquist and especially John Roberts, under whom a majority of current justices are former Executive Branch officials who believe that in the years following Watergate and Vietnam, the presidency suffered a grave diminution in authority at the hands of an overweening Congress.<sup>38</sup>

What would happen if a Republican Congress passed a law like the one invalidated in Poland, if not firing federal judges (who have lifetime protection), then, say, expanding the size of lower courts to pack them with loyal supporters?<sup>39</sup> Because the Constitution permits Congress to create and undo courts, and because the United States lacks a well-developed body of law protecting judicial independence against the political branches, it is unclear that even if the Supreme Court were to review such a law, it would fall afoul of any established legal principles.<sup>40</sup>

Can norm-following, election reform, or the judiciary stop democratic erosion? They are important building blocks, but incomplete in themselves.

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to stop administrative action); *Bowsher v. Synar*, 478 U.S. 714 (1986) (holding that Congress could not give the Comptroller General, a legislative official, power to approve or disapprove of the President's budget); *Clinton v. City of New York*, 524 U.S. 417 (1998) (holding that Congress could not delegate to the President a "partial" veto); *Raines v. Byrd*, 521 U.S. 811 (1997) (holding that individual legislators have no standing to sue to challenge legislation they believe to be unconstitutional).

37. See *Myers*, 272 U.S. 52; *Nixon*, 457 U.S. 731; *Lucia v. SEC*, 138 S. Ct. 2044 (2018); *United States v. Arthrex*, 141 S. Ct. 1970 (2021).

38. Six of nine current Supreme Court justices have worked in the Executive Branch, all but Justices Sonya Sotomayor, Amy Coney Barrett, and Ketanji Brown Jackson. On the history of unitary views of the presidency, see ANDREW RUDALEVIGE, *THE NEW IMPERIAL PRESIDENCY* (Univ. of Mich. Press 2006). In this story of presidential growth, judicial method seems not to matter much in these results. Since the Burger Court (1969–86), the Court can be characterized as separation of powers formalist, purporting to *ignore* the changing balance of powers between Congress and the President as something deserving of judicial notice so long as no laws are broken. Before, the Burger, Stone, Vinson, and Warren Courts applied a pragmatic approach to separation of powers questions, largely to the same result: legitimating the President having a greater hand in policymaking of all sorts.

39. U.S. CONST. art. III, § 3.

40. U.S. CONST. art. III, § 1, cl. 3. Some legal commentators argue that external constitutional text or moral values limit Congress's ability to interfere with courts carrying out their mandate. See, e.g., Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953). But these limits remain hypothetical and undeveloped in either statutes or case law.

The former do not reach the problem of executive capture of the civil service, and judicial review, by design, is reactive and too weak to do much once political capture spreads. Hence there is reason to think that system defense should begin *before* democratic decline reaches the courts. In the next Part, I discuss the closest thing the United States has experienced to democratic collapse—the 2020 election and subsequent events—and what lessons can be drawn from it before turning to guardrails that can be explored before the next crisis hits.<sup>41</sup>

## II. ANATOMY OF A NEAR COLLAPSE: THE TRUMP PRESIDENCY AND FALLOUT

The presidency of Donald Trump was many things: a jolt of populist energy to a close-knit Republican Party and Beltway community; a key battle in the GOP war to make over the courts and the federal bureaucracy; a profound challenge for expert governance in the nation; and memorably, a time when—at several points—America came close to constitutional collapse.<sup>42</sup> Three episodes in particular illustrate the President’s potential to co-opt and destroy institutions, and just how close Trump came to doing so.<sup>43</sup>

On September 5, 2018, the *New York Times* published a bombshell op-ed, breaking its own policy against anonymity to run the story.<sup>44</sup> An internal Trump Administration official revealed how, from the White House to Executive Branch departments and agencies, senior officials were “working to insulate their operations” from the whims of a distracted, ill-informed, impulsive, reckless, and genuinely immoral President Trump.<sup>45</sup> “It may be cold comfort in this chaotic era,” wrote the official, “but Americans should know that there are adults in the room. We fully recognize what is happening. And we are trying to do what’s right even when Donald Trump won’t.”<sup>46</sup> The op-ed gave an example of a “two-track presidency” at work.<sup>47</sup> On Russia, the President had been reluctant to expel Russian diplomats loyal to Vladimir Putin, even after Putin’s administration was revealed to

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41. See *infra* Part II.

42. DIONNE, ORNSTEIN & MANN, *supra* note 4, at 1–8, 110–11, 138.

43. E.g., Miles Taylor, *I Am Part of the Resistance Inside the Trump Administration*, N.Y. TIMES (Sept. 5, 2018), <https://www.nytimes.com/2018/09/05/opinion/trump-white-house-anonymous-resistance.html>.

44. *Id.*

45. *Id.* We now know that individual to be Miles Taylor, then Chief of Staff at the Department of Homeland Security and a lifelong Republican.

46. *Id.*

47. *Id.*

have been behind the poisoning of a former spy in Britain.<sup>48</sup> President Trump complained that his own senior staff members were boxing him into confrontation with Russia, and “he expressed frustration that the U.S. continued to impose sanctions on [Russia] for its malign behavior. But his national security team knew better,”<sup>49</sup> wrote the anonymous author, “such actions had to be taken, to hold Moscow accountable. This isn’t the work of the so-called deep state. It’s the work of the steady state.”<sup>50</sup>

The author’s revelations sparked many reactions. Some people celebrated the fact of “adults in the room,” but many were horrified.<sup>51</sup> Donald Trump had raged furiously at the “Deep State,” a supposed conspiracy of unelected bureaucrats to overthrow his presidency.<sup>52</sup> It all sounded highly implausible, but wasn’t the op-ed essentially proving Trump’s point by exposing that the President’s own advisers were thwarting his own desires wherever they could? “Steadiness” aside, was a “two-track presidency” something to celebrate?

A second critical episode also revolved around Trump’s ties with Russia. For nearly two years, the Mueller investigation into Russian meddling in the 2016 election dominated headlines, but in retrospect, the whole episode came and went with barely a ripple.<sup>53</sup> The report itself that came out of the investigation proved an anticlimax, but what was most anomalous about the episode was how the presidential chain of command muddled the report’s findings, and thereby buried the story.<sup>54</sup>

The investigation itself had kicked off under controversy about whether an independent prosecutor had the legal authority to investigate

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48. *Id.*

49. *Id.*

50. *Id.*

51. David Leonhardt, *Reaction to the Anonymous Op-Ed*, N.Y. TIMES (Sept. 6, 2018), <https://www.nytimes.com/2018/09/06/opinion/columnists/trump-official-anonymous-op-ed.html>.

52. Alana Abramson, *President Trump’s Allies Keep Talking About the ‘Deep State.’ What’s That?*, TIME (Mar. 8, 2017, 8:00 AM), <https://time.com/4692178/donald-trump-deep-state-breitbart-barack-obama/> [<https://perma.cc/SD9U-XFFK>].

53. See Abby Johnston & Leila Miller, *The Mueller Investigation, Explained*, PBS: FRONTLINE (Mar. 25, 2019), <https://www.pbs.org/wgbh/frontline/article/the-mueller-investigation-explained-2/> [<https://perma.cc/2AV5-Q4SC>].

54. See Jeffrey Toobin, *Why the Mueller Investigation Failed*, THE NEW YORKER (June 29, 2020), <https://www.newyorker.com/magazine/2020/07/06/why-the-mueller-investigation-failed> [<https://perma.cc/8XYY-JENH>].

(some said, “harass”) a sitting President.<sup>55</sup> Dating back to the Watergate scandal, special prosecutors were established by law and appointed by a special branch of the judiciary.<sup>56</sup> Robert Mueller, however, was appointed by acting Attorney General Rod Rosenstein, who himself owed his job to Trump. Midway through the investigation, the special counsel’s charge had to be expanded to cover the June 2017 firing of FBI Director James Comey. Later, it came to light that President Trump had repeatedly contemplated firing Mueller.<sup>57</sup>

The most troubling part, however, is what happened upon conclusion of the investigation. Mueller delivered his 448-page Report on the Investigation into Russian Interference in the 2016 Presidential Election (the Report) to the new Attorney General, William Barr (another Trump political appointee), who proceeded to send a summary of what he called the Report’s “principal conclusions” to a few members of Congress.<sup>58</sup> In a televised address, Attorney General Barr told the public that the Report did not establish that the President had conspired with the Russians, and did not establish obstruction of justice.<sup>59</sup> “No collusion” became the resulting Trump buzzword.<sup>60</sup> Days later, the Special Counsel himself wrote a letter to the Attorney General complaining that his summary “did not fully capture the context, nature, and substance” of the investigation, and that ensuing “public confusion” about the results “threatens to undermine . . . full public confidence in the outcome of the investigations.”<sup>61</sup> For the tight-lipped

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55. *See id.*

56. *See* Jim Mokhiber, *A Brief History of the Independent Counsel Law*, PBS: FRONTLINE (May 1998), <https://www.pbs.org/wgbh/pages/frontline/shows/counsel/office/history.html> [<https://perma.cc/FV39-TCN9>].

57. Michael D. Shear & Maggie Haberman, *Friend Says Trump Is Considering Firing Mueller as Special Counsel*, N.Y. TIMES (Jun. 12, 2017), <https://www.nytimes.com/2017/06/12/us/politics/robert-mueller-trump.html>.

58. Dana Farrington, *READ: The Justice Department’s Summary of the Mueller Report*, NPR (Mar. 24, 2019, 3:45 PM), <https://www.npr.org/2019/03/24/706351394/read-the-justice-departments-summary-of-the-mueller-report> [<https://perma.cc/5UAJ-KMUY>].

59. William P. Barr, U.S. Att’y Gen., Remarks on the Release of the Report on the Investigation into Russian Interference in the 2016 Presidential Election (Apr. 18, 2019), <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-release-report-investigation-russian> [<https://perma.cc/RG8Q-PZAK>].

60. Richard Gonzales & Sasha Ingber, *Mueller’s Letter to Barr Complained That Trump-Russia Report Summary Lacked ‘Context’*, NPR (Apr. 30, 2019, 11:12 PM), <https://www.npr.org/2019/04/30/718883130/mueller-complained-that-barr-summary-of-trump-russia-probe-lacked-context> [<https://perma.cc/9CML-4HAJ>].

61. *Id.*

Mueller this was a significant statement, tantamount to alleging that Barr had deliberately misrepresented the Report's conclusions. Eventually, a redacted version of the Report was released to the public, and after reading it, numerous commentators concluded that Barr had deliberately misrepresented the report and called for his resignation.<sup>62</sup> Indeed, the Report clearly established that the Russians *had* interfered with the election; that there had been several links between the Trump campaign and individuals with ties to the Russian government; and that the Trump campaign celebrated these attacks on the election, if not actively conspiring with the Russians.<sup>63</sup> The Report also described 10 episodes where the President *may* have obstructed justice and stated that Congress could decide whether to initiate impeachment proceedings.<sup>64</sup> It was Mueller's own belief that in his role he could not recommend impeachment charges, but his report's conclusions were far from exonerating the President.<sup>65</sup> Trump himself alternately boasted that the Report exonerated him and called it a fabrication by "angry Democrats" and traitors.<sup>66</sup>

Finally, there were the events spanning November 2020 and February 2021, the severest stress test of American institutions since any time besides the Civil War or, at least, the 1876 election.<sup>67</sup> On Election Day, November 3, President Trump took an initial lead, but as votes from the cities came in, he steadily lost ground until the election was called for Joe Biden four days

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62. *Id.*

63. See U.S. DEP'T OF JUST., REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (Mar. 2019).

64. *Id.*

65. *Id.*

66. Hope Yen & Calvin Woodward, *AP Fact Check: Trump Falsely Claims Mueller Exonerated Him*, AP NEWS (July 24, 2019), <https://apnews.com/article/ap-fact-check-donald-trump-ap-top-news-politics-russia-130932b573664ea5a4d186f752bb8d50> [<https://perma.cc/RY3G-HZQD>].

67. The elections of the late nineteenth century were some of the closest—and the dirtiest—in American history, plagued with cheating and rampant violence, and in 1876, the intricate system Article II envisions to elect the President failed amidst great uncertainty about how to count state slates of electors. After much wrangling, an ad hoc commission of eight eminent political figures was set up to resolve the disputes over the ballots and eventually voted—along party lines—to award the presidential election to Rutherford Hayes. The strong odor of illegitimacy around the whole affair led to the Electoral Count Act of 1887, which improved matters some—but as the events of 2020–2021 showed, did not fully solve the problem. This story is told in lively fashion in JON GRINSPAN, *THE AGE OF ACRIMONY: HOW AMERICANS FOUGHT TO FIX THEIR DEMOCRACY* 86–95 (Bloomsbury Publ'g 2021).

later.<sup>68</sup> President Trump's first response was to cry foul on Twitter and to launch a volley of lawsuits to halt the counting of votes in states where late-counted ballots augured a Biden victory.<sup>69</sup> Without a single exception, judges threw out the suits.<sup>70</sup> After suffering 50 or so losses in court, Trump turned toward a public-facing campaign to pressure state and local election officials to produce favorable results—most notoriously Georgia secretary of state Brad Raffensperger, a lifelong Republican, whom he asked to “find 11,780 votes” to overcome the gap between himself and Biden in the state.<sup>71</sup> These civil servants, too, invariably invoked professional ethics in resisting the call to politicize their duties.<sup>72</sup> On November 12, a federal cybersecurity agency issued a statement calling the election “the most secure in American history” and attesting to the total absence of evidence of fraud.<sup>73</sup> Tellingly, a week later, Trump fired the head of the agency.<sup>74</sup>

As the weeks went by, the President continued to repeat his baseless claims of fraud, making him the first modern American presidential candidate to refuse to concede an election, while he and an increasingly

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68. Scott Detrow & Asma Khalid, *Biden Wins Presidency, According to AP, Edging Trump in Turbulent Race*, NPR (Nov. 7, 2020, 11:26 AM), <https://www.npr.org/2020/11/07/928803493/biden-wins-presidency-according-to-ap-edging-trump-in-turbulent-race> [<https://perma.cc/7YZW-QDHS>].

69. Alison Durkee, *Trump and the GOP Have Now Lost More than 50 Post-Election Lawsuits*, FORBES, <https://www.forbes.com/sites/alisondurkee/2020/12/08/trump-and-the-gop-have-now-lost-50-post-election-lawsuits/?sh=2b012b6d2960> [<https://perma.cc/C7JG-94AE>] (Dec. 9, 2020, 2:18 PM).

70. *Id.*

71. John Bowden, *Trump Asked Georgia Secretary of State to ‘Find’ 11.7k Ballots, Recalculate Election Result*, THE HILL (Jan. 3, 2021, 1:50 PM), <https://thehill.com/homenews/administration/532433-trump-asked-georgia-secretary-of-state-to-find-116k-ballots/> [<https://perma.cc/KN4K-LUA8>].

72. See Toluse Olorunnipa, Amy B. Wang & Chelsea Janes, *Trump’s Quest to Overturn Election Runs into Quiet Resistance from Local and State Republicans*, WASH. POST (Nov. 21, 2020, 7:19 PM), [https://www.washingtonpost.com/politics/trump-michigan-georgia-pennsylvania-certify-votes-state-lawmakers/2020/11/21/1f410296-2b9e-11eb-8fa2-06e7cbb145c0\\_story.html](https://www.washingtonpost.com/politics/trump-michigan-georgia-pennsylvania-certify-votes-state-lawmakers/2020/11/21/1f410296-2b9e-11eb-8fa2-06e7cbb145c0_story.html).

73. *Joint Statement from Elections Infrastructure Government Coordinating Council & the Election Infrastructure Sector Coordinating Executive Committees, CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY* (Nov. 12, 2020), <https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election> [<https://perma.cc/5RQY-AEMN>].

74. Alana Wise, *Trump Fires Election Security Director Who Corrected Voter Fraud Disinformation*, NPR (Nov. 17, 2020, 7:37 PM), <https://www.npr.org/2020/11/17/936003057/cisa-director-chris-krebs-fired-after-trying-to-correct-voter-fraud-disinformati> [<https://perma.cc/6YU9-EWVD>].

fractured team continued to brainstorm strategies to produce their desired outcome.<sup>75</sup> One was a purported legal theory under which state legislatures could simply ignore the election results and appoint new slates of Trump electors to replace the ones chosen in the election: no Republican-led state legislature took the bait, even if some were tempted.<sup>76</sup> During a meeting at the Oval Office in December 2020, disgraced former National Security Adviser Michael Flynn (who still had the President's ear despite having resigned after lying under oath about his contacts with Russian diplomats), suggested that the President invoke martial law and deploy the military to "rerun" the election.<sup>77</sup> Top military officials immediately issued a joint statement distancing the U.S. military from the election.<sup>78</sup> The next day, President Trump's own Attorney General spoke on TV to undercut several ideas reportedly being considered by the President, including seizing voting machines and appointing a special counsel to investigate electoral fraud.<sup>79</sup> The result, as the public later learned, was an angry tantrum by the President during which he threw a plate of food against the wall of the West Wing dining room.<sup>80</sup>

75. Steve Inskeep, *Timeline: What Trump Told Supporters for Months Before They Attacked*, NPR (Feb. 8, 2021, 2:32 PM), <https://www.npr.org/2021/02/08/965342252/timeline-what-trump-told-supporters-for-months-before-they-attacked> [<https://perma.cc/TVL9-MJXY>].

76. Chelsey Cox, *Fact Check: State Legislatures Choose Electors, but Electors Vote How State Dictates*, USA TODAY, <https://www.usatoday.com/story/news/factcheck/2020/11/10/fact-check-state-legislators-choose-electors/6204171002/> [<https://perma.cc/JMX3-BCVU>] (Nov. 14, 2020, 5:48 PM).

77. Kevin Liptak & Pamela Brown, *Heated Oval Office Meeting Included Talk of Special Counsel, Martial Law as Trump Advisers Clash*, CNN, <https://www.cnn.com/2020/12/19/politics/trump-oval-office-meeting-special-counsel-martial-law/index.html> [<https://perma.cc/P2KP-6VYK>] (Dec. 20, 2020, 9:15 PM); David Sherfinski & Andrew Blake, *Army Brass Rejects Calls for Martial Law: 'No Role' for Military in Determining Election Outcome*, WASH. TIMES (Dec. 19, 2020), <https://www.washingtontimes.com/news/2020/dec/19/army-brass-rejects-calls-for-martial-law-no-role-f/>.

78. That statement read, in part: "There is no role for the U.S. military in determining the outcome of an American election[.]" Sherfinski & Blake, *supra* note 77.

79. Matt Zapotosky, *Undercutting Trump, Barr Says There's No Basis for Seizing Voting Machines, Using Special Counsels for Election Fraud, Hunter Biden*, WASH. POST (Dec. 21, 2020, 12:13 PM), [https://www.washingtonpost.com/national-security/barr-trump-special-counsel-voter-fraud-hunter-biden/2020/12/21/4d85f060-439c-11eb-b0e4-0f182923a025\\_story.html](https://www.washingtonpost.com/national-security/barr-trump-special-counsel-voter-fraud-hunter-biden/2020/12/21/4d85f060-439c-11eb-b0e4-0f182923a025_story.html).

80. Brett Samuels, *Trump Threw Lunch Against the Wall Over Barr Interview, Hutchinson Says*, THE HILL (June 28, 2022, 2:18 PM), <https://thehill.com/homenews/administration/3539978-trump-threw-lunch-against-the-wall-over-barr-interview-hutchinson-says/> [<https://perma.cc/4GKX-CDLN>].

Finally, on January 6, 2021, an angry mob stormed the U.S. Capitol as Congress was preparing to count the electoral ballots and certify the results of the election.<sup>81</sup> The outgoing President stood before a crowd of several thousand and told them:

This [is] the most corrupt election in the history, maybe of the world . . . .  
[I]n addition to challenging the certification of the election, I'm calling on Congress and the state legislatures to quickly pass sweeping election reforms, and you better do it before we have no country left . . . . [I]f you don't fight like hell, you're not going to have a country anymore.<sup>82</sup>

President Trump failed in his attempts to earn victory, but a crowd of 2,000–2,500 rioters did storm the U.S. Capitol, forcing legislators to flee into bunkers hidden in its passageways.<sup>83</sup> A few weeks later, Congress voted to impeach Trump, but the Senate failed to convict.<sup>84</sup> Meanwhile, in the years following these events, a number of Republican-controlled states heeded Trump's call, with 19 enacting laws restricting access to the vote.<sup>85</sup>

What are the lessons learned from these events? In some ways, America got lucky: things could have gone much worse, particularly during the election, given the ongoing pandemic, political polarization, the incumbent's attempts to politicize the office, the alarmism and falsehoods being spread, and the degree of support President Trump's message received in the American public. In the end, not a single judge (even Trump-appointed ones) entertained the more than 50 spurious President Trump lawsuits in their court.<sup>86</sup> State and local election officials—again, even Republican ones—invariably invoked their professional ethical

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81. Larry Buchanan et al., *How a Pro-Trump Mob Stormed the U.S. Capitol*, N.Y. TIMES, <https://www.nytimes.com/interactive/2021/01/06/us/trump-mob-capitol-building.html> (Jan. 7, 2021).

82. *Id.*; President Donald Trump, *Remarks by Donald Trump Before the Capital Riot (2021)*, in 1 POLITICAL VIOLENCE IN AMERICA 641, 645 (Lori Cox Han & Tomislav Han eds., ABC-CLIO 2022).

83. Buchanan et al., *supra* note 81.

84. Domenico Montanaro, *Senate Acquits Trump in Impeachment Trial — Again*, NPR (Feb. 13, 2021, 3:52 PM), <https://www.npr.org/sections/trump-impeachment-trial-live-updates/2021/02/13/967098840/senate-acquits-trump-in-impeachment-trial-again> [<https://perma.cc/W74P-PJLE>].

85. Jane C. Timm, *19 States Enacted Voting Restrictions in 2021. What's Next?*, NBC NEWS (Dec. 21, 2021, 6:02 AM), <https://www.nbcnews.com/politics/elections/19-states-enacted-voting-restrictions-2021-rcna8342> [<https://perma.cc/WF3U-PEMB>].

86. Durkee, *supra* note 69.



commitments in resisting the call to politicize their duties.<sup>87</sup> The military publicly distanced itself from the election, and Trump's own Attorney General and Vice President refused to entertain more drastic means to overturn the results.<sup>88</sup> By contrast, it is telling that the Mueller Report seems to have been buried by a chain of command built for loyalty and responsiveness, as opposed to professionalism. In fact, in May of 2019, over 1,000 former federal prosecutors signed a statement stating that the conduct described in the Report "would, in the case of any other person . . . result in multiple felony charges for obstruction of justice."<sup>89</sup>

The events surrounding the 2020 election proved that, while there are many courageous and professional people working in government, the system has more exposure to risk than one, ideally, might like to tolerate. In the end, it was norm-following by the public servants—"the adults in the room," to recall that shocking op-ed<sup>90</sup>—following norms and codes of conduct of their professions (military, cybersecurity, public health, election administration, and so on) that saved the nation. All this remained so, despite the worst impulses—indeed, the explicit orders—of the President, to some of these officials owed their jobs.

For this reason, it is profoundly ironic that in the American judiciary, a movement is spreading which calls into question the independence of civil servants as a matter of law. In the next Part, I discuss why this idea is so wrong-headed and help put into context civil service independence as one of the most important of an expanding menu of guardrails of democracy.

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87. Olorunnipa, Wang & Janes, *supra* note 72; Amy Gardner, Emma Brown & Josh Dawsey, *Inside the Nonstop Pressure Campaign by Trump Allies to Get Election Officials to Revisit the 2020 Vote*, WASH. POST (Dec. 22, 2021, 5:38 PM), [https://www.washingtonpost.com/politics/trump-election-officials-pressure-campaign/2021/12/22/8a0b0788-5d26-11ec-ae5b-5002292337c7\\_story.html](https://www.washingtonpost.com/politics/trump-election-officials-pressure-campaign/2021/12/22/8a0b0788-5d26-11ec-ae5b-5002292337c7_story.html).

88. Sherfinski & Blake, *supra* note 77; Adam Schrader & Daniel Uria, *Trump's Inner Circle Says in Jan. 6 Hearing He Refused to Accept Election Results*, UNITED PRESS INT'L, [https://www.upi.com/Top\\_News/US/2022/06/13/second-Jan-6-hearing-Trump-overturn-election/3971655068074/](https://www.upi.com/Top_News/US/2022/06/13/second-Jan-6-hearing-Trump-overturn-election/3971655068074/) [<https://perma.cc/XG38-V4WH>] (June 13, 2022, 2:14 PM).

89. DOJ Alumni, *Statement by Former Federal Prosecutors*, MEDIUM (May 6, 2019), <https://medium.com/@dojalumni/statement-by-former-federal-prosecutors-8ab7691c2aa1> [<https://perma.cc/L25Q-LMPX>].

90. Taylor, *supra* note 43.

### III. MILITANT DEMOCRACY 2.0: AN EXPANDING MENU OF GUARDRAILS

Typically, when we use the words “technological innovation” and “progress,” it is in reference to hard sciences like engineering and tech, *not* constitutional law. Yet constitutions are not written in a vacuum, but rather, in global waves of borrowing and imitation tending to reflect the preferences, insights, or discoveries of their age. So when it comes to the science of building a democracy resistant to backsliding into tyranny, the U.S. Constitution is definitely first-generation technology.<sup>91</sup> America boasts a world-renowned judiciary and a powerful military, but it lacks some of the more popular democracy-defending devices of newer constitutions like Germany, South Africa, and Colombia.<sup>92</sup> Many of these feature constitutional protections for the administrative state—provisions absent, obviously, from America’s eighteenth century Constitution, which predates the rise of the modern state.<sup>93</sup> As a result, America’s federal bureaucracy is a legislative creation—and it can be dismantled by laws or by judicial review, the latter of which, animated by a conservative deregulatory wave, is precisely what is going on today.<sup>94</sup>

Democratic self-government is a relatively new phenomenon in the world, and many who have studied it have been concerned with how it can be protected from devolving into older, more familiar, more repressive forms of rule: monarchy, aristocracy, or stratocracy (military rule). The U.S. Framers used the term “tyranny” to express these fears.<sup>95</sup> For a time after World War II, “totalitarianism” became the buzzword, and “militant democracy” became the term favored for a democracy ready and willing to stop anti-democrats from running elections and then destroying free competition—even if this meant that democracy was violating its own tenets of inclusivity in order to survive.<sup>96</sup> Political parties who called for an end to

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91. See THE FEDERALIST NO. 10 (James Madison).

92. Tom Ginsburg & Aziz Huq, *How We Lost Constitutional Democracy*, in CAN IT HAPPEN HERE?, *supra* note 4, at 135, 144–55; HOW TO SAVE A CONSTITUTIONAL DEMOCRACY, *supra* note 3, at 164–205.

93. See Ginsburg & Huq, *supra* note 92, at 148.

94. Gillian E. Metzger, Foreword, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 17–33 (2017).

95. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

96. One of the main theorists of militant democracy was Karl Loewenstein, a German émigré who taught in the United States during the war. See *Biography*, AMHURST COLLEGE: KARL LOEWENSTEIN AND THE AMERICAN OCCUPATION OF GERMANS, <https://loewenstein.wordpress.amherst.edu/biography/> [<https://perma.cc/G472-D2PE>]. Loewenstein explained the concept as follows: “[W]hen fascism uses with

democracy, as the Nazis and Communists had done, could be disbanded entirely. After the Second World War, reformers believed that constitutional democracy required a “guardian”: a special type of court—the constitutional court—that would perform this critical gatekeeping function, among others.<sup>97</sup> So far, courts have performed this role rarely, but ably. Anti-system parties have been banned—not without controversy, of course—in Spain and Turkey, and have come close to doing so in Germany and Israel, among others.<sup>98</sup>

More recently, new types of democratic guardrails have been developed to supplement the democracy-defending role of courts. I cluster these under the heading of *bureaucratic* remedies (to distinguish them from older judicial ones). Political parties whose aim is institutional takeover do not always helpfully make those intentions clear, so it is useful to build in limits on the damage they can do once in office. The premise of the new guardrails is that, at the level of the constitution, independent actors can be studded throughout the government to play distinct democracy-saving roles: preventing the concentration of political power, blocking the politicization of neutral functions, or simply blowing the whistle on government actors who abuse their powers. In this Article, I group these actors into three categories based on the distinct role they play, and briefly review them here.

One category aims at countering politicization by ensuring the neutral administration of the law. The substance of the idea is not new. For decades, it has been viewed as desirable to wall off policy realms like fiscal and monetary policy, science and technology, food and drug safety, public health,

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impunity democratic institutions to gain power, democracy cannot be blamed if it learns from its ruthless enemy and applies in time a modicum of the coercion that autocracy will not hesitate to apply against democracy.” Karl Loewenstein, *Autocracy Versus Democracy in Contemporary Europe*, 29 AM. POL. SCI. REV. 574, 593 (1935). See also Karl Loewenstein, *Militant Democracy and Fundamental Rights, II*, 31 AM. POL. SCI. REV. 638, 639 (1937) [hereinafter *Militant Democracy and Fundamental Rights II*]; Karl Loewenstein, *Militant Democracy and Fundamental Rights, I*, 31 AM. POL. SCI. REV. 417, 422 (1937).

97. Michaela Hailbronner, *Rethinking the Rise of the German Constitutional Court: From anti-Nazism to Value Formalism*, 12 INT. J. CON. LAW 626 (2014). See Hans Kelsen, *On the Nature and Development of Constitutional Adjudication*, in THE GUARDIAN OF THE CONSTITUTION: HANS Kelsen AND CARL SCHMITT ON THE LIMITS OF CONSTITUTIONAL LAW (Lars Vinx, ed., trans., Cambridge Univ. Press 2015).

98. Yigal Mersel, *The Dissolution of Political Parties: The Problem of Internal Democracy*, 4 INT’L J. CONST. L. 84, 84–86 (2006).

civil rights, and many others from the give-and-take of politics.<sup>99</sup> What *is* new are the roles independent actors play and the powers they wield. For instance, in the electoral context, independent actors like national election commissions or special electoral courts have proliferated. These often wield substantial powers: approving maps (that is, banning political gerrymandering), organizing and monitoring elections, counting ballots, and resolving any electoral disputes.<sup>100</sup> In some countries, these bodies also have the power to allot public campaign funds and public media airtime among candidates and to introduce legislative bills related to their subject areas. They may also be empowered to ban political parties where necessary.<sup>101</sup> Ordinarily, these positions are not appointed by the President and must be staffed by individuals who meet stringent criteria for service and who may sometimes be barred from holding political office after service.<sup>102</sup> In general, structures like these are founded on the basic idea that there is a fundamental conflict of interest in elected officials defining the rules that get them elected.<sup>103</sup>

Another group of remedies focuses on depoliticizing appointments of officials like judges or high-level officers.<sup>104</sup> They usually introduce non-politicians into the appointment process or require broad participation from various sectors to ensure these officials' impartiality.<sup>105</sup> Such provisions are considered democracy-enhancing because they ensure that no simple legislative majority can bend the civil service to their advantage. For instance, in Germany, half of the judges on the Federal Constitutional Court must be appointed by one house of Parliament (the Bundestag) and the other half by the other (the Bundesrat).<sup>106</sup> In Colombia, Constitutional Court judges are chosen by the Senate based off lists presented by the President,

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99. For an old version of this idea, see FRANK J. GOODNOW, *POLITICS AND ADMINISTRATION* (Macmillan 1900).

100. See URUGUAY'S CONSTITUTION OF 1966, arts. 322–28; CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] [CONSTITUTION], art. 265; CONSTITUTION OF ECUADOR, Oct. 20, 2008, arts. 217–21.

101. In other systems, this power is held by the constitutional court. See, e.g., GRUNDGESETZ [GG] [BASIC LAW], art. 18 (Ger.), translation at [http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html) [<https://perma.cc/K3ZR-MCJZ>]; *id.* art. 21.

102. Political Parties, Elections and Referendums Act 2000, c. 41 §§ 1–21 (UK).

103. Christopher S. Elmendorf, *Election Commissions and Electoral Reform: An Overview*, 5 ELECTION L.J.: RULES, POL., & POL'Y 425 (2006).

104. Laura Denvir Stith & Jeremy Root, *The Missouri Nonpartisan Court Plan: The Least Political Method of Selecting High Quality Judges*, 74 MO. L. REV. 711, 723 (2009).

105. *Id.*

106. GRUNDGESETZ [GG] [BASIC LAW], art. 94 (Ger.).

the Supreme Court (a separate body), and the Council of State (Colombia's highest administrative court).<sup>107</sup> By law, the Court must include judges representing different sectors of society and the profession (e.g., academia, private practice).<sup>108</sup> Other countries have procedures that are even more intricate. In Honduras, where corruption is a serious problem, Supreme Court judges are appointed by a two-thirds vote by the legislature based off a list put together by a seven-member Federal Nominating Board.<sup>109</sup> That Board, according to the Constitution, must include: a prior member of the Supreme Court, a member of the federal bar, the National Commissioner of Human Rights (a federal civil servant), a representative of the Council of Private Enterprise (a private citizen), a law professor from the nation's largest law school, a representative of civil society, and a representative of national labor unions.<sup>110</sup> Honduras has failed to tame its corruption problems, but that is not the point—arrangements like these help guard against overreach by a single party, representing the idea that the impartiality of a judge or other public servant means specifically being accountable to *many* parties in society at once.

Finally, another cache of bureaucratic remedies employ independent actors for oversight purposes. Checking and balancing, these remedies suggest, is not enough to stop overreach; constitutional watchdogs are also necessary. How these actors are structured varies from system to system: some can be placed within ordinary federal agencies (as with inspectors general in the United States), or independent branches of popular oversight may be created (as in newer democracies like Ecuador).<sup>111</sup> Either way, under this heading, we find officials like ombudsmen, inspectors general, and comptrollers. As a class, these officials do two things. First, they *increase transparency in government* by collecting and sharing information, reporting ethics breaches, or investigating rights violations on the part of the government.<sup>112</sup> Second, they *ensure institutional stability* simply by virtue of not being directly accountable to the President.<sup>113</sup>

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107. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] [CONSTITUTION], art. 239.

108. L. 270/96, marzo 15, 1996, DIARIO OFICIAL [D.O.] (Colom.).

109. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS [CONSTITUTION] 1982, art. 311.

110. *Id.*

111. See CONSTITUCION OF ECUADOR Oct. 20, 2008, art. 191, art. 204 (on the Office of the Attorney for the Defense of the People and on Transparency and Social Control Branch of Government, respectively).

112. Guillermo O'Donnell, *Horizontal Accountability in New Democracies*, J. DEMOCRACY, July 1998, at 112, 121.

113. See *id.*

We return now to the American context. Many of these sorts of officials exist in the United States, but in other countries' public bureaucracies they are more numerous, dense, better protected, and exercise certain broader functions unknown stateside.<sup>114</sup> There are several reasons for this. One, of course, is the age of the U.S. Constitution, written before modern bureaucracies, when neither the perils of these structures nor their perks were fully understood. Another reason is political culture. To borrow the terms of the great comparativist Mirjan Damaška, European states have long featured *hierarchical* modes of authority: *professionalized, permanent bureaucracies* featuring *clear hierarchical relationships* involving superiors and subordinates and *technical decision-making procedures*.<sup>115</sup> Americans, by contrast, tend to employ *coordinate* systems featuring *nonhierarchical relationships* between rough equals and decision-making informed by *general community norms*.<sup>116</sup> To be sure, Americans have *some* tolerance for bureaucratic independence when it comes to complex market regulation (e.g., the Securities and Exchange Commission) or where political balancing is considered important for the evenhanded application of the law (like the Federal Electoral Commission). But the relationship with bureaucracy and expertise is complicated, seen not just in the perennial demonization of "pointy-headed experts" in our politics,<sup>117</sup> but also, particularly after the Reagan era, in a public bureaucracy that, while large and powerful, is increasingly chastened and at pains to justify itself. One more reason for America's underdeveloped defensive institutions: the so-called militant democracy debate never took place in the United States, which suffered no twentieth century institutional collapse. And though concerns about democratic backsliding have now reached the American academy,<sup>118</sup> in identifying responses to the challenge, most Americans assume that our existing institutions are up to the task. Commentators often see the issue as one of values: defending civic republicanism, tolerance, and so forth.<sup>119</sup> Others believe the problem lies with our current party system, suggesting

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114. See MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 16 (Yale Univ. Press 1986).

115. *Id.*

116. *Id.* at 16–18.

117. MICHAEL KAZIN, *THE POPULIST PERSUASION* 218, 273–74 (Cornell Univ. Press 2d ed. 2017).

118. See, e.g., Posner, *supra* note 21, at 4, 17; BALKIN, *supra* note 12; SANFORD LEVINSON & JACK M. BALKIN, *DEMOCRACY AND DYSFUNCTION* (Univ. Chi. Press 2019); CONSTITUTIONAL DEMOCRACY IN CRISIS?, *supra* note 4; HOW TO SAVE A CONSTITUTIONAL DEMOCRACY, *supra* note 3.

119. See, e.g., Feldman, *supra* note 21, at 157.

that democratic loss will self-correct as we enter a new period of party alignment.<sup>120</sup> Others turn to courts, but usually with plans to coax them into rethinking their own doctrines—e.g., judge-made rules like the political question doctrine and the unitary executive theory.<sup>121</sup> But why would a court do so of its own will absent some deeper change? These ideas are good. But we should add another.

America lacks centralized public oversight structures like human rights ombudsmen, and it lacks sufficiently stringent independence protections for other actors like public prosecutors and Executive Branch attorneys. Independence in American government is under increasing pressure today, and this exposes us to significant risks of democratic backsliding, as the recent events described in the last section suggest. It is therefore ironic and unfortunate that these days, the U.S. Supreme Court increasingly treats such independent actors as presumptively *undemocratic* insofar as they prevent a democratically elected President from exercising direct control over Executive Branch officials.<sup>122</sup> The lessons from abroad appear to point in the opposite direction; to some extent, defending democracy means defending government *from* the President.<sup>123</sup> Taken together, these institutions appear to be a wager on institutional independence to make sure that the rule of law is obeyed and not, ultimately, bent to partisan ends.<sup>124</sup>

120. Jack Balkin believes that this problem is in part a symptom of a major realignment of the party system, so that (again, in part) it will self-correct as parties recalibrate, gain different shares of the electorate, and learn to share power again. BALKIN, *supra* note 12.

121. See DRIESEN, *supra* note 4, at 85.

122. In a recent series of cases, the Supreme Court has cut into the purview of independent bureaucrats. See, e.g., *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 513–14 (2010); *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018); *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2211 (2020); *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1988 (2021); *Collins v. Yellen*, 131 S. Ct. 1761, 1789 (2021). The mantra behind these cases is one elaborated in *Myers v. United States*, a 1926 case written by Chief Justice (and former president) William Taft, who wrote that “as [the President’s] selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible.” 272 U.S. 52, 117, 118 (1926).

123. See GRUNDGESETZ [GG] [BASIC LAW], art. 44 (Ger.). But see CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] [CONSTITUTION], art. 115.

124. Another group of democracy-defending devices that are often discussed in the literature pertain to the legislature, not the public bureaucracy, and so will not be discussed here: power-sharing arrangements in the legislature. Most important are minority parliamentary rights of inquiry and investigation and supermajoritarian requirements for a broad array of actions—e.g., triggering emergency powers or

How else could the United States approximate a more robust regime of democracy defense given present-day institutional constraints? The good news is that, to some extent, the United States already has experience with bureaucratic remedies similar to the ones discussed under three headings above: neutral rule of law enforcement (e.g., electoral commissions), depoliticized appointments (involving multiple actors in selecting court justices), and internal oversight (inspectors generals, ombudsmen, and the like). Under the latter category, America has several federal statutes, especially those passed in the wake of the Watergate scandal, namely the Ethics in Government Act and the Inspector General Act of 1978.<sup>125</sup> Under the first category, we find multimember bipartisan commissions like the FCC, the SEC, and the FEC—the former dating back to the Progressive Era, the latter, again, to the post-Watergate moment of interbranch sparring. When it comes to appointments, our Constitution contemplates a single process for appointing diplomats, Supreme Court justices, and what are now called “principal officers” (understood to be heads of departments and other presidential advisers): the President nominates them and the Senate confirms.<sup>126</sup> It appears our Constitution drafters were mistaken to assume that senatorial confirmation would serve the function of preventing unqualified or politicized appointments.<sup>127</sup> That said, even under existing procedures, there are ways to encourage depoliticization. For instance, in practice, lists of candidates are already submitted to the President by organized groups in private society, for instance, the Federalist Society, which hand-selects conservative judicial candidates for federal office.<sup>128</sup> A statute could conceivably formalize the process of formulating a shortlist of candidates and open it up to wider participation, say, by representatives of labor, commerce, consumer protection, environmental advocacy, and others.

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appointing high-court judges. These procedural devices help counter the winner-takes-all effect of majority parties.

125. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified in scattered sections of 5 U.S.C. app. § 4, 2 U.S.C., 28 U.S.C.); Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (codified as 5 U.S.C. app. §§ 1–13).

126. U.S. CONST. art. II, § 2, cl. 2.

127. See BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS* 256–58 (2005) (discussing how it is a mistaken assumption that branch loyalty, not party spirit, would animate our institutions); Darryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2374 (2006) (discussing how party, not branch identity, drive present-day political outcomes).

128. STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* 158 (Princeton Univ. Press 2008).



Of course, the present political winds are blowing against these changes. Without an appreciation that our constitutional democracy depends on preserving our governing structures, and without an appreciation for the structure-saving function that neutral and independent government officials play, ongoing trends of concentrated presidentialism will continue undisturbed. Presidential power is often defended today on the grounds that it vindicates democracy, but democracy cannot do without the rule of law.<sup>129</sup> As recent events stateside and abroad unmistakably prove, America's defenses against democratic loss are doomed to remain inchoate and weak unless we supplement judicial review and explore deeper and far-reaching institutional reforms.

Hence, the fight against democratic loss should begin with a fundamental rethinking of judicial doctrine on the executive branch; in particular, the misguided theory of the unitary executive must be abandoned, not because it is likely that a future president will attempt to abuse the office as unabashedly as Trump did, but because if one were to do so, they would be stopped only by the ethical scruples of the civil servants around them. But a rethinking, too, of the point of federal bureaucracy is critical, not just as an institutional matter but also as a political matter. If Americans continue to believe that "government is not the solution to our problem: government is the problem," we will be left with a government amenable to no legal limits, one that can easily become the stuff of small-government advocates' nightmares.<sup>130</sup>

#### IV. CONCLUSION

A main contribution of the vast and growing democratic decline literature is to make clear just how similar stories of democratic decline over the world are, with the same authoritarian playbook being exploited in context after context. First, a population is put on high alert, warned of threats inside or outside the country. Second, the President concentrates powers in their office through delegation and by placing loyalists in important bureaucratic positions. Third, and most destructively, the powers of government are turned against groups deemed enemies of the regime:

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129. Is what we are discussing democratic defense, or rule of law defense? The two can be opposed, as when a court invalidates a popular law. The democratic theorist Jürgen Habermas has famously argued, however, that the conflict is overstated, and that the two are mutually co-dependent: without laws, neutrally enforced and binding upon all, democracy cannot function. JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* 449–50, 454–56 (William Rehg trans., MIT Press 1996).

130. President Ronald Reagan, Inaugural Address 1981 (Jan. 20, 1981).

political opponents, ethnic or religious minorities, foreigners, journalists, etc. At this point, democracy is no longer truly democracy, and it has now become difficult for the people or the political opposition to push back as a strong regime concentrates its hold on power.

Not just the sobering results observed in once-democratic contexts like Russia and Venezuela but also the milder symptoms displayed of late in the United States counsel in favor of taking stock of what defenses have worked to stop the democratic slide, and what have not. As I have argued here, judicial review that strikes down unconstitutional, anti-system laws and actions by the government plays a critical role, but it suffers from two limitations. First, such processes ordinarily proceed in procedurally “lawful” ways that evade judicial review at early stages. And second, courts—the “weakest branch” according to common wisdom—tend to lack the capacity to deal with this problem at late stages of the process because they lack the institutional strength to push back against a unified front in the political branches.<sup>131</sup>

Within the American legal academy, many are now taking the debate over “militant” or “intolerant” democracy seriously.<sup>132</sup> Yet, as I argue here, America’s defenses are weak compared to those of newer constitutional systems because they depend so heavily on the power of courts and leave civil servants comparatively unprotected. For this reason, I have argued for taking a page from other countries and exploring “bureaucratic” remedies adopted in newer constitutions in places like Germany, South Africa, and Colombia.<sup>133</sup> The United States lacks centralized public oversight structures like human rights ombudsmen, not to mention multi-party appointment procedures that minimize politicization. We do have a long history of independence protections for actors like public prosecutors and executive-branch attorneys, but these protections are statutorily—not constitutionally—derived, and they are subject to increasing pressure.

As Mirjan Damaška noted, we in common-law America tend to be allergic to any institutional arrangements that rely on state bureaucracies and paths of hierarchical authority.<sup>134</sup> In today’s political climate, so deeply suspicious of government power, the “bureaucratic remedy” to democratic

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131. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 21–25 (Yale Univ. Press 1962).

132. See sources cited *supra* note 4.

133. Ginsburg & Huq, *supra* note 92; HOW TO SAVE A CONSTITUTIONAL DEMOCRACY, *supra* note 3.

134. DAMAŠKA, *supra* note 114, at 183.

loss will inevitably seem a bitter pill to swallow. But, the argument goes, a comparative lens on democratic decline suggests that the bitter pill may be necessary. Clearly, it is better to prevent democratic loss before it starts rather than try to stop it once it's too late. For this, it is crucial here in America to wean ourselves off of misguided and dangerous judicial formulas, namely our dependency on a unitary executive and non-justiciability. We are not used to treating our presidency as a structural liability, but at this point, said unquestioned faith in the office is naïve. Presidential power is crucial to running an “energetic” government, but a strong presidency does not necessarily mean a presidency with limitless power over the legislature or the bureaucracy.<sup>135</sup> Democratic decline, as we have seen the world over, is increasingly being carried out through a centralization of executive power. Where this happens, only countervailing centers of power are sufficient to arrest it. Other countries achieve this by walling off areas of the government from presidential intermeddling.<sup>136</sup> Such arrangements may be a radical about-face for American government, but our democracy has faced great challenges before and adapted to meet them head-on. Hyper-presidentialism is the next great test.

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135. THE FEDERALIST NO. 70 (Alexander Hamilton) (“Taking it for granted, therefore, that all men of sense will agree in the necessity of an energetic Executive . . . [I]t teaches us not to be enamored of plurality in the Executive.”).

136. See *supra* Part III.