

The Presidency

Is the executive branch too powerful?

President Trump's governance style has heightened long-standing concerns that presidents have been asserting more power, through executive orders and other means, than the Constitution intended. For instance, no president has asked Congress for a declaration of war since World War II even though the Constitution reserves war-making power to the legislative branch. Some historians date the growth of presidential control to the New Deal-era expansion of the federal government, and others to the end of the Cold War and a decline of foreign policy expertise in Congress. Critics of Trump, pointing to his mounting executive orders and criticism of the justice system, worry that the American system of checks and balances could be in peril. Others see Trump's overturning of standing policies as the inevitable result of rising presidential power under both Republicans and Democrats. Trump's supporters say he is doing exactly what he was elected to do: disrupt Washington's traditions. Whether future presidents will follow Trump's example remains an open question.



President Trump boards Air Force One at Joint Base Andrews in Maryland on Nov. 5, 2018. Trump's leadership style has exacerbated long-standing concerns that presidents – both Republican and Democratic – have been asserting more power, through executive orders and other means, than the Constitution intended.

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**CQ Researcher • Nov. 16, 2018 • www.cqresearcher.com
Volume 28, Number 41 • Pages 969-992**

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Nov. 16, 2018
 Volume 28, Number 41

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CQ Press is a registered trademark of Congressional Quarterly Inc.

CQ Researcher (ISSN 1056-2036) is printed on acid-free paper. Published weekly, except: (March wk. 4) (May wk. 4) (June wk. 5) (Aug. wks. 2, 3) (Nov. wk. 4) and (Dec. wks. 3, 4). Published by SAGE Publications, Inc., 2455 Teller Rd., Thousand Oaks, CA 91320. Annual full-service subscriptions start at \$1,131. For pricing, call 1-800-818-7243. To purchase a CQ Researcher report in print or electronic format (PDF), visit www.cqpress.com or call 866-427-7737. Single reports start at \$15. Bulk purchase discounts and electronic-rights licensing are also available. Periodicals postage paid at Thousand Oaks, California, and at additional mailing offices. POSTMASTER: Send address changes to CQ Researcher, 2600 Virginia Ave., N.W., Suite 600, Washington, DC 20037.

The Presidency

BY SARAH GLAZER

THE ISSUES

In his first year in office, President Trump overturned more than 100 Obama-era policies on issues ranging from immigration to the environment.

He also withdrew the United States from international agreements to limit climate change and curb Iran's nuclear ambitions and said he has the power to pardon former advisers ensnared by special counsel Robert S. Mueller's investigation of Russian election interference — and even to pardon himself.¹

Recently, Trump said he wanted to amend a long-established interpretation of the Constitution's 14th Amendment by declaring that it does not automatically grant citizenship to noncitizens' U.S.-born children.²

Trump's actions have stirred new questions about where the limits of presidential power lie — questions that have persisted throughout the nation's 242-year history but that have grown more pronounced during recent presidencies as political polarization has increasingly gripped the nation.

In some ways, say historians and presidential experts, Trump has merely continued a long-standing trend toward broadening executive authority, whether by claiming war-making powers or conducting foreign policy without congressional approval. Checks and balances on the presidency have been eroding for decades, experts say, as presidents increasingly have asserted more authority than the Founders intended.

Yet, while other recent presidents have stretched the boundaries of presidential power, perhaps none has stirred as much controversy as Trump over the limits of that power. Moreover, Trump's unconventional behavior has triggered questions about



President Barack Obama signs two presidential memoranda in his office on Air Force One in November 2014. Presidents increasingly have been using executive orders, memoranda, proclamations and letters to agencies to enact policies. Obama issued more executive memoranda than any previous president.

whether he is permanently reshaping the very norms and customs of the office.

The White House under Trump is an “unchained, unconstrained” presidency, wrote James M. Goldgeier, a professor of international relations at American University, and Elizabeth N. Saunders, associate professor in the Georgetown University School of Foreign Service. The phenomenon “didn't start with Trump,” they wrote in an article describing what they see as Congress' abdication of power in foreign policy, “but it has exploded since he took office.”³

Presidential experts say traditional brakes on presidential power have been diminishing in recent administrations, including those of Trump and Presidents Barack Obama, George W. Bush and Bill Clinton, because Congress has shown little stomach for resisting executive incursions.

Since the Cold War ended in 1991, Congress has been losing its willingness and capacity “to rein in the presidents,” particularly on foreign policy, according to Goldgeier and Saunders. Moreover, they and other experts say, growing party polarization and changes in Congress since the 1970s, including the weakening of committees, has exacerbated the situation.⁴

During Obama's first two years in office, his Democratic Party controlled both houses of Congress. But Republicans took control of the House in 2011, and Democrats held only a tiny majority in the Senate. Facing an increasingly resistant Congress, Obama began to exert his authority through executive action rather than seek legislation. For example, instead of entering into official treaties on curbing climate change and limiting Iran's nuclear bomb-making capacity,

Obama signed international agreements on those issues. This was necessary, argued Obama's Secretary of State John Kerry, because it had “become physically impossible” to obtain the two-thirds (67) vote of the Senate required by the Constitution to ratify a treaty.⁵

As a result, however, the next president could reverse those international agreements with the stroke of a pen, which is what Trump did.

“Obama left a loaded gun in the Oval Office” in the form of executive orders, says Sidney Milkis, a professor of politics at the University of Virginia. Executive orders and other types of presidential actions will now become more common, he predicts. “We'll have dueling executive swords,” he adds, a “kind of Caesarism” that subordinates the rule of law to the presidency.

With the November midterms resulting

Clinton Issued Most Executive Orders in First Year

Of the last four presidents, Bill Clinton issued the most executive orders in his first year in office, followed by President Trump. Former President Barack Obama issued the least, but he used other executive actions to achieve some policy goals.



Sources: “Executive Orders,” Federal Register, National Archives, 2018, <https://tinyurl.com/yajx9bph>; “Executive Orders Disposition Tables,” Federal Register, National Archives, undated, <https://tinyurl.com/y9vcwg3k>

in another divided Congress — Democrats are set to control the House, while Republicans expanded their control of the Senate — more standoffs between the executive and legislative branches, and more controversial assertions of presidential power by the Trump White House, are likely, some political observers say.

“The administration will be under higher scrutiny and accountability by a Democratic House,” former Rep. Tom Davis, a Republican from Virginia, said after the election. “Look for more investigations and subpoenas. The honeymoon is over. Voters voted to put a check on the president rather than giving him a blank check.”⁶

Others, however, predict more Democratic efforts to cooperate with Trump on issues that have bipartisan support. “Democrats winning the House provides a silver lining for the president in that he could craft bipartisan solutions for prescription drug costs and infrastructure,” said Sara Fagen, a former White House political director under Republican Bush.⁷

Executive-centered governing expanded rapidly under Democratic President Franklin D. Roosevelt (FDR), who

issued more than 3,700 executive orders in his 12 years in office spanning the Depression, New Deal and World War II. The use of executive orders declined significantly after Roosevelt but picked up again under Republican Ronald Reagan, who issued 381 — more than any other recent president — during his eight years in office.⁸

But Milkis has pointed out that while Obama signed fewer executive orders than his recent predecessors, he developed “creative tactics” to circumvent the legal and procedural hurdles outlined in the Administrative Procedure Act, the 1946 law specifying how federal agencies issue regulations.⁹ Now, says Milkis, presidents use devices such as memoranda, proclamations, letters to agencies and waivers in addition to executive orders.

For instance, Obama used executive memoranda more than any other president and by 2014 was on track to take more executive actions than any president since Democrat Harry S. Truman.¹⁰

For decades presidents have been asserting increasing authority to send U.S. forces into battle abroad, even though the Constitution specifically gives Congress the authority to declare war.

Presidents have initiated more than 100 military actions without congressional approval, representing a “long continued practice on the part of the Executive, acquiesced in by the Congress,” according to the Justice Department’s Office of Legal Counsel.¹¹ (See sidebar, p. 980.)

“The problem is that over 200 years, things have changed, so a president can take us into war almost overnight,” says presidential historian Michael Beschloss, author of the 2018 book *Presidents of War*. “That is a big increase in power that the Founding Fathers never wanted and would be horrified by.” And by not demanding that presidents first seek congressional declarations of war, he adds, “Congress has too often acted like a lapdog.”

Some experts say constitutional checks and balances on the presidency remain effective, citing recent actions by Congress and the judicial branch. The separation of powers, designed by the Founders to keep the three branches of government competing with one another, is working as intended, they say.

For example, several courts have blocked Trump’s executive order barring refugees and travelers from seven Muslim countries on the grounds that it discriminated against people based on religion. The Supreme Court finally upheld the administration’s third version of the order, which stressed national security concerns and included non-Muslim countries.¹²

In addition, the Republican-controlled Congress has succeeded in “stopping or deterring Trump from acting unlawfully,” wrote Harvard law professor Jack Goldsmith, a former assistant attorney general in the Bush administration. Goldsmith cited sanctions Congress imposed on Russia for interfering in the 2016 U.S. presidential election, which Trump vigorously opposed but signed because it passed with a veto-proof majority.¹³

But new concerns have arisen after Trump on Nov. 7 forced the resignation of Attorney General Jeff Sessions and

put oversight of the Mueller investigation under a Justice Department official, Matthew Whitaker, who has criticized the investigation. The action has ignited fears that Trump might try to wield control over the probe.

“No one is above the law, and any effort to interfere with the special counsel’s investigation would be a gross abuse of power by the president,” said Sen. Mark Warner of Virginia, the ranking Democrat on the Senate Intelligence Committee. “While the president may have the authority to replace the attorney general, this must not be the first step in an attempt to impede, obstruct or end the Mueller investigation.”¹⁴

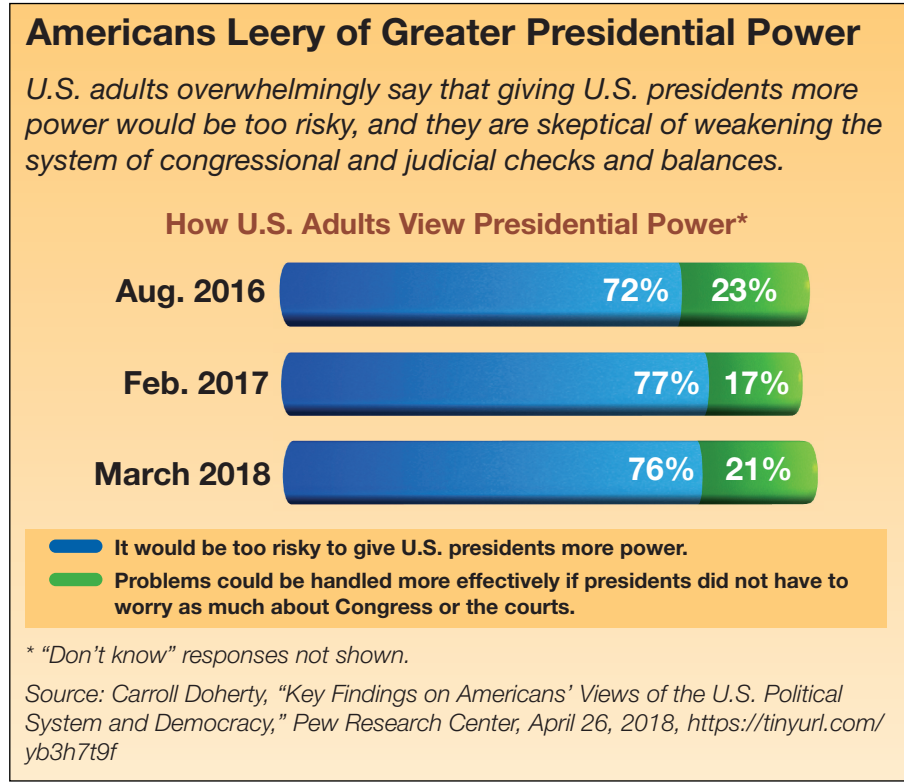
While Trump’s approach to presidential authority has sparked new debates about the office, some contend that his approach is consistent with historical precedent. Like most presidents, Trump is a counterreaction to the style and policies of his predecessor, says Marc Short, a former legislative liaison in Trump’s White House, and now a practitioner senior fellow at the University of Virginia’s nonpartisan Miller Center, which studies the presidency. “I believe the American people were very intentional in sending somebody to Washington to disrupt it, because they were frustrated with the way it was operating,” he says.

As presidential scholars, lawmakers and political analysts examine the state of the U.S. presidency, here are some of the questions being debated:

Are the checks and balances on presidential power still working?

“I’m the president. I’m not king,” Obama, who taught constitutional law at the University of Chicago, said in a 2010 interview explaining why he could not extend amnesty to undocumented immigrants without new immigration legislation. “I can’t just make up the laws by myself.”¹⁵

But two years later, frustrated that Congress refused to pass bipartisan immigration legislation, Obama re-



versed himself, issuing an executive memorandum in June 2012 deferring enforcement of immigration laws against so-called Dreamers — people 30 and under who were brought to the United States as children. In 2014, he extended the program, known as the Deferred Action for Childhood Arrivals (DACA), to parents of such children. As authority, Obama cited the executive branch’s discretion to decide where to focus its prosecution efforts in enforcing laws.¹⁶

Obama’s critics condemned the actions as a new assertion of presidential power that defied the Constitution’s Article II clause directing that the executive shall “faithfully” execute the laws passed by Congress.¹⁷

And because the actions were done through executive memoranda, the Trump administration was able to terminate the programs with an executive memorandum on Sept. 5, 2017, an action now embroiled in the courts.¹⁸

Obama’s actions amounted to governance by presidential fiat, says the University of Virginia’s Milkis. Congressional

gridlock — the deepest partisan split since the Civil War in Milkis’ opinion — is driving presidents to do this, he says.

Procedural changes in Congress that have increased the power of political parties have worsened polarization, Milkis says. As House speaker from 1995-99, conservative Newt Gingrich, R-Ga., consolidated the speaker’s power and limited the terms of key committee chairs, giving party leaders more authority while reducing the power of senior committee chairs, who had often acted independently of the party. As a result, lawmakers increasingly became less willing to enter into bipartisan agreements, according to a 2012 analysis by Alex Seitz-Wald, an assistant editor of ThinkProgress.org, a project of the liberal Center for American Progress Action Fund.¹⁹

The partisanship is notably affecting foreign policy, because “it’s very, very hard to get 67 votes in [the Senate] for treaties,” says Georgetown’s Saunders. “More and more we will see executive agreements,” which do not require congressional



Getty Images/Mark Wilson

A Muslim woman demonstrates outside the U.S. Supreme Court in June 2018 after the justices upheld the Trump administration's third version of a ban on refugees and travelers from certain countries. Lower courts had said the original ban on travelers from seven Muslim countries discriminated against people based on religion. Some experts cited the earlier decisions as evidence that the courts still serve as a check on the presidency.

approval, she says, “and that just means the next president can undo them.”

Former Trump aide Short attributes the decline in bipartisanship in part to partisan gerrymandering, which has created safe House districts for incumbents and given members “less incentive to work across the aisle.”

For checks and balances to work, say presidential scholars, loyalty to the institution — Congress — must be at least as strong as loyalty to one’s party.

For instance, they point out, in the 1970s some Republican lawmakers overcame partisan differences to investigate the Watergate scandal, which ended up driving Republican President Richard M. Nixon from office under threat of impeachment. In contrast, says University of Virginia professor of history Brian Balogh, “this Congress is overlooking its basic oversight functions,” in its own committee investigations of Russian interference into the 2016 elections because Republican lawmakers are not eager “to cross swords” with Trump, who “denies the existence” of the problem.

In the aftermath of the midterm elections, House Democrats are expected to reopen an Intelligence Committee investigation into Russian election interference, which they say was closed prematurely when Republicans controlled the committee.²⁰

According to the American Presidency Project, an online archive of presidential documents compiled by the University of California, Santa Barbara, Trump issued more executive actions, including executive orders, memoranda and proclamations, in his first 100 days than any of his three immediate predecessors — Obama, Bush and Clinton. Also, the orders were “unusual in their scope” and “in the chaotic and rapid pace of their introduction,” said the project.²¹

However, Elaine Kamarck, a former senior policy adviser in the Clinton White House and now a senior fellow in governance studies at the Brookings Institution, says the concern about executive orders is “overblown.”

“All the executive order does is say, ‘Begin the process of implementing a

new rule or repealing an old rule,’ ” Kamarck says. The rule change still must follow a lengthy process subject to legal and congressional intervention, outlined in the Administrative Procedure Act. “It makes for an inefficient system but that’s precisely what the Founding Fathers wanted,” she says, “because they didn’t want a king.”

Trump also has been able to wield an unusual degree of influence over the future of the judicial branch. When he took office, Trump inherited an open Supreme Court seat and 107 judicial vacancies (compared with Obama’s 54) — an opportunity orchestrated by Senate Majority Leader Mitch McConnell of Kentucky, who blocked many of Obama’s court nominees. Twelve of Trump’s appeals court nominees were confirmed in 2017, more than any other president in his first year in office.²²

The recent bitterly partisan debate over Supreme Court Justice Brett Kavanaugh’s confirmation has raised questions about whether the judicial system is becoming politicized in favor of the president.

But Harvard law professor Goldsmith has argued that so far, the judicial branch has proved remarkably independent. The conviction of Trump’s former campaign chairman, Paul Manafort, for bank and tax fraud, and the guilty plea by Trump’s former attorney, Michael Cohen, for fraud and campaign finance law violations — including some that implicate the president — show that judicial institutions “have worked well despite Trump’s unprecedented efforts to derail them,” Goldsmith wrote in the conservative *Weekly Standard*.²³

In an essay written before the midterms and the Kavanaugh confirmation, University of Chicago law professor Eric A. Posner concluded that the judicial and congressional branches still have a lot of power to prevent the abuses feared by some Trump critics, such as the president controlling the courts or turning Congress into a puppet. For example,

while Trump can act unilaterally in some areas — such as imposing tariffs on China — Congress could withdraw that power, he said. However, Posner conceded that having a Congress filled with members worried about opposing a president with a strongly loyal base or potentially having a judiciary dominated by Trump’s supporters could change that calculus.²⁴

Will President Trump’s nontraditional behavior alter the presidency for good?

“The thing to fear from the Trump presidency is not the bold overthrow of the Constitution . . . but an accumulating subversion of norms,” *Atlantic* senior editor David Frum, a former speechwriter for President George W. Bush and a longtime Trump critic, wrote in his 2018 book, *Trumpocracy: The Corruption of the American Republic*. For instance, he said, past presidencies were limited by notions of tradition and propriety — such as not enriching oneself while in office or biasing law enforcement in favor of the powerful — both areas where Trump has been accused of breaking ethical taboos and exploiting vulnerabilities in the U.S. system.²⁵

“As the norm-shatterer-in-chief, President Trump has altered the American presidency forever,” particularly testing “our constitutional structure of accountability,” according to Kimberly Wehle, a professor of law at the University of Baltimore. She raised the possibility that Trump has violated the Constitution’s emoluments clauses, which ban U.S. officeholders from accepting gifts from domestic or foreign officials. Several pending lawsuits argue Trump has violated the clauses through his business dealings.²⁶ (See sidebar, p. 982.)

On foreign policy, the president has questioned the value of long-standing alliances such as NATO, harshly criticized foreign leaders, embraced foreign dictators while ignoring their human rights violations and deferred to Russian President Vladimir Putin’s denial of

Russia’s interference in U.S. elections, despite U.S. intelligence agencies’ insistence to the contrary.²⁷

While other presidents have used the power of their office to protect their personal interests — President Nixon famously pressed successfully for the firing of a special prosecutor investigating Watergate — Trump’s actions have drawn especially harsh scrutiny. For example, he has been criticized for ousting Attorney General Sessions and FBI Director James Comey, whose actions could have threatened Trump personally. Trump has repeatedly called the Mueller investigation a “witch hunt” and has criticized the Justice Department for indicting two Republican congressmen before the midterm elections.²⁸

Critics also have complained that Trump has refused to release his tax returns, which presidents have published since the 1970s, and that he has used inflammatory political rhetoric that some argue has encouraged hate crimes.²⁹

Paul Rosenzweig, a senior Homeland Security official in the George W. Bush administration and now a senior fellow at the R Street Institute, a center-right think tank, points to two Trump actions as being particularly striking departures from presidential practice. Those were Trump’s order to declassify law enforcement material related to the Mueller investigation (he later rescinded the order) and his revocation of the security clearances of critics such as former CIA Director John Brennan, who had called Trump’s failure to condemn Russian involvement in the 2016 elections “nothing short of treasonous.”³⁰

Rosenzweig says Trump’s actions will weaken the president’s discretion on national security. Eventually, he predicts, the other two branches of government will withdraw that leeway, which could hurt the United States because the nation typically wants the president to have latitude in making national security decisions.

Critics also allege Trump has abused his pardon powers by, for instance, pardoning former Arizona Sheriff Joe Arpaio, a political ally convicted of criminal contempt related to his department’s targeting of undocumented immigrants. Trump also has hinted he may pardon former aides who have been convicted or pleaded guilty in connection with the Mueller investigation.³¹

“He’s using the pardon power to reward his allies politically and thinking about using it to frustrate investigations of his own political misconduct,” says Rosenzweig.

But questions over pardons have arisen in other presidencies. Democrat Clinton, for example, stirred bitter controversy when, on his last day in office, he pardoned financier Marc Rich, who was indicted on tax evasion and other charges. Rich’s wife was a major Democratic donor.³²

Charles Kesler, a senior fellow at the conservative Claremont Institute and a professor of government at Claremont McKenna College, countered criticism of Trump, saying he has mainly broken “picayune” norms or made salutary changes in how Washington conducts business rather than violating any laws.

“Disturbing our NATO allies’ slumber seems more like due diligence than recklessness,” he wrote, referring to Trump’s threat to pull out of the alliance and his criticism of NATO allies for allegedly failing to pay their fair share of the cost of military defense.³³

Kesler disagrees with those who say Trump was suppressing dissent when he withdrew Brennan’s security clearance. “Trump’s not doing anything unconstitutional or athwart the law,” he says. “It seems entirely reasonable to counterattack against a political enemy; it’s political hardball.”

Adds former Trump aide Short, “A lot of the coverage from inside the Beltway is often aghast at norms that are broken, when I believe in many ways that’s what the American people were looking for.”

Parties Trade Control of Congress

Control of six of the last 19 Congresses has been divided between the two major political parties, a situation that historically has limited a president's ability to achieve legislative aims.

Party Majorities in the Senate and House of Representatives, 1981-2019

Years	President	Senate Majority	House Majority
1981-83	Reagan	Republican	Democrat
1983-85	Reagan	Republican	Democrat
1985-87	Reagan	Republican	Democrat
1987-89	Reagan	Democrat	Democrat
1989-91	H.W. Bush	Democrat	Democrat
1991-93	H.W. Bush	Democrat	Democrat
1993-95	Clinton	Democrat	Democrat
1995-97	Clinton	Republican	Republican
1997-99	Clinton	Republican	Republican
1999-2001	Clinton	Republican	Republican
2001-03*	W. Bush	Even	Republican
2003-05	W. Bush	Republican	Republican
2005-07	W. Bush	Republican	Republican
2007-09	W. Bush	Democrat	Democrat
2009-11	Obama	Democrat	Democrat
2011-13	Obama	Democrat	Republican
2013-15	Obama	Democrat	Republican
2015-17	Obama	Republican	Republican
2017-19	Trump	Republican	Republican
2019-21	Trump	Republican	Democrat

* Democrats regained Senate control in 2001, when Republican Sen. James Jeffords of Vermont left the GOP and caucused with the Democrats.



Sources: Harold W. Stanley and Richard G. Niemi, "Vital Statistics on American Politics 2009-2010," CQ Press, 2009, Table 1-13; "Party Divisions of the House of Representatives," History, Art and Archives, U.S. House of Representatives, <https://tinyurl.com/yaencyyu>; "Party Division," U.S. Senate, <https://tinyurl.com/yc3opkd6>

Some political observers say that whether Trump's norm-breaking will influence future presidents depends on whether he is re-elected, which would represent an electoral endorsement of his governing style. If Trump wins a second term, "the office will be forever changed, and not for the better," said former Bush Justice official Goldsmith.³⁴

Has the office of the president grown too big for one person?

In 1938, when President Roosevelt proposed legislation to expand his staff beyond two secretaries, Congress balked, and demonstrators protested with placards reading, "We don't want a dictator." Eventually FDR got six staffers. Today the president has some 400 staffers in the White House and another

1,000 in the Executive Office, which provides support for the president.³⁵

Nevertheless, several presidential scholars recently have argued that the presidency is no longer manageable.

In *The Impossible Presidency*, Jeremi Suri, a professor of history and public affairs at the University of Texas, Austin, said the office has become too big for one person. Modern presidents, he wrote, "have rarely achieved what they wanted because they have consistently overcommitted, overpromised and overreached." In addition, presidents are so distracted by competing demands they become "largely reactive," he argued.³⁶

"What makes [the presidency] impossible is that the range of policies the United States deals with are so complex and come at you so fast that either you're too caught up in details or you're operating at too much of a distance," says Suri. "Both are ineffective."

Suri suggests a somewhat radical solution: divide the office between the president and someone else, such as the vice president or a prime minister, with the deputy president handling domestic issues and the president focusing on foreign policy and big decisions.

It's an old argument. The Founders considered but rejected the idea of a "plural executive." For example, Edmund Randolph, a member of the Continental Congress and later governor of Virginia, proposed a three-person magistracy to prevent the president from becoming a monarch. Thomas Jefferson, who initially favored a plural executive, later decided that opposing wills among multiple leaders would produce "absolute inaction."³⁷

Suri counters that the Founders were writing when the country was small: "They had no concept of how big and complex the country would become and how involved the president would be in people's lives on a day-to-day basis."

But White House advisers from both political parties disagree that the office is unmanageable.

The Executive Office of the President — where staffers deal with national

security, the budget and domestic policy — “was designed to make the office manageable,” says Kamarck, the former White House adviser, who oversaw Clinton’s “reinventing government” initiative. Moreover, she says, Clinton and George W. Bush used their vice presidents in the manner Suri proposes: Clinton handed over environmental policy to Vice President Al Gore; Bush let Vice President Dick Cheney handle foreign policy early in his presidency.

Former Trump aide Short agrees the president can handle the job if he or she delegates authority to competent Cabinet members and staffers. When voters select a president, he says, “you’re partly hiring the president for the people he or she will put around himself.”

Writing in 1973, historian Arthur M. Schlesinger Jr., who served as special assistant to President John F. Kennedy, dismissed concerns about the need for more than one person to fill the president’s shoes, citing an objection that concerned the Founders — assigning accountability.

“In the case of high crimes and misdemeanors, who . . . was to be impeached?” Schlesinger wrote the year before Congress initiated impeachment proceedings against Nixon.³⁸

In a recent article for *The Atlantic*, contributing editor John Dickerson, a co-anchor of “CBS This Morning,” argued that the office of the presidency is “broken” and has become a “wheezing and jerry-rigged contraption badly in need of repair.” As the presidency has expanded in power, scope, complexity and degree of difficulty, he said, it has become “overburdened, unrelenting in its demands and unlike anything the Founders intended when they designed the role 230 years ago.”³⁹

During increasingly long presidential campaigns, he said, presidents make more and more campaign promises they cannot keep. Having a talent for speaking persuasively on the stump is not the same deliberative skill needed for governing, he wrote.

Dickerson cited a study finding that Obama filled 58 percent of his

senior White House posts with former campaign aides. Suddenly transitioning from running a campaign to helping the president govern does not allow time to ensure aides are “suited to the unique challenges of the executive branch,” he said. Instead, he cited one possible solution: Each party’s nominee should form a “government-in-waiting and learn the folkways of the federal system.”⁴⁰

However, the author of that Obama White House study, Shirley Anne Warshaw, a political science professor at Gettysburg College in Pennsylvania, disagrees with Dickerson’s conclusion. “The reason people get involved in the campaign is often because they have other government experience,” she says, noting that almost all of Obama’s senior White House advisers had worked in the federal government at some senior level. As for a “government-in-waiting,” she says presidential nominees already do that by forming transition teams.

Warshaw, author of the *CQ Press Guide to the White House Staff*, says, “I don’t think the presidency is too big for one person.” She describes Suri’s and Dickerson’s thesis as a minority view among presidential scholars. “Managing 15 Cabinet departments is hard, but that’s one reason to have a strong White House staff.” ■

BACKGROUND

Checks and Balances

The Founders rejected the 17th-century view that government required unified authority, historically in the hands of a monarch. In his influential “Thoughts on Government,” John Adams, who became president in 1797, argued that a tripartite government was the best way to avoid tyranny. “I think a people cannot be long free,

nor ever happy, whose government is in one assembly,” he wrote in 1776.⁴¹

With vigorous competition between rivalrous, self-interested executive and legislative branches, James Madison wrote, “ambition [would] be made to counteract ambition.”⁴²

During the four-month Constitutional Convention in the summer of 1787, delegates created checks and balances to prevent the rise of a tyrannical president but left the powers of the executive relatively undefined. The Founders imagined a moral leader, wrote University of Texas historian Suri, who would rise above party, be free from corruption and be “impartial, fair, forward-looking and unifying” in the mold of the broadly trusted patriot George Washington.⁴³

The Constitution gave the president a handful of independent powers: commander-in-chief over the military, chief treaty negotiator and chief enforcer of laws passed by Congress. But the contradictions between “a powerful legislature and an assertive president were not resolved in the Constitution — or thereafter,” said Suri.⁴⁴

For decades, according to historians, presidents have seized powers that the Constitution reserved for Congress, particularly with regard to war-making. In his 1973 book *The Imperial Presidency*, Schlesinger blasted President Nixon’s tenure as the culmination of an ongoing trend toward “presidential supremacy.”⁴⁵

Presidents have generally asserted war-making powers under the Constitution’s commander-in-chief clause. “With the frequent acquiescence of Congress, [presidents] have seized for themselves the power to launch large conflicts, almost on their own authority” for almost two centuries, historian Beschloss contends.⁴⁶

In addition, presidents have used their veto power to assert authority over Congress more expansively than in the nation’s early years. Initially, a veto was used only if legislation was considered unconstitutional. President George Washington issued the first veto

in 1792, declaring that a bill revising how House representatives were apportioned conflicted with the Constitution.⁴⁷

Andrew Jackson's use of the veto transformed the president into "the most powerful policy-maker in the country," as he strangled projects he believed served special interests or raised the federal debt, according to Suri. During Jackson's eight-year presidency (1829-37), he issued 12 vetoes, more than all six presidents before him combined.⁴⁸

Franklin Roosevelt vetoed 635 bills, more than any other president.⁴⁹

Expanding Authority

Madison called military conflict "the true nurse of executive aggrandizement," arguing Congress and not the president should decide when to go to war.⁵⁰ Since then, historians have pointed out how presidential power grows during times of war.

President Abraham Lincoln "greatly expanded presidential power in the interests of 'defense,'" during the Civil War, said Suri, and Roosevelt's role in World War II led to "a quantum increase in presidential power," according to Beschloss.⁵¹

Lincoln emerged from the Civil War (1861-65) with more authority than any of his predecessors, according to Suri. During the war he commanded the world's largest army, directed one of the fastest industrializing economies toward his war goals and created new domestic agencies to strengthen the Union. By 1863, Lincoln had become the first president to institute military conscription as a condition of citizenship. Previously, governors had decided who served in the military; under Lincoln, officials employed by the president took over that job.⁵²

Also during the war it was Lincoln, not Congress, who issued the Emancipation Proclamation, a military order, freeing all slaves living in the Confederacy, and ordered the military recruitment of former slaves.⁵³ After the war, Congress enacted the 13th

Amendment, abolishing slavery nationwide, which then was ratified by three-quarters of the states.

FDR, widely viewed as the first modern "administrative president," signed 3,721 executive orders and created a multitude of federal agencies with new executive powers, spawning a legacy of hard-to-fill expectations for later presidents.⁵⁴

Facing the Great Depression, waves of bank runs and 25 percent unemployment, the newly inaugurated Roosevelt asked Congress to quickly pass the Emergency Banking Act, on March 9, 1933. It gave the president new powers over banks, currency and modes of exchange and created the unrealistic expectation that presidents could control economic growth, according to Suri.⁵⁵

The executive branch expanded rapidly under Roosevelt, with Congress' blessing. For instance, the regulation of food and farming became a federal matter for the first time in 1933 when Congress authorized FDR to create the Agricultural Adjustment Administration to provide federal farm subsidies and determine what crops farmers would grow and how much.⁵⁶ That same year Roosevelt created the first federal welfare program after Congress passed the Federal Emergency Relief Act, which provided federal aid to the unemployed. Previously, unemployment relief had come from state and local governments.

Roosevelt is the last president, so far, to ask Congress for a formal declaration of war. On Dec. 8, 1941, the day after the Japanese attacked Pearl Harbor, Roosevelt requested, and Congress passed, a declaration of war against Japan. Congress passed five more declarations of war — against Germany, Italy, Bulgaria, Hungary and Rumania — in 1941 and 1942.⁵⁷

When Roosevelt's successor, President Harry S. Truman, ordered that atomic bombs be dropped on Japan in August 1945, his decision marked an enormous expansion of presidential authority. The development of nuclear arms gave the president sole control over weapons that

could kill millions of people and, as other nations developed nuclear capability, the authority to make split-second decisions without time to consult Congress.⁵⁸

The Korean War marked the first time a president entered a major conflict without a declaration from Congress. On June 25, 1950, the day after North Korea invaded South Korea, Truman decided to commit U.S. forces to support South Korea. He did not inform congressional leaders of his decision until two days later, and he did not request a declaration of war. In a precedent-setting rationale, Secretary of State Dean Acheson recommended instead that Truman "rely on constitutional powers as president and commander in chief."⁵⁹

During the Cuban Missile Crisis of October 1962, the United States and the USSR engaged in a tense 13-day standoff over the Soviet Union's installation of nuclear-armed missiles in Cuba, 90 miles off the Florida coast. On Oct. 22, 1962, President Kennedy appeared on TV, informing Americans that he was imposing a naval blockade around Cuba and that the United States was prepared to use military force. The crisis was resolved after the Soviets agreed to remove the missiles in exchange for a U.S. promise not to invade Cuba and to lift the blockade. The Soviets also demanded the withdrawal of U.S. missiles from Turkey, which Kennedy secretly agreed to do.⁶⁰

Kennedy's action became "enshrined as a rule" for how presidents could act militarily without Congress, when it should have been viewed as an exception, historian Schlesinger wrote. It fulfilled the "romantic ideal of a strong president" acting alone and the public's expectation of the need for split-second decision-making in the nuclear age. However, the unfortunate legacy would be the expansion of the Vietnam War without congressional input, said Schlesinger.⁶¹

The Vietnam War expanded rapidly under Presidents Lyndon B. Johnson and Nixon, resulting in more than

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Chronology

1780s-1860s

Constitution creates an executive office; Andrew Jackson and Abraham Lincoln begin expanding its power.

1789

A three-branch government debuts, headed by a president with vaguely defined powers.

1792

George Washington issues the first presidential veto.

1829-1837

President Jackson issues 12 vetoes.

1845

Congress for the first time overrides a veto, issued by President John Tyler.

1863

Lincoln issues the Emancipation Proclamation, declaring all slaves in the Confederate states free.

1930s-1950s

Executive branch grows rapidly during the New Deal.

1933

Amid the Great Depression, the Emergency Banking Act hands power over banks to the president, Franklin D. Roosevelt.

1941

Roosevelt asks Congress for a declaration of war against Japan, the last president to make such a request.

1945

Roosevelt dies in office after serving 12 years and issuing 3,721 executive orders, more than any other president.

1950

President Harry S. Truman commits U.S. forces to Korea without seeking a declaration of war.

1960s-1970s

Richard Nixon's presidency ends in scandal.

1962

President John F. Kennedy threatens, without congressional approval, military action against the Soviets over their nuclear missiles in Cuba.

1965

President Lyndon B. Johnson begins sending troops to Vietnam; by 1968, more than 500,000 are deployed.

1973

War Powers Act requires presidents to consult with Congress before committing U.S. troops abroad, but presidents ignore it.

1974

House Judiciary Committee passes three articles of impeachment against Nixon in the Watergate scandal; he resigns before House or Senate acts.

1980s-Present

Use of executive power expands.

1981

President Ronald Reagan oversees executive branch expansion, issues more executive orders than any of his four successors.

1998

House impeaches President Bill Clinton on charges of perjury and obstruction of justice, but Senate does not convict him.

2000s

Presidents George W. Bush and Barack Obama issue fewer executive orders than their recent predecessors, but Obama uses memos and letters to impose policies without congressional consent.

2012

Obama uses executive memo to defer deportations of "Dreamers," undocumented immigrants who arrived as children.

2017

President Trump issues more executive orders and other executive actions during his first 100 days in office than any of his recent predecessors. Trump fires FBI Director James Comey; Robert S. Mueller III is appointed special counsel to investigate alleged Russian interference in the 2016 U.S. elections and whether there was coordination between the Trump campaign and Russian officials. . . . Trump signs Russia sanctions bill but calls it unconstitutional. . . . Trump terminates Dreamers program of young immigrants but is blocked by the courts.

2018

Senate Judiciary Committee passes bill to block president from firing Mueller, but measure is put on hold (April). . . . Supreme Court rules that the administration can ban travelers from certain Muslim-majority countries (June). . . . Trump does not dispute Putin's denial of Russian meddling in U.S. elections despite conclusion of U.S. intelligence agencies (June). Trump orders more sanctions on foreigners interfering with U.S. elections (September). . . . Federal judge says lawmakers can sue President Trump for accepting foreign payments (September). . . . Trump says he will end automatic citizenship for those born in the U.S. to noncitizen parents.

War Declarations Not Sought in Modern Times

Presidents dislike “having to go to Congress and fight that out.”

In October 2017, many Americans — including senior members of Congress — were surprised to learn that U.S. troops were fighting in the West African nation of Niger as part of a global anti-terrorism campaign. The revelation came when the Pentagon announced that four U.S. soldiers had been killed there in an ambush by Islamist extremists.¹

The nation’s Founders gave Congress the constitutional power to declare war, but in recent years the United States has engaged in military conflicts around the world without specific authorization from Congress.² Since the Sept. 11, 2001, terrorist attacks in the United States, presidents have relied on a 17-year-old resolution that critics say was supposed to be limited to empowering combat only against the perpetrators of those attacks.

The resolution was adopted after President George W. Bush asked Congress for an open-ended Authorization for Use of Military Force (AUMF), allowing him to retaliate against those he determined had planned or aided in the attacks.³ Although Bush had sought even broader language, Congress insisted that military targets be nations and groups associated with the 9/11 attacks, which at the time were al Qaeda and the Taliban in Afghanistan.⁴

Since then, however, presidents have relied on the resolution to order military actions against Islamist extremist groups such as the Islamic State, or ISIS, which did not exist on 9/11, and in other countries where terrorism threats have emerged, including Pakistan, Yemen, Somalia and Libya.⁵

“We’re now on the third president who has just taken the 2001 AUMF and contorted it to fit whatever military action they want to take anywhere in the world,” says Christopher Anders, deputy director of the Washington legislative office of the American Civil Liberties Union. “If it’s worth going to war, it’s worth going to Congress and voting specifically on that war.”

Some members of Congress agree. “For too long, Congress has given presidents a blank check to wage war,” said Sen. Tim Kaine, D-Va., citing U.S. military action against terrorist groups in more than a dozen countries, including Niger.⁶ He and Sen. Bob Corker, R-Tenn., have cosponsored a bill that would return some war-making powers to Congress. It would allow a president to expand military action into a new foreign country not named in the law but require the president to notify Congress within 48 hours after introducing military force. The bill would give

Congress 60 days to reverse the president’s action.⁷

But the bill has critics on both the right and left. The Trump administration said it already has “sufficient legal authority” to fight terrorists without additional congressional approval.⁸ Conservative Sen. Rand Paul, R-Ky., said the bill subverts Congress’ war-making authority by requiring a veto-proof, “supermajority” vote by two-thirds of both houses of Congress to reverse a president’s expansion of conflict in a new locale.⁹ By contrast, under Congress’ constitutional authority to declare war, it can vote down a proposed war declaration by majority vote, which instantly blocks a president from starting a war.

Sen. Jeff Merkley, D-Ore., a member of the Senate Foreign Relations Committee, complained the measure empowers presidents to expand the scope of the U.S. war on terrorism to new groups and geography without seeking prior authorization. “I don’t think the American people want an endless ever-expanding war,” he said. Merkley has introduced a bill requiring the president to seek congressional approval before taking military action against any new country or terrorist group.¹⁰

But such requirements likely would be opposed by any administration, says Scott Anderson, a fellow in governance studies at the centrist Brookings Institution think tank and a former State Department lawyer. “The executive branch gets very nervous about that, especially in a dynamic environment like Syria, where . . . enemy forces dissolve and combine and change identities with some regularity,” he says. “So there’s some concern about having to go to Congress and fight that out every time there’s a need to make that adjustment.”

In a new book, *Presidents of War*, presidential scholar Michael Beschloss argues that by not seeking war declarations presidents have “disrupted the Founders’ design.”¹¹ They had wanted a full war declaration in order to have “a full debate in Congress . . . to see how much support there was for” whatever war the president was proposing, Beschloss says.

The last president to ask Congress for a declaration of war was Franklin D. Roosevelt, after the Japanese attack on Pearl Harbor in December 1941. Unlike a limited authorization, a declaration of war creates a state of war under international law and gives the president authority in military, foreign trade and other arenas.¹²

Authorizations, Beschloss says, are a “cheap way presidents

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58,000 U.S. combat deaths — more than in any other conflict except the Civil War and the two world wars. But at first Vietnam appeared to be a minor conflict. On Aug. 7, 1964, following reports — later called into

serious question — that North Vietnam had fired on two U.S. destroyers in the Gulf of Tonkin off the northeast coast of Vietnam, Congress rushed through a resolution at Johnson’s urging. The Tonkin Gulf Resolution authorized the president to take any measures he

believed necessary to repel an armed attack “or prevent further aggression.”⁶²

Congress supported the resolution but assumed “that the president would return and seek their support before additional escalations of the war,” according to the State Department’s ac-

have found to get into war without Congress really signing on.” Some political observers say Congress often uses military authorizations because it allows members to avoid taking a stand on a war that could later become unpopular.

It “suits both sides,” says Elizabeth N. Saunders, an associate professor in the Georgetown University School of Foreign Service. “The president can just keep relying on the existing AUMF and Congress can keep complaining about the lack of new ones” without actually voting on the record for any new use of military force.”

The unpopularity of voting for war was “seared into the memory” of lawmakers when a 2002 vote for the use of military force in Iraq penalized proponents in the 2008 Democratic presidential primary, says Anders. Candidates Hillary Clinton and Joseph Biden, who had voted for the Iraq war, lost. Sen. Barack Obama, who had voted against it, won the nomination.

Ironically, as president, Obama undertook a bombing campaign in 2011 against Libyan leader Moammar Gadhafi without congressional approval, using a novel interpretation of his powers under the little-used War Powers Resolution of 1973. That act requires the president to notify Congress within 48 hours of committing U.S. forces to armed conflict and limits their participation to 60 days (plus a 30-day withdrawal period) without a congressional authorization for use of military force or a declaration of war by the United States. But as the Obama administration approached the 90-day deadline, it argued that the bombing campaign, in fact, did not qualify as a full-blown war because no ground forces were involved.¹³

The Trump administration followed Obama’s Libya rationale to claim authority to bomb Syria’s chemical weapons facilities last April without congressional approval, noting it “did not plan to employ any U.S. ground troops.”¹⁴

— Sarah Glazer

¹ Rukmini Callimachi *et al.*, “‘An Endless War,’” *The New York Times*, Feb. 20, 2018, <https://tinyurl.com/yb4othhh>.

² “War Powers,” Cornell Law School Legal Information Institute, <https://tinyurl.com/mb3dbvr>.

³ “Public Law 107-40,” Government Publishing Office, <https://tinyurl.com/jgoyhty>.

⁴ Steve Vladeck, “Congress’ Reluctance to Limit Trump’s War Powers is a dangerous bipartisan failure 17 years in the making,” *Think*, Oct. 10, 2018, <https://tinyurl.com/ydav2w3x>.



Getty Images/The Miami Herald/Matias J. Ocner

A soldier presents Myeshia Johnson with the American flag from the casket of her husband, Sgt. La David Johnson, on Oct. 21, 2017, in Hollywood, Fla. Johnson and three other soldiers were killed during a battle with Islamist insurgents in Niger, raising questions about the president’s authority to expand the fight against terrorism without congressional approval.

⁵ Callimachi *et al.*, *op. cit.*

⁶ “Senators Propose Legislation to Update Authorities Used to Fight Terror Abroad,” press release, Office of Sen. Tim Kaine, U.S. Senate, April 16, 2018, <https://tinyurl.com/yb54ffq>.

⁷ See text of resolution, <https://tinyurl.com/y9tnruuf>.

⁸ John T. Bennett and Lindsey McPherson, “White House Brushes off Calls for Updated Authorization of Military Force,” *Roll Call*, Sept. 7, 2017, <https://tinyurl.com/y8smuma3>.

⁹ “War Powers and the Effects of Unauthorized Military Engagements on Federal Spending,” Opening Statement of Chairman Rand Paul, Senate Federal Spending Oversight Subcommittee, Hearing, June 6, 2018, <https://tinyurl.com/yb3l9e9o>.

¹⁰ “Merkley introduces alternative AUMF,” press release, Sen. Jeff Merkley, U.S. Senate, May 23, 2018, <https://tinyurl.com/ybjrbyly>.

¹¹ Michael Beschloss, *Presidents of War* (2018), p. viii.

¹² Jennifer K. Elsea and Matthew C. Weed, “Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications,” Congressional Research Service, April 18, 2014, <https://tinyurl.com/y7gumuvj>.

¹³ “Authority to Use Military Force in Libya,” Office of Legal Counsel, U.S. Department of Justice, April 1, 2011, <https://tinyurl.com/y8k5pxzf>.

¹⁴ “April 2018 Airstrikes against Syrian Chemical-Weapons Facilities,” Office of Legal Counsel, U.S. Department of Justice, May 31, 2018, p. 20, <https://tinyurl.com/y8vhlzza>.

count. He did not. In 1965, Johnson sent U.S. combat troops to Vietnam for the first time, the start of a major increase in American involvement. The Tonkin Gulf Resolution became the legal justification for Johnson and Nixon to escalate and continue the war.⁶³

The “Imperial” Presidency

In 1973, when Schlesinger wrote *The Imperial Presidency*, he warned that Nixon was pursuing an “audacious” reinterpretation of the presidency’s constitutional power — unilaterally abolishing

legislatively created programs and enlarging the notion of executive privilege.

At the time, Nixon, a Republican, had “impounded” — refused to spend — \$15 billion in funds that the Democratic-controlled Congress had appropriated for more than 100 programs, claiming

Is Trump Violating the Emoluments Clauses?

The president's properties could invite special treatment, critics say.

As Benjamin Franklin was ending his tour as U.S. ambassador to France in 1785, he received a diamond-encrusted snuffbox from King Louis XVI of France, a custom for departing diplomats.¹ Because the gift was so extravagant, some feared Franklin might be unduly influenced by French interests, leading the Constitution's framers to specify that gifts or benefits — known as emoluments — to federal officials must be approved by Congress.²

Since the early 19th century, presidents have asked Congress for approval to accept gifts or benefits from foreign governments.³ Under the Foreign Emoluments Clause — one of two constitutional clauses governing emoluments — no federal official “shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title . . . from any King, Prince or foreign State.” The Domestic Emoluments Clause prohibits a president from receiving any benefits (other than his or her executive office compensation) from a federal, state or local government and does not allow Congress to waive that prohibition.⁴

The clauses have come under scrutiny recently because of lawsuits alleging that President Trump has violated them by receiving payments or benefits, including tax and regulatory relief, from foreign and domestic governments through his businesses with full awareness of their source. Trump's enterprises include hotels, golf courses, office towers and other interests in more than 20 countries. He also leases the Old Post Office building, located near the White House, from the federal government for his luxury Trump International Hotel.

Trump's situation presents an unprecedented legal question: Can a president knowingly receive, while in office, payments or other benefits from foreign or domestic governments through his private businesses without receiving approval from Congress? Prior to Trump's election, presidents generally steered clear of the clauses either by selling their holdings or, in the case of Bill Clinton and George W. Bush, putting their holdings in blind trusts, where the president retains ownership but is unaware of how the assets are managed.

Trump, by contrast, chose not to divest and instead put his assets into a revocable trust run by his sons. The trust can be revoked by him at any time and is not “blind” because he knows how the assets are managed.⁵

Trump turned over daily operations of the Trump Organization, his family's international real estate conglomerate, to his sons. He also agreed to donate all profits from foreign government payments made to his hotels to the United States Treasury. Trump's International Hotel in Washington has become a favorite of foreign dignitaries, as have his hotels and office towers in Chicago and New York City.

“Why wouldn't I stay at his hotel . . . so I can tell the new president, ‘I love your new hotel!’ ” an Asian diplomat said shortly after the election. “Isn't it rude to come to his city and say, ‘I am staying at your competitor?’ ”⁶

Three lawsuits have been filed claiming that Trump has violated the emoluments clauses:

- Citizens for Responsibility and Ethics in Washington (CREW), an anti-corruption advocacy group, sued under the Foreign Emoluments Clause, claiming Trump's hospitality industry competitors were “injured, financially, by the uneven and unfair playing field” created by Trump's “unconstitutional conduct.”⁷

- Maryland and the District of Columbia sued under the Foreign and Domestic clauses, claiming hospitality businesses and convention centers in those jurisdictions will lose business and revenues due to what they say is unfair competition from Trump's Washington hotel.⁸

- A group of nearly 200 Democratic lawmakers sued Trump, alleging he violated the Foreign Emoluments Clause by not seeking Congress' approval before accepting benefits from foreign dignitaries. Those benefits include rent and revenues paid by foreign governments at his real estate properties worldwide, the suit said.⁹

U.S. District Judge George B. Daniels dismissed the CREW case in December 2017, saying it was up to Congress, not citizens, to decide if the clauses have been violated.¹⁰ Trump's lawyers said CREW's damage claims in the case, which was filed shortly after Trump's inauguration, were speculative. CREW appealed, and a three-judge panel of the Second Circuit heard arguments Oct. 30.¹¹

In July, U.S. District Judge Peter J. Messitte in Greenbelt, Md., said the Maryland and District case could proceed in what appeared to be the first decision by a federal judge interpreting the emoluments prohibitions with regard to a sitting president.¹²

it was within his constitutional power to defy Congress. Meanwhile, Congress passed a joint resolution on Nov. 7, 1973, known as the War Powers Act, which required the executive branch to consult with and report to Congress before involving U.S. forces in military

hostilities overseas. Widely regarded as a congressional effort to prevent future Vietnams, it has frequently been ignored by subsequent presidents from both parties, who say it is an unconstitutional infringement on presidential authority.⁶⁴

The Watergate scandal — a break-in

by Republican operatives at the Democratic Party headquarters in Washington, followed by Nixon's attempt to cover up the criminal conduct — was symptomatic of Nixon's “unprecedented expansion of presidential power,” in Schlesinger's view.⁶⁵ Paradoxically, that expansion

The president's lawyers had sought dismissal, arguing that the Domestic Emoluments Clause was designed only to bar government payments above the presidential salary or to prevent bribes, not to stop private business transactions. But Messitte said the common understanding of the definition of emoluments, citing historic dictionaries from the time of the framers, was that it "covered any profit, gain or advantage including profits from private transactions." Messitte later denied a Justice Department bid to halt the proceedings pending an appeal by the department.¹³

In the third lawsuit, a federal judge in Washington ruled in September that 198 Democratic lawmakers have standing to sue in their case against the president. The lawmakers' attorneys had argued that they have a constitutional obligation to weigh in on potential emoluments provided to Trump.¹⁴

The Trump Organization said it had donated \$151,470 in foreign government profits received in 2017 at its hotels and similar businesses to the Treasury in February of that year but released no details on how much profit the organization received or from which governments.¹⁵ According to *The Washington Post*, Saudi lobbyists spent \$270,000 on rooms at Trump's Washington hotel in 2017, and Trump-owned properties in New York and Chicago have seen significant increases in bookings from Saudi and Qatari dignitaries.¹⁶

Several constitutional law experts have said it is unclear how the Trump Organization defined "profits" and that without details from the company it would be impossible to verify.

Moreover, while the president maintains his financial interests, his businesses could be "magnets for special treatment in commerce, taxation, regulation, and investigation — benefits from foreign powers that qualify as gifts or emoluments," according to Harvard constitutional law professor Laurence Tribe, who wrote a brief in the CREW case against Trump.¹⁷

— Sarah Glazer

¹ Alan McDuffee, "This diamond gift to Benjamin Franklin is the reason Donald Trump can't benefit from the presidency," *Timeline*, Sept. 22, 2017, <https://tinyurl.com/ybfaxjaq>.

² Zephyr Teachout, "What the Clintons Can Learn from Ben Franklin's Foreign Money Scandal," *The Daily Beast*, May 3, 2015, <https://tinyurl.com/yb2p76kk>.

³ *Ibid.*



AFP/Getty Images/Paul J. Richards

The Trump International Hotel in Washington, D.C., is one of President Trump's businesses that receives revenues from foreign officials. Trump faces lawsuits alleging that such income amounts to emoluments from foreign dignitaries, which are prohibited under the Constitution. Trump's attorneys have denied wrongdoing.

⁴ Brian Duignan, "What is the Emoluments Clause?" *Encyclopaedia Britannica*, <https://tinyurl.com/yaodalkp>; "The Domestic Emoluments Clause," Constitutional Accountability Center, <https://tinyurl.com/yavaxy52>.

⁵ "Report: Trump Assets in Revocable, not Blind, Trust," VOA News, Feb. 4, 2017, <https://tinyurl.com/ybmha3df>.

⁶ Jonathan O'Connell and Mary Jordan, "For foreign diplomats, Trump hotel is place to be," *The Washington Post*, Nov. 18, 2016, <https://tinyurl.com/ya22vvy>.

⁷ *Citizens for Responsibility and Ethics in Washington v. Donald J. Trump*, Case 1:17-cv-00458, U.S. District Court for the Southern District of New York, Jan. 23, 2017, <https://tinyurl.com/y8mjt9hj>.

⁸ *The District of Columbia and the State of Maryland v. Donald J. Trump*, U.S. District Court, District of Maryland, Complaint, June 12, 2017, <https://tinyurl.com/y6ub6gg6>.

⁹ *Sen. Richard Blumenthal et al., v. Donald J. Trump*, U.S. District Court for the District of Columbia, June 14, 2017, <https://tinyurl.com/yaatmx4g>.

¹⁰ Scott Bomboy, "An update on the Emoluments cases," *Constitution Daily*, Aug. 1, 2018, <https://tinyurl.com/y99fv92>.

¹¹ "Crew v. Donald J. Trump," Citizens for Responsibility and Ethics in Washington, <https://tinyurl.com/y8rjbe57>. Also see Adam Klasfeld, "Panel Presses Trump Admin in Emoluments Appeal," Courthouse News Service, Oct. 30, 2018, <https://tinyurl.com/ydgrmw49>.

¹² *The District of Columbia and State of Maryland v. Donald J. Trump*, "Opinion," U.S. District Judge Peter J. Messitte, U.S. District Court for the District of Maryland, July 25, 2018, pp. 21, 30, <https://tinyurl.com/y8cgsfa2>.

¹³ *Ibid.*, pp. 21, 30; Jonathan O'Connell and David A. Farenthold, "Judge denies Trump's request to stay emoluments suit," *The Washington Post*, Nov. 2, 2018, <https://tinyurl.com/y86f3txu>.

¹⁴ Marimow, *op. cit.*; Associated Press, *op. cit.*

¹⁵ Lorraine Woellert, "Trump organization sends \$151,470 in foreign profits to Treasury," *Politico*, March 9, 2018, <https://tinyurl.com/yaal8y5x>.

¹⁶ David A. Farenthold and Jonathan O'Connell, "Business at Trump's hotels has declined since he took office, but Saudis have boosted his Chicago tower," *The Chicago Tribune*, Oct. 11, 2018, <https://tinyurl.com/y9fvsgbd>.

¹⁷ Nik DeCosta-Klipa, "Experts say President Trump is violating the Constitution," *boston.com*, Jan. 31, 2017, <https://tinyurl.com/jbbd52q>.

reinvigorated the separation of powers, triggering congressional and judicial efforts to rein in Nixon's attempts to block congressional and Justice Department investigations into the scandal.

On Oct. 20, 1973, in an incident known as the "Saturday night massacre,"

Nixon ordered Attorney General Elliot Richardson to fire special prosecutor Archibald Cox, who was investigating the Watergate affair. Richardson refused and resigned. The massacre has become a frequently mentioned touchstone in speculation about whether Trump would

attempt, similarly, to fire those overseeing the Russia investigation.

Nixon also fought the special prosecutor's subpoena of Oval Office audio tapes, invoking presidential "executive privilege" to keep confidential conversations secret. The Supreme Court

unanimously disagreed, saying the tapes must be released. The tapes revealed that Nixon clearly had obstructed justice in covering up the break-in. ⁶⁶

In July 1974, the House Judiciary Committee voted three articles of impeachment against the president, charging him with obstruction of justice, abuse of power and contempt of Congress. Nixon resigned before the inevitable impeachment by the full House, and his successor, Gerald Ford, pardoned Nixon for any crimes he might have committed. ⁶⁷

the first time in 40 years and began investigating Clinton over allegations of sexual misconduct.

On Dec. 19, 1998, the House passed two impeachment articles: for perjury (lying to a federal grand jury) and for obstruction of justice, stemming from a sexual harassment lawsuit by Arkansas state employee Paula Jones and an affair with White House intern Monica Lewinsky. (This was the first time since 1868, when Andrew Johnson was in the White House, that the



President George W. Bush addresses a joint session of Congress on Sept. 20, 2001, shortly after the 9/11 terrorist attacks in the United States. Congress adopted a resolution that allowed Bush to use military force against nations or groups he determined were involved in the attacks. Bush and his successors have used the order to authorize attacks on other countries and Islamist targets, raising questions about limits on presidential war-making powers.

Age of Gridlock

President Reagan was elected on a campaign to limit government, but the trend toward an expanded executive branch continued.

Reagan promised to cut two Cabinet agencies, the departments of Energy and Education, but instead added one, Veterans Affairs, now one of the federal government's largest. Under Reagan the federal debt almost tripled as he slashed taxes and expanded the military, and the federal workforce rose from 4.1 million to almost 5.3 million. ⁶⁸

During the Democratic Clinton administration, Republicans regained control of both houses of Congress for

House had impeached a president.) The Senate, acting as jury, rejected the perjury charge and split 50/50 on the obstruction charge, failing to reach the required two-thirds vote to convict on Feb. 12, 1999. ⁶⁹

Clinton and Obama both faced congressional gridlock, which was on the rise after 1995, when Republicans took control of Congress. Republicans, who held both houses until 2006, vowed not to compromise with Democrats. The Democrats regained control of both houses in 2007, but the Republicans took back the House after Obama's second year in office, and took over both houses in 2015. (See graph, p. 976.)

Congressional impasses over budgets and other issues have intensified in the past decade due to increased control exerted by the majority party and changes they've made in congressional rules, according to a new report from *The Washington Post* and ProPublica. Party leaders, for instance, have limited the number of votes on floor amendments in the Senate and, in some cases, closed off amendments entirely. And committees in both houses meet significantly less often to consider legislation, the report said. Congress has become a weakened branch of the government, where "debate is strictly curtailed, party leaders dictate the agenda, most elected representatives rarely get a say and government shutdowns are a regular threat." ⁷⁰

In 2016, Trump, a real estate developer with no government experience, won the presidency, campaigning against such Republican Party tenets as free trade and international engagement. During his campaign and the first year and a half of his presidency, he defied bipartisan consensus around international trade agreements, pledged to crack down on undocumented immigrants and build a wall on the U.S.-Mexico border. Many of his executive orders were promptly challenged in court, including some of more than 70 environmental regulations the administration sought to roll back. ⁷¹ ■

CURRENT SITUATION

Russia Probe

Special counsel Mueller's investigation of Russian interference in the 2016 elections is expected to result in more court action and potentially

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At Issue:

Does a U.S. president have the authority to pardon himself?



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WRITTEN FOR CQ RESEARCHER, NOVEMBER 2018

american history and jurisprudence concur with the view that the U.S. president has the constitutional authority to pardon himself or herself.

In debating the Constitution, Virginia Delegate Edmund Randolph advocated against presidential pardon authority for acts of treason since “the President may himself be guilty.” At the Constitutional Convention of 1787, a proposal seeking to require Senate consent for pardons was defeated, while Delegates James Wilson and Alexander Hamilton advocated for a strong presidential pardon authority. The Constitution ultimately was ratified with an unlimited executive pardon power for “Offenses against the United States,” except in “Cases of Impeachment.” The language has *no* other restrictions.

Historically, the courts have affirmed the president’s nearly limitless pardon power. In 1866, in *Ex Parte Garland*, the Supreme Court ruled: “Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders,” and “the power thus conferred is *unlimited*, with the [impeachment] exception stated. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment.”

The president’s pardon power has been controversial since George Washington first issued pardons in response to the Whiskey Rebellion and Thomas Jefferson pardoned his “political supporters” convicted under the Alien and Sedition Act. During Richard Nixon’s final days in office, Solicitor General Robert Bork concluded that the president had criminal immunity due to the self-pardon power. But when Chief of Staff Alexander Haig presented Nixon with the option to self-pardon, Nixon declined.

When President George H. W. Bush pardoned six aides in the Iran-Contra scandal, he effectively shut down the prosecution that may have implicated his own conduct. Independent Counsel Lawrence Walsh questioned whether the pardons were “an act of friendship or an act of self-protection.”

For two decades I have proposed a constitutional amendment to prohibit a president from shielding himself or herself from criminal prosecution by self-pardon. As Aristotle noted: “The only stable state is the one in which all men are equal before the law.” No person should be able to avoid the consequences of his or her criminal conduct.



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nobody knows for sure whether a presidential self-pardon would hold up in court. If I were the judge, though, I would rule it invalid for three reasons.

Reason 1 is textual. The Constitution does not explicitly rule out self-pardons, but the pardon power is limited by the definition of the word “pardon.” For instance, pardons are only for past acts; they cannot forgive future crimes. This limit, while not explicitly recited in the Constitution, is implicit in the definition of a pardon. Similarly, a self-pardon is not a “pardon.” Pardons are inherently bilateral: something one grants to someone else. It would not make sense to “donate” money to yourself or “condone” your own actions (two words with the same Latin root as “pardon”). Thus, pardoning oneself makes no sense.

Reason 2 is the principle that a person cannot be the judge in his own case. The Supreme Court has recognized this principle as “a mainstay of our system of government,” although it is not stated explicitly in the Constitution. Self-pardons are directly incompatible with this axiom.

Reason 3 is historical. To the Founders, the impossibility of self-pardons seems to have gone literally without saying. For instance, Alexander Hamilton noted in *Federalist Paper No. 69* that a criminal president could be removed from office and “would afterwards be liable to prosecution and punishment in the ordinary course of law.” Hamilton was either relying on an unrestrained criminal being a restrained pardoner (unlikely) or he presumed that everyone understood self-pardons to be impossible (likely).

Similar evidence appears in James Madison’s notes from the Constitutional Convention. Edmund Randolph moved to forbid presidents from pardoning treason, noting: “The President may himself be guilty.” Randolph’s motion failed after James Wilson responded that “[i]f [the president] be himself a party to the guilt he can be impeached and prosecuted.” Wilson’s argument — let the traitor-president pardon his traitor-cronies; we can still prosecute *him* — surely would not have carried the day had the delegates believed in self-pardonability.

If a self-pardon case ever arises, there would be room for courts to rule either way, but the argument against self-pardonability is by far the better one. Ideally, though, this hypothetical question will ever remain hypothetical.

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more revelations. As of Oct. 10, seven people have pleaded guilty or been convicted in connection with the probe, and more than two dozen others have been indicted.⁷²

Thus far, however, the investigation has not resulted in indictments linking Trump aides to a conspiracy with Russian officials. Another reported focus of the investigation, whether Trump obstructed justice by firing Comey, also has not resulted in indictments.⁷³

However, the future of the investigation was put in doubt the day after the Nov. 6 midterms, when Trump named Sessions' chief of staff and a longtime Mueller critic, Mathew G. Whitaker, as acting attorney general to replace Sessions.

Democrats vowed to pursue their own Russia probes after they take control of the House in January and to counter any administration attempts to shut down the Mueller investigation.⁷⁴

In April, the Senate Judiciary Committee had passed a bipartisan measure stating that Mueller could be fired only by a senior Justice Department official and that such a firing could be challenged in court. But the Republican Senate leadership refused to move the bill forward, saying it was "not necessary."⁷⁵

In late October, Mueller's investigators reportedly were questioning Trump associates about whether political consultant Roger Stone, a longtime Trump ally, had previous knowledge of the October 2016 release by WikiLeaks of Democratic emails that prosecutors say were hacked by Russian operatives.⁷⁶

Congress vs. the Presidency

As they prepare to take over the House in January, Democrats say they have a list of more than five dozen subpoenas aimed at the administration that were blocked by the powerful House Oversight and Government Reform Committee under Republican control.

"Republicans in the House have been acting as President Trump's defense counsel," Rep. Elijah Cummings, D-Md., who is expected to head the oversight panel, said the day after the midterms. "We are required to be a check and balance over the executive branch. We haven't been doing that because Republicans have been aiders and abettors."⁷⁷

The House Intelligence Committee investigated the question of Russian interference in the 2016 election and concluded the Trump campaign did not collude with the Russians.⁷⁸

Inquiries by the Democrats could look into possible connections between Trump and the Russians and potential conflicts of interest in his family's business operations and among his political appointees. Momentum for impeachment had been widely predicted if the Democrats won control of the House, but Democratic leader Nancy Pelosi has downplayed talk of impeachment since the elections, stressing the need to pass legislation that has bipartisan support.

Still, some analysts said impeachment might be the last resort for House Democrats if Trump shuts down the Mueller probe. "Strict readers of the Constitution might say that's really the only proper resolution here to begin with," the University of Baltimore's Wehle told NPR. "And if there's wrongdoing by the president it should be impeachment."⁷⁹

Lawmakers from both parties continue to criticize Trump for not coming down harder on Russia for meddling with U.S. elections. Trump signed an executive order on Sept. 12 authorizing the president to impose additional sanctions on foreigners found to have interfered with U.S. elections, but it was widely seen by Trump's critics, Democrats and Republicans alike, as an effort to prevent more-aggressive legislation. However, the administration has taken other steps to crack down on Russia, including sanctioning seven Russian oligarchs and 17 top government officials last April for

"malign activity," including meddling in U.S. elections.⁸⁰

Perennial questions about presidential exercise of war powers could also come up in the next session of Congress. Bipartisan legislation introduced in the Senate aims to give Congress a greater role in anti-terrorism military actions by the White House, but it faces opposition from both the left and right.⁸¹

Meanwhile, a U.S. District Court judge ruled in September that a group of about 200 congressional Democrats have standing to sue Trump on charges of violating the Constitution's emoluments clause by accepting payments from foreign dignitaries for stays at Trump's hotels or leases at his commercial properties.⁸²

"This gives Congress an opportunity to invoke our congressional right to make sure that the president is loyal to the U.S. and not to his own pocketbook," said Rep. Jerrold Nadler, D-N.Y., one of those who filed the suit.⁸³ Trump's attorneys in the cases have denied that the president has violated the clauses.

Going to Court

The Trump administration has pursued at least 143 "significant" deregulatory actions, according to a new Brookings Institution report.

However, of the 19 executive actions — mostly involving environmental regulations — that have been challenged in court so far, the administration has prevailed in only one, Brookings said.⁸⁴

By late October, the Trump administration was "on a staggering litigation losing streak, with restraining orders littering the legal battlefield from coast to coast," Fred Barbash, an editor at *The Washington Post*, wrote in a blog. About 40 to 50 federal judges have ruled against the administration so far, he estimated.⁸⁵

Such litigation is expected to continue to play out over the coming year, as interest groups continue to challenge the White House's deregulation efforts

and as the administration appeals court injunctions blocking those orders.

Court opinions went against the administration in others areas as well, including its attempt to rescind the DACA “Dreamers” program, blocked by a federal appeals court on Nov. 8 and likely headed to the Supreme Court. Courts also obstructed his proposed ban on transgender people serving in the military and the administration’s family separation policies for would-be immigrants and asylum seekers arriving at the U.S.-Mexico border. At least four courts have blocked the administration’s efforts to withhold federal funds from “sanctuary cities,” jurisdictions that limit their cooperation with federal immigration enforcement agents in order to protect low-priority undocumented immigrants from deportation.⁸⁶

In a speech to the conservative Heritage Foundation in October, then-Attorney General Sessions attributed the losses to “judicial encroachment” on the executive and legislative branches, which he said are the “constitutionally authorized branches” for enforcing policy in areas such as immigration.⁸⁷

In turn, some judges have complained of what they see as presidential overreach. “It falls to us, the judiciary . . . to act as a check on such usurpation of power,” wrote Seventh Circuit Court of Appeals Judge Ilana Rovner.⁸⁸

In October, Trump told an interviewer that he had an executive order “in the process” to deny birthright citizenship to children of noncitizens. To do so, Trump would have to reinterpret or amend the 14th amendment, which says, “All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”⁸⁹

Civil rights groups and leading members of Trump’s own party objected on the grounds it would be unconstitutional. “You cannot end birthright citizenship with an executive order,” said House Speaker Paul Ryan, R-Wis.⁹⁰

A former Trump national security official, Michael Anton, had floated the idea of an executive order this summer, saying Trump would just be clarifying the amendment’s original intent — to exclude children of noncitizens because they are not “subject to the jurisdiction” of the United States.⁹¹

If issued, the order likely would be challenged in court.

If such an order reached the Supreme Court, it would likely be the first big test of presidential power in the newly solidified conservative-majority court since Kavanaugh’s confirmation. ■

OUTLOOK

Bully Pulpit

Regardless of how Donald Trump’s presidency plays out — and his supporters stress he was elected to blow up many of the nation’s political traditions and inject his own provocative style into the ways of Washington — the long-standing trend toward growing presidential powers will likely continue, presidential scholars say.

The president’s ability to mold public opinion far outstrips that of Congress, as Trump has shown. He is a populist with a uniquely “intravenous” way of relating to his political base via Twitter, according to University of Virginia presidential historian Balogh. “If there’s one power that has increased under Donald Trump, it’s the bully pulpit,” he says.

For Congress to push back against the executive branch, says Georgetown’s Saunders, it needs more foreign policy and national security expertise. “It’s not as though congressional expertise can be regenerated overnight or even in one election,” she says. Thus, even when Trump leaves office, “that’s not going to be enough to restore Congress to its previous rule.”

Milkis of the University of Virginia predicted that Americans in coming years might decide to limit the presidency again and give more power to Congress and the states.⁹²

But he does not see that happening anytime soon. “The whole country loves presidential power,” he says, predicting that “the Democrats — as much as they hate Trump — are looking forward to having a president willing to go further than Obama” in exercising executive power.

Some experts also worry that Trump’s “America First” beliefs could hurt future U.S. presidents on the international stage. Historian Suri says that many people around the world once viewed the U.S. president as a world leader — not just a partisan one. “For the president to say at the United Nations that we only care about the United States shatters this,” he says, “and I think we will pay much higher transaction costs in the future.”

Former Bush Justice official Goldsmith has been compiling a “hopeful” analysis of how the Constitution has “prevented presidential law-breaking” — highlighting the continued independence of the Mueller investigation and subsequent court convictions. But he also envisions an alternative scenario in which the current president sparks a constitutional crisis exceeding that of Watergate.

“What if Mueller finds evidence that Trump colluded with the Russians, and Trump fires not just Mueller but also scores of others in the Justice Department, and pardons himself and everyone else involved?” Goldsmith asked. “The Constitution has held thus far and might continue to do so under more-extreme circumstances. But it also might not.”⁹³ ■

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A historian traces how presidents have waged war since the Madison administration, arguing that they have seized the war-making powers that the Constitution delegated to Congress.

Frum, David, *Trumpocracy: The Corruption of the American Republic*, Harper, 2018.

A former speechwriter for Republican President George W. Bush argues that President Trump has defied traditional limits on presidential authority and that this defiance, along with his attacks on the press and the courts, is pushing the United States closer to a dictatorship.

Lewis, Michael, *The Fifth Risk*, W.W. Norton & Company, Inc., 2018.

A best-selling author says President Trump has been neglectful in how he manages executive agencies, significantly changing how certain laws are implemented.

Schlesinger Jr., Arthur M., *The Imperial Presidency*, Houghton Mifflin, 1973.

A historian and former adviser to Democratic President John F. Kennedy popularized the term “imperial presidency” in this classic work that traces the expanding power of the office.

Sunstein, Cass R., ed., *Can It Happen Here?*, William Morrow, 2018.

In essays edited by a Harvard law professor, 15 experts in law and politics address whether American democracy is moving toward an authoritarian state — in the spirit of Sinclair Lewis’ 1935 dystopian satirical novel *It Can’t Happen Here*.

Suri, Jeremi, *The Impossible Presidency: The Rise and Fall of America’s Highest Office*, Basic Books, 2017.

A history professor at the University of Texas, Austin, argues that the duties of the presidency have become so great that a single executive is anachronistic.

Articles

Dickerson, John, “The Hardest Job in the World,” *The Atlantic*, May 2018, <https://tinyurl.com/y8t45u4j>.

A co-anchor of “CBS This Morning” argues that the expectations and duties of the presidency have grown so much that the office is “broken;” he reviews several proposals to fix it.

Goldgeier, James M., and Elizabeth N. Saunders, “The Unconstrained Presidency: Checks and Balances Eroded Long Before Trump,” *Foreign Affairs*, Aug. 14, 2018, <https://tinyurl.com/y9lmg8k>.

A professor of international relations at American University (Goldgeier) and an associate professor in the Georgetown University School of Foreign Service (Saunders) argue that the foreign policy powers of the presidency have become “unconstrained” by Congress — a problem they date back to the Cold War’s end.

Goldsmith, Jack, “Trump’s Nuclear Option,” *The Weekly Standard*, Aug. 22, 2018, <https://tinyurl.com/ybf5oy6t>.

A Harvard law professor, who was assistant attorney general in the George W. Bush administration, predicts that the justice system would defeat efforts by Trump to shut down the Russia investigation.

Kalt, Brian C., “Pardon Me: The Constitutional Case Against Presidential Self-Pardons,” *Yale Law Journal*, 106:779, 1997, <https://tinyurl.com/y83psvry>.

A Michigan State University law professor argues that the Constitution does not permit a president to pardon himself.

Kesler, Charles R., “Breaking Norms Will Renew Democracy, Not Ruin It,” *The New York Times*, Aug. 23, 2018, <https://tinyurl.com/yc3flmzw>.

A senior fellow at the conservative Claremont Institute think tank and professor of government at Claremont McKenna College argues that Trump has broken political traditions for good reasons.

Nida, Robert, and Rebecca L. Spiro, “The President as His Own Judge and Jury: A Legal Analysis of the Presidential Self-Pardon Power,” *Oklahoma Law Review*, 1999, <https://tinyurl.com/ycbkesx6>.

A California lawyer (Nida) and a Catholic University law student (Spiro) argue in this widely cited article that the Constitution allows a president to pardon himself, and they propose a constitutional amendment to prohibit that.

Reports and Studies

Elesa, Jennifer K., and Matthew C. Weed, “Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications,” *Congressional Research Service*, April 18, 2014, <https://tinyurl.com/y7gumuvj>.

A comprehensive report from Congress’ research arm describes U.S. declarations of war and authorizations for military force from 1789 to 2002, along with their legal justifications.

Raso, Connor, “Trump’s deregulatory efforts keep losing in court — and the losses could make it harder for future administrations to deregulate,” *Brookings Institution*, Oct. 25, 2018, <https://tinyurl.com/ycz56alj>.

A centrist Washington think tank finds that of 19 deregulatory initiatives challenged in court, mostly in environmental protection, the Trump administration has prevailed in only one case, while losing or abandoning its position in 18 others.

The Next Step:

Additional Articles from Current Periodicals

Checks and Balances

Brettschneider, Corey, “Brett Kavanaugh’s Radical View of Executive Power,” *Politico Magazine*, Sept. 4, 2018, <https://tinyurl.com/y9xevey6>.

Brett Kavanaugh’s historic deference to presidential authority could potentially award Trump an advantage over the usual checks and balances that the Supreme Court provides, says a Brown University political science professor.

Goldberg, Jonah, “Commentary: The importance of true checks and balances in government,” *The Chicago Tribune*, May 11, 2018, <https://tinyurl.com/y8wo5y4h>.

The nation has become too invested in the power of the Supreme Court on deciding divisive legislation, says the editor-at-large for the conservative *National Review*.

Pramuk, Jacob, “Democrats pick up at least 28 seats to win back the House — giving the party a check on Trump,” *CNBC*, Nov. 6, 2018, <https://tinyurl.com/y767ada6>.

By gaining control of the House in November’s midterm elections, Democrats will be able not only to investigate President Trump’s finances but also to block Republican economic legislation, analysts say.

Emoluments

Harris, Andrew, et al., “What You Need to Know About the Emoluments Clause,” *Bloomberg, The Washington Post*, Nov. 7, 2018, <https://tinyurl.com/y94hw5db>.

The constitutional clauses aimed at preventing U.S. leaders from accepting gifts from other governments are the basis of several lawsuits against President Trump.

Tatum, Sophie, “Federal judge allows discovery to move forward in Trump emoluments case,” *CNN*, Nov. 2, 2018, <https://tinyurl.com/y7y3bbce>.

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Trickey, Erick, “Move over, Trump. This president’s two lions set off the greatest emoluments debate,” *The Washington Post*, Sept. 28, 2018, <https://tinyurl.com/ybkppvgr>.

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Constitution and how it has been interpreted over centuries, says an MSNBC analyst.

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Trump has issued an executive order requiring migrants seeking asylum in the United States to pass through certain official points of entry.

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Congress could stem Trump’s power in foreign policy and military affairs next year by reinstating frequent hearings and investigations, say a senior director and a senior fellow with the Penn Biden Center for Diplomacy and Global Engagement.

Ward, Alex, “This historian spent 10 years researching wartime presidents. Trump scares him the most,” *Vox*, Nov. 5, 2018, <https://tinyurl.com/yagtx8sw>.

Trump has not shown a willingness to learn from history, setting him apart from most other wartime presidents, contends presidential historian Michael Beschloss.

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