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One Hundred Days of Lawlessness

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The second Trump administration has finally awoken the world to the existential dangers posed by America's unilateralist presidency, which itself evolved over the course of many decades of legal theorizing and political paradigm shifts. The question now is what to do about it.

NEW HAVEN – Americans have long trumpeted the checks and balances that animate their constitution. But the first 100 days of Donald Trump's second term as president have forced us to ask how robust these guardrails really are. How did the structural features of the American system become so distorted and degraded as to transform the chief defender of US national security into its biggest threat?

As I show in [The National Security Constitution in the 21st Century](#), a confluence of institutional incentives has brought us to this precarious place. My book caps five decades of study into the constitutional interpretations that have come to underpin US foreign policy. When I first [examined](#) this topic during the Iran-Contra Affair in the 1980s, I argued that a subset of constitutional norms, precedents, and framework laws comprise a "National Security Constitution" that governs US foreign policymaking.

From the founding to the present, two competing visions of the National Security Constitution have battled for dominance: the Framers' vision of balanced institutional participation, captured in Justice Robert Jackson's landmark concurrence in [Youngstown Sheet & Tube Co. v. Sawyer](#) (1952); and the unilateralist vision of the president as "the sole organ of our Nation in foreign affairs" – the view trumpeted by Justice George Sutherland in [United States v. Curtiss-Wright Export Corp](#) (1936).

The Tide Turns

The *Youngstown* (shared powers) and *Curtiss-Wright* (executive unilateralism) visions have done battle across the centuries of American history. The impulse for executive dominance over foreign policy was first espoused by Alexander Hamilton, and exercised and moderated by George Washington and others during the country's infancy and adolescence (1789-1850). The rise of executive power accelerated as America became a dominant regional power (1850-1933), and then a global hegemon after World War II.

President Franklin Delano Roosevelt initiated an "extrovert" phase in US foreign policy, with the American chief executive overseeing the creation of an entire multilateral political and economic order. The activist logic of this era greatly expanded the executive branch and made unilateral presidential initiatives virtually inevitable. A generation of US policymakers came to power believing in the wisdom of muscular presidential leadership in foreign policy. While the Vietnam War prompted widespread questioning of this globalist attitude, presidential initiatives not only continued but accelerated thereafter.

Paradoxically, during the Cold War and the immediate post-Cold War years (1989-2001), America experienced a relative weakening in the world arena, which prompted an increase in presidential initiatives. The rise of new, informal regional and functional regimes that the US did not dominate forced successive administrations to manage relations through repeated applications of economic carrots and political sticks. As global challenges multiplied, the president's superior institutional capacity to mobilize government resources ensured that the burden of generating rapid, reactive, and often secretive responses to external challenges would fall on him.

This trend inevitably placed stress on constitutional checks and balances. Though the *Youngstown* vision held sway as late as the presidencies of George H.W. Bush and Bill Clinton, the terrorist attacks of September 11, 2001 inaugurated an Age of Terror in which the president felt repeatedly pressured to take unilateral action. George W. Bush ordered invasions of Iraq and Afghanistan, reopened Guantánamo and CIA black sites, authorized torture and cruel treatment, and greatly expanded the use of force abroad – all in the name of pre-emptive self-defense.

The Bush administration fully embraced the *Curtiss-Wright* vision and trumpeted executive power. But in crisis, weaker executives also asserted unilateral power, because they feared that Congress or the courts would not permit what they felt pressured by circumstance to do.

Consider Harry Truman's decision to seize the steel mills during the unpopular Korean War; Richard Nixon's illegal actions during Watergate; or Jimmy Carter's handling of the Iran hostage crisis. While Ronald Reagan effectively privatized foreign policy during the Iran-Contra Affair, [Joe Biden](#) imposed dramatic economic sanctions on Russia after its invasion of Ukraine. The Clinton, Obama, and Biden presidencies – each burdened by weak legislative support – all under-corrected for past executive overreach and resorted to reactive *ad hoc* unilateralism to respond to various national-security crises.

Once such crises are thrust upon the president, powerful domestic factors such as ideology, governing philosophy, and bureaucratic politics combine to help drive a unilateralist response. But the constant sense of threat that has pervaded the twenty-first century has given weak and strong presidents alike more reason to monopolize foreign policy. It has also given a polarized Congress greater excuse to acquiesce, and the courts more reason to defer to or rubberstamp executive decisions.

Unilateralism Breeds Lawlessness

As executive power has become more concentrated, it has inevitably pressed the limits of law. Pressured executive branch officials do not think of themselves as dangerous, but rather as underappreciated public servants whose worthy motives have been misunderstood. Inside their bubble of “groupthink,” executives grow isolated, breeding a temptation to act alone, often in secret.

When executives' power combine a capacity to act with a continual duty to react, it is only a matter of time before they see the advantages of going it alone. They find it better to ask for forgiveness than for permission. Or as Reagan reportedly [said](#) during the Iran-Contra Affair, “The American people will never forgive me if I fail to get these hostages out over this *legal* question.”

In time, feeling put-upon allows executives to convince themselves that their actions are justified by some external source of authority, such as competence or a “mandate,”

derived from popular or legal legitimacy. They come to believe that because they *can* exercise executive power, they *ought to*. From there, it is just a short step to Nixon's infamous [claim](#) that, "When the President does it, that means that it is not illegal." Or as Trump recently [put it](#), "He who saves his Country does not violate any Law." The repeated exercise of executive power comes to validate itself.

This link between unilateralism and lawlessness has tightened with the two Trump presidencies. During his first administration, Trump's activist impulses disrupted the global landscape with unprovoked trade wars, threat-based diplomacy, anti-immigration campaigns, and a wholesale denigration of alliances. He repeatedly relied on far-fetched claims of "national emergencies" to justify unilateral executive action in areas where the Constitution affords Congress primary authority – from immigration and war to international trade and the regulation of cross-border investments.

Trump, moreover, claimed legal power to terminate longstanding treaties at will, without even paying lip service to consultation with legislators. And he usurped Congress's power of the purse by proceeding to build a border wall with funds that it had expressly withheld.

Along the way, Trump 1.0 amalgamated his predecessors' worst national-security abuses. Like Nixon, he illegally used force abroad to kill Iranian General Qassem Suleimani in Iraq, and pressured his attorney general to weaponize the Justice Department against his critics. Like George W. Bush, he claimed a right to launch preemptive military strikes. And like Reagan, he condoned the privatization of foreign policy by allowing unaccountable cronies to intervene in official matters. His first impeachment – for turning an arms shipment to Ukraine into a de facto *quid pro quo* for his own political gain – recalled Marine Colonel Oliver North's illegal diversion of proceeds from Iranian arms shipments to finance Nicaraguan guerrillas after Congress cut off funds.

Such a sustained presidential effort to dodge the rule of law could not have succeeded had constitutional checks and balances functioned as intended. Trump's unilateralist project fed on the other branches' willingness to normalize his aberrant behavior. Congressional Republicans repeatedly refused to assert their constitutional prerogatives, and the conservative majority on the Supreme Court deferred to

fabricated presidential motives, particularly when it upheld the Muslim ban by accepting what Justice Sonia Sotomayor, dissenting, called a national security “[masquerade](#).”

Then, in [Trump v. United States](#) (2024), the Court’s six-justice conservative majority weakened the former president’s accountability for any act that could be deemed “official.” In its obsession to avoid “enfeebling the presidency,” the Court never acknowledged the actual lawless acts undertaken by the once and future incumbent.

What made Trump’s first-term unilateralism constitutionally distinctive was his [claim](#) that “I have an Article II,” which “gives me the right to do whatever I want” as president. Trump and his supporters insisted that all of his actions were authorized, justified, and immunized from interbranch interference by his plenary constitutional powers. Under this sweeping theory of a “unitary executive,” any restraints coming from *within* the executive branch can be ignored, and any restraints coming from *outside* the executive branch can be treated as unconstitutional intrusions.

Ironically, this claim was bolstered by generations of executive branch lawyers who had sought to *protect* America by issuing opinions empowering the president to act as its prime defender against national-security threats. Until Trump arrived on the scene, those drafting such opinions could always assume that a president would have *some* internalized limit – a sense of public duty or shame that would dictate self-restraint. But Trump exhibits no such probity and has consistently shown contempt for legal constraints of any kind. Perversely, executive lawyers’ good-faith labors to empower the executive in the name of national security have helped transform the executive himself into a national-security threat.

Trump 2.0

During the first frenetic 100 days of his second term, Trump swiftly took executive unilateralism to new heights as he sought to nullify the rule of law for his own administration. While out of office, Trump was indicted in four separate cases and convicted on 34 felony counts. But after his re-election, these cases were all frozen or dismissed.

Moreover, after courts had issued hundreds of criminal convictions for those who had violated national-security laws and participated in the January 6, 2021, insurrection at

the US Capitol, Trump used a “pardon whitewash” to grant amnesty to even the most violent offenders. He eviscerated checks and balances within the executive branch, firing 17 independent inspectors general, the director of the Office of Government Ethics, the chair of the Joint Chiefs of Staff and other military leaders, and key judge advocates general, who advise military officials on whether presidential orders are lawful.

Similarly, in the name of “government efficiency,” Trump has gutted the career civil service and concentrated power in the hands of his most loyal cronies. He has sought to dismantle congressionally established departments and independent agencies, mandating that only the president and his attorney general’s interpretations of law are controlling on the executive branch. He has deployed his billionaire backer Elon Musk to oust or place on administrative leave tens of thousands of federal employees, including agency heads, and question countless prospective employees about their loyalty to Trump.

As in his [first term](#), Trump has favored impulse over strategy, transactions over relationships, hard power over diplomacy, and “resigning without leaving” over meaningful engagement with international institutions. He has continued to denigrate the truth and attack the press, international institutions, and government agencies in a rush to reverse Biden’s policies and confound longstanding bipartisan foreign-policy commitments. As always, he has sought to “flood the zone” with distracting daily initiatives designed to shift the “[Overton Window](#),” so that the previously unimaginable quickly becomes the new normal.

But there are also important differences from the first term. Trump’s second administration, now comprised only of staunch loyalists, is even more vindictive, bellicose, and openly contemptuous of legal constraints. Trump has fully instituted government by decree, issuing [142 executive orders](#) during his first hundred days – many advancing policies without any congressional authorization. He has also “paused” already appropriated expenditures for foreign aid to Ukraine and elsewhere, openly commandeering Congress’s constitutional power of the purse.

Even more ominous, Trump has threatened to invoke long-moribund statutes (like the Insurrection and Alien Enemies Acts) to deploy the National Guard and military

domestically against claimed immigrant “invasions.” He has retaliated against perceived critics and enemies with [bills of attainder](#), which the Constitution expressly forbids. To discourage collective resistance, he has targeted a long list of law firms, universities, and the media, cowing them into legally dubious [“negotiated surrender” agreements](#). And he has deployed “shock and awe” tactics to encourage isolation, anticipatory capitulation, and self-silencing or exit by those who might otherwise defend the rule of law, undocumented immigrants, and career civil servants.

Trump 2.0’s early “foreign-policy” initiatives have amounted to an *ad hoc* sanctions policy, with the president invoking overstated claims of “national security” to demonize immigrants and promote mass deportations. Continuing the pattern, he has justified his disastrous tariffs against America’s closest trading partners on “national-emergency” grounds.

In his first term, Trump hesitated to use force; but in his second, he has already launched strikes on the Houthis in Yemen and advanced absurd territorial claims against Canada, Gaza, Greenland, and the Panama Canal. The same Trump who previously opposed nation-building now proposes that Gaza be transformed into an Atlantic City-style beach resort – though he cannot explain where the people of Gaza would go, or what role US armed forces might play in their displacement.

Meanwhile, Trump’s diplomacy has tipped even more heavily toward Russia. The administration is leveraging foreign aid and military intelligence to bully Ukraine’s government into surrendering territory without receiving any security guarantees. Trump has also vacillated between confrontational and conciliatory approaches toward China, as well as launching a systematic attack on America’s preparedness against natural disasters, global warming, future pandemics, cyberattacks, and crises that would demand the expertise and support of career bureaucrats and foreign alliances.

Throughout these chaotic 100 days, Congress has remained startlingly compliant, dutifully confirming Trump’s extreme – and often extremely unqualified – cabinet nominees. But the lower courts have pushed back, with more than 50 of them blocking early Trump initiatives across seven federal circuits. These decisions have come from judges appointed by five presidents, from both political parties.

As the current cases work their way through the appellate process, the burning question has become whether and when a majority of the Supreme Court will emerge to rebuff Trump's unilateralist constitutional theory. Despite clear constitutional barriers, Trump has repeatedly raised the prospect of running for a third term, which the White House social-media team indulges with [declarations](#) of "LONG LIVE THE KING!"

What Is to Be Done?

For those who would defend the rule of law, the most pressing political challenge is deciding how collectively to stem the flood of lawlessness, while at the same time rebuilding the constitutional dam. A meaningful response would comprise a concerted sequence of revival, resistance, resilience, and reform.

Most immediately, we must revive traditional constitutional restraints on executive overreach, such as the Bill of Attainder Clause and Congress's authority over the purse, foreign commerce, and immigration. At the same time, global human-rights and humanitarian institutions that Trump does not control can investigate his shipment of US detainees to extraterritorial prisons, his compliance with the laws of war in the Red Sea, and Russian or Israeli violations of international law in Ukraine and Gaza, respectively.

Medium-term strategies of resistance and resilience would use domestic and international law to push back on illegal initiatives. As Justice Louis Brandeis famously [observed](#), the purpose of separation of powers is "by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."

Such frictions are already beginning to be felt, not just from Democrats in Congress and statehouses, but also from factional clashes within Trump's political base. Overconfidence has caused Trump to overplay his hand on issues such as immigration, government downsizing, tariffs, and tax cuts. Those policies are widely expected to hurt middle-class Americans and alienate those who voted for him unenthusiastically.

In time, what Albert O. Hirschman called "[countervailing passions](#)" will likely kick in, as the most extreme "movement supporters" clash with those who have merely sought to gain personally from Trump's re-ascendancy. Trump's undisciplined impulses will make it impossible for his administration to maintain a durable, coherent approach on

any complex issue. If faced with sustained opposition, Trump's focus will shift to easier symbolic targets.

Even more frictions will arise as institutional counterweights activate and coalesce. These include states and localities (especially on climate change and immigration); uncowed independent media; international institutions; and powerful interest groups (including some technology companies, former military leaders, and nongovernmental organizations promoting democracy and civil liberties). Bureaucratic resistance, leaking, and whistleblowers will help make executive branch actions more transparent. On the international stage, Trump's policies will face frequent and forceful pushback from democratic allies. As I described in [*The Trump Administration and International Law*](#), the rule of law is sticky and bends more easily than it breaks. Because autarky is not the global norm, domestic and international law have become [intertwined](#) in a "transnational legal process" and patterns of law-observant behavior that even a willfully lawless president cannot easily discard.

This transnational legal process is bigger than Trump, and so are challenges such as climate change and pandemic prevention. International bureaucracies and alliances assume legality and therefore resist repeated insults to the rule of law. Violations tend to provoke global blowback, hamstringing the lawbreaker elsewhere. Trump's perceived lawlessness will dilute American power and – as happened during his first term – turn his "America First" strategy into "America Alone."

But rule-of-law advocates cannot be content with plugging leaks. Over the longer term, Americans will need to pursue thoroughgoing institutional reform. To that end, the final chapters of my latest [book](#) detail a long list of proposals. The US needs better congressional tools to restrain unilateral warmaking and clarify international lawmaking and unmaking. It also needs stronger intelligence oversight, information control, and protections for the electoral process.

After the twin debacles of Vietnam and Watergate, Congress enacted a series of framework statutes that reasserted its constitutional role in such areas as warmaking, emergency economic powers, budgetary matters, intelligence oversight, and international agreements. Today's Congress could similarly start [adopting](#) legislative proposals to restrain government by secret law; maintain America's adherence to

international law; clarify constitutional restraints on unilateral abrogation of treaties and agreements; and encourage judicial readings of presidential power more in line with *Youngstown* than *Curtiss-Wright*.

The second Trump administration's tumultuous opening has finally awoken the world to the existential dangers posed by America's imperial presidency. US allies have now been thoroughly schooled about the risks of relying too much on responsible bipartisan foreign-policy leadership – something that the US political system may no longer be able to provide.

Trump 2.0 is already guilty of startling lawlessness. The excesses still to come should finally push Americans to act as “Americans First,” and start pursuing the structural reforms needed to restore the checks and balances enshrined in the National Security Constitution.