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Maria Elisabetta de Franciscis

# Checks and balances in the second Trump administration

## A stress test or a constitutional crisis?

This paper was spurred by the flurry of executive orders that began on 20 January 2025 a few hours after Trump's inauguration and has yet to stop, and by an apparent dereliction of duties of Congress. The scope of the research was to confront and compare the first days, weeks and months of the second Trump term with past administrations that had indeed stressed the constitutional balance of powers to detect the signs, if any, of a new stressful period or rather to identify eventual warnings of a constitutional crisis. Reported here are some of the early findings while the research is a work in progress.

**Keywords:** Checks, Balances, Executive orders, Unitary presidency, Trump.

### 1. Introduction

On January 20, 2025, in his inaugural speech, Donald J. Trump said in an ominous fashion, «The Golden Age of America is Back». Since then, and up to the 100<sup>th</sup> day of the administration (as of April 30, 2025), he signed 143 executive orders, 42 proclamations and 42 memoranda<sup>1</sup>. In the same period the 119<sup>th</sup> Congress introduced, brought to the floor and voted upon two pieces of legislation and three Resolutions<sup>2</sup> while the Federal Courts responded to over 200 challenges to Trump's initiatives. These cases were claimed by civil society, Attorney Generals of over twenty States, Law firms, media corporations, Universities and individuals deported and/or disappeared in violation of their *habeas corpus* rights, or citizens who were terminated abruptly from their federal employments. This paper was spurred by the astounding data just mentioned and by the knowledge

<sup>1</sup> The legal peculiarities of, and the differences between executive orders, proclamations and memoranda are analysed *infra* in paragraph 4.

<sup>2</sup> Trump signed the first bill, the bipartisan *Laken Riley Act*, nine days after taking office while declaring an invasion at the southwest border; then two Resolutions, one repealing a Biden-era *Waste Emissions Charge*, authorized by the *2022 Inflation Reduction Act* and the second rescinding another Biden-era measure meant to protect aquatic environments; and finally, a six-month Continuing Resolution, preventing a government shutdown by maintaining current funding levels for the rest of the fiscal year, which ends in October.

that – albeit executive orders are a common tool for expediently directing the government and the agencies to be in line with president’s policies – they have never been so many and in such a short time frame, so much so to bear a resemblance to a «government by decrees»<sup>3</sup>. In fact, presidents have been cautious not to overstep the prerogatives of the legislative branch and have thus resorted to executive orders mostly to clarify new policy directives to federal agencies. Furthermore, data shows that the recourse to this instrument is proportionally lower when a political party has been endowed by the electorate, as it is the case for this administration, with a trifecta<sup>4</sup> whereas the same party is attributed control of the executive and legislative branches. Indeed, a same majority in both houses of Congress undoubtedly facilitate a less confrontational relationship between the legislative and executive branches that, in turn, ensues in a more legislatively productive Administration. It is bewildering then that, notwithstanding the trifecta, the president has chosen to adopt *extra ordinem* tools while the legislative branch appears to be wilfully neglecting its duties.

For almost 250 years the “experiment” in government by the people and for the people has relied on a well-orchestrated separation of powers between three equal branches and a system of checks and balances that has provided restraint whenever one branch was overreaching upon the spheres of competence and the powers of one or both the remaining two branches. As it is generally known in fact, the Founding Fathers were determined to create a system of government that would prevent the disastrous eventuality of one branch prevailing over the others and to this end they devised guarantees whereas each branch is endowed with exclusive powers and independence from the other two branches and yet it is dependent on the consent of one or both the others. The Founding Fathers especially feared the establishment of a tyranny and to that end purposely chose to have a monocratic executive<sup>5</sup> with few enumerated

<sup>3</sup> J.L. Hirszen, *Government by Decree: From President to Dictator through Executive Orders*, Alameda, 1999.

<sup>4</sup> A trifecta occurs when one political party controls the executive branch and holds majorities in both chambers of the legislative branch. In 2024 the Republican party in fact, won the White House by 2.284.967 votes, the House of Representatives with a majority of 5, the slimmest in almost 100 years and the Senate with a margin of 6 Senators.

<sup>5</sup> To ensure accountability, Hamilton endorsed the monocratic executive who could always be identified and eventually charged in cases of «bad execution of government» yet not at the expense of «energy» that is a «leading character in the definition of good government». A. Hamilton, J. Madison, J. Jay (Eds.), *The Federalist Papers* (introduction by Clinton Rossiter), New York, 1961, n. 70, 423-424.

absolute powers and some shared powers with Congress, accountable to the people every four years or sooner through impeachment. They coveted in fact, an executive who would be overall, substantially weaker than the King<sup>6</sup> and yet at the opposite of the “weak” executive provided under the Articles of Confederations. Until recently this elaborate scheme of constitutional engineering has survived the test of time and stress, yet in the first 100 days of this Administration it appeared to be struggling, not performing its purpose to impede or, at a minimum, to resist what was emerging to be an attempt by the executive to either invade the sphere of the legislative or to obliterate altogether the need and purpose of the legislative branch while defying the judiciary and threatening individual judges in what could be an attempt to introduce a unitary presidency<sup>7</sup>.

Thus, the aim of this research is to investigate the health of the checks and balances; the causes of it not responding to the situation at hand; to confront previous historical similar situations; and to evaluate if the apparent dereliction of duties of the present Congress is temporary or is it to facilitate a change of regime. In sum, to evaluate if that which has transpired thus far is physiological or rather pathological and if the United States of America are little by little yet inevitably moving toward a change of regime.

## 2. Checks and balances

The debates that preceded the drafting of the Constitution and those that followed during its ratification process clearly indicate the profound knowledge the Founding Fathers had of history and of the underlying philosophy for governmental successes and failures of the past. They were well educated on the writings of Montesquieu, Hume, Locke and Blackstone whom they referenced when construing the theoretical inspiration for correcting and innovating on the monarchical “deficiencies” they experienced while being subjugated to the British Crown. Furthermore, the Founding Fathers were also familiar with Thucydides, Livius and Tacitus as well as Beccaria and Filangieri as it is readily accessible when perusing The Federalist Papers. Thus, the constitutional go-

<sup>6</sup> In Hamilton’ words the powers of the President were «the authorities of a magistrate, in few instances greater, in some instances less, than those of a governor of New York», Ivi, n. 67, 407.

<sup>7</sup> *Infra*, paragraph 6, and S. Calabresi, C.S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush*, New Haven, 2008.

vernment they drafted was a combination of influences culminating in a blend of enumerated and implicit powers whereas the rigidity of a higher written law was mitigated by the flexibility borrowed from common law; the firm separation of powers envisioned by Montesquieu was tempered by the checks and balances adopted by the Venetian Republic<sup>8</sup>; and the rights of *habeas corpus*<sup>9</sup> long fought for and finally obtained in 1679, were combined with Beccaria's principles<sup>10</sup>.

Nowhere in the Constitution can we find a direct reference to Locke's theory of the contract and yet the opening words of the preamble «We the people» indicate the determination of the Founding Fathers to attribute to the people the original power to choose who governs over them and to fashion the people as the addressee of government's accountability. The relevance of the people is further reflected by the choice to dedicate the first article of the Constitution to the elected legislative branch and to recognize to this organ most of the enumerated powers of the whole Constitution. Moreover, it is to the people that the Founding Fathers attributed the powers of the purse and of the sword and likewise it falls upon the people to decide the size and reach of the government and the creation of the federal courts<sup>11</sup>; and significantly it is the people who are vested with the constitutional duty to check upon, and ultimately remove through impeachment, an intemperate executive or a judge who has failed to honour the good behaviour clause.

The fear that a monocratic executive could easily develop in a tyrannical despot transpires in both *The Federalist Papers* and in the carefully carved powers enumerated in article 2 of the Constitution. The presidency

<sup>8</sup> M. D'Addio, *Italian Sixteenth and Seventeenth Century Political Thought. The Founding Fathers and the American Constitution*, in E.P. Noether (Ed.), *The American Constitution as Symbol and Reality for Italy*, Lampeter, 1989, 1-19.

<sup>9</sup> In the British colonies in North America, by the time of the American Revolution, the rights to *habeas corpus* were popularly regarded as among the basic protections of individual liberty. The United States Constitution (Art. I, sec. 9, paragraph 2) guarantees that the privilege «shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it». Today, *habeas corpus* is a legal process that allows a person in custody to challenge the legality of the detention or imprisonment, and it is a writ that requires the custodian of a person to produce that person before a court to either charge the arrested person with an offense or release the person.

<sup>10</sup> K. Preyer, *Cesare Beccaria and the Founding Fathers*, in E.P. Noether (Ed.), *The American Constitution as Symbol and Reality for Italy*, 21-34.

<sup>11</sup> These federal courts are those mentioned in Art. III, sec. 1 of the Constitution whereas «the judicial power shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish».

was the object of the most attention<sup>12</sup>, one of the main causes of division amongst the Founding Fathers attending the Philadelphia Convention and the one and only branch whose definition of powers risked calling the whole project off. Two models were envisioned and discussed, one advocated for a weak executive while the other wished for a strong and unchecked president. The former, was expected to be directly dependant from Congress, expression of a pluralistic electorate, monocratic, with a fixed mandate and limited powers while the latter was to be independent from Congress endowed with exclusive powers amongst which selecting the direction of governmental policies and beholden only to the Constitution. In the end, a compromise solution prevailed in Philadelphia whereas the executive was endowed with shared powers and burdened by checks by both the other branches while being granted only some enumerated exclusive powers. To this end the most significant power bestowed on the executive was that it would «take care that the laws be faithfully executed»<sup>13</sup> and the most relevant check upon it was the impeachment. It follows then that the president's main responsibility is to assure that the will of the people is indeed respected and likewise it ensues that all the executive's actions are accountable to the people.

### 3. Historical overview of stressful challenges to checks and balances

The form of government envisioned by the Founding Fathers and all the checks implemented as deterrents to overreaches of one branch upon both or either one of the others, were foremost aimed to prevent those possible occurrences of excessive intemperance by an ambitious president who might willingly introduce tyranny for self-aggrandisement. And the system has withstood the test of time and all shapes and forms of unrestrained behaviour. The *pendulum* has always gone back to its gravitational point sometimes with a swifter reaction sometimes with a slower movement but still back at the starting point. As cases in point, presidents Buchanan, Lincoln, A. Johnson, F.D. Roosevelt, Nixon, Reagan and G.W. Bush, have been selected because of their attempts to a muscular exe-

<sup>12</sup> Hamilton writes that «There is hardly any part of the system which could have been attended with greater difficulty in the arrangement of it than this; and there is, perhaps, none which has been inveighed against with less candor or criticized with less judgement», in *The Federalist Papers*, op. cit., n. 67, 407.

<sup>13</sup> Art. II, sec. 3 of the Constitution.

cutive that challenged the equilibrium of powers and yet were checked by either or both the legislative and the judiciary. In fact, they all have committed overreaches, yet they were all blocked by either the Courts or Congress or at times by both the Courts and Congress to reinstate the rightful attributions of powers to the executive.

James Buchanan<sup>14</sup> pressured Associate Justices of the Supreme Court, and by so doing infringed on their independence, to rule in favour of affirming slavery as the rule of the land and to deny citizenship and privileges to the African descendants of slaves<sup>15</sup>. The Court went further than what Buchanan had asked, and Chief Justice Roger Taney, writing for the 7-2 majority, also claimed that Congress did not have the power to ban slavery because the Fifth Amendment protected slaveowners' property rights, and slaves were legal property. The Court also struck down the Missouri Compromise legislation, which Congress had used to limit the expansion of slavery to new states and territories. The dreadfulness of the opinion aside<sup>16</sup> and the undue pressure by the executive tainted the reputation of the Court, led to the civil war and exposed the Court to the political attacks that were mounted by the republican party<sup>17</sup> that culminated in the election of Abraham Lincoln. Congress, on its part, set in motion the rigid and long process to amend the Constitution eventually resulting in the abolition of slavery<sup>18</sup> and the affirmation of privileges and immunities of citizenship by birth<sup>19</sup>. Buchanan was denied a second presidential term.

<sup>14</sup> James Buchanan, 15<sup>th</sup> president from 4 March 1857 to 4 March 1861.

<sup>15</sup> *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

<sup>16</sup> Until July 2024 and the presidential immunity opinion-*Trump v. United States*, 603 U.S. 593 (2024), the Dred Scott opinion was considered the worst opinion ever penned by the Supreme Court.

<sup>17</sup> In fact, during the campaign for the federal election of 1860, Republicans rejected the Dred Scott ruling as being corrupted by partisanship and non-binding.

<sup>18</sup> On 31 January 1865 the Thirteenth Amendment was proposed to the legislatures of the States, and having been ratified by the legislatures of twenty-seven States was proclaimed on 18 December of the same year. It established that «Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction».

<sup>19</sup> On 13 June 1866 the Fourteenth Amendment was proposed to the legislatures of the States, and having been ratified by the legislatures of twenty-eight States was proclaimed on 28 July of the same year. It established «All persons born or naturalized in the United States, and subject thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws».

Abraham Lincoln<sup>20</sup> as a matter of fact, disavowed the Dred Scott opinion and by so doing challenged the role and authority of the Supreme Court and then later unilaterally suspended the protections of the *habeas corpus*, action that is of exclusive competence of Congress<sup>21</sup>. In fact, in 1861 Lincoln initially suspended *habeas corpus* in Maryland to put on trial in military courts large numbers of civilian rioters and to prevent the movement of Confederate troops onto Washington. The order was eventually extended in response to different threats. By 25 September 1862, Lincoln subjected protestors to martial law and to the suspension of *habeas corpus*. Instead of convening the adjourned Congress back to Washington, Lincoln proceeded – upon his perceived authority under the Commander in Chief clause – to suspend the *habeas* rights by issuing a General Order<sup>22</sup>. Thus, the president exercised Art. I, sec. 9.2 powers while shunning his own Art. II, sec. 3 prerogatives by invoking his role as the “guarantor” of national unity and his obligation to protect the member States from invasions and aggressions. When the war was over, Lincoln’s suspension of *habeas corpus* was challenged in Court, notably by Chief Justice Roger B. Taney in *Ex Parte Merryman*<sup>23</sup>, who ruled that only Congress could suspend *habeas corpus*. Lincoln argued that acts that might be illegal in peacetime might be necessary «in cases of rebellion», when the nation’s survival is at stake. However, Congress on 3 March 1863 *ex post facto* passed the *Habeas Corpus Suspension Act*, which authorized the president to suspend the writ when necessary for public safety.

Andrew Johnson<sup>24</sup> who was Vice president, was sworn in at the death of Lincoln. Johnson was a southerner who found himself faced with the post-civil war problems of Reconstruction, the enfranchising of the “freed” African population and the treatment of the secessionist leaders. His presidency was characterized by a confrontational relationship with Congress that affected also his power of appointment to the judiciary. In fact, when a vacancy in the Supreme Court occurred in 1866, and the Senate did not like the nominee, instead of refusing consent ex article 2.2, Congress eliminated the judicial seat to prevent the appointment. Fur-

<sup>20</sup> 16<sup>th</sup> president from 4 March 1861 to 15 April 1865 when he was assassinated only a month into the second term.

<sup>21</sup> Art. I, sec. 9.2 of the Constitution.

<sup>22</sup> A General Order is an order issued by a competent authority including general directives and announcements.

<sup>23</sup> 17 F. Cas. 144 (C.C.D. Md. 1861) (no. 9487).

<sup>24</sup> 17<sup>th</sup> president from 1865-1869.

thermore, and to ensure that Johnson would never appoint to the highest court of the land, Congress also preventively eliminated the next vacancy as well, stipulating that the court would shrink by one justice when one next departed from office. The confrontation between the executive and the legislative branch occurred also on typically political grounds due to his moderate approach to the timetable and the process of integration of the ex-Confederate States; their need to amend their constitutions and laws and the introduction of federal voting rights for their representation in the federal legislature. If at first the confrontation with Congress was about policies, it soon became a conflict of attribution of powers between the two branches. Johnson claimed he was justified to decide and rule from the White House because of the commander in chief clause, and Congress, on the other hand, passed legislation that granted all blacks citizenship and provided for sanctions for all those violating any of their civil rights. When Johnson vetoed the law, Congress overrode his veto. When Johnson encouraged white southerners to ignore such law, Congress passed the *Reconstruction Act*, and the south returned in a state of siege. Johnson then revoked the appointment of military and civil cabinet members<sup>25</sup> who were faithful executors of the law and replaced them with sympathizers of his more moderate transitional policies. Hence Congress approved the *Tenure of Office Act* of 1867 that asserted the right of the Senate to advice and consent also in cases of removal of those who had been approved by the Senate in the nomination/appointment phase. Johnson thought the constitutionality of this law was at minimum questionable and decided to ignore it. It is at this point of conflict in 1867, before the midterm elections, that the House of Representatives decided to begin impeachment procedures by charging its Judiciary Committee to investigate the existence of impeachable offenses. The articles of impeachment were voted upon after the election that had, however, produced a majority favourable to Johnson and the trial was never undertaken. But only two months later<sup>26</sup> the House charged anew its Judiciary Committee to investigate the possibility of a new impeachment and this time, voted in favour of 3 articles of impeachment<sup>27</sup> and again Johnson was spared the verdict of culpability in fact, this time, the Senate did not reach, by one

<sup>25</sup> Johnson had not appointed his Cabinet having chosen to confirm Lincoln's choices.

<sup>26</sup> In March 1868.

<sup>27</sup> He was accused of violation of the *Tenure of Office Act* of 1867; of abuse of power; and contempt of Congress.

vote, the two third majority required by the Constitution. Johnson completed his term but lost the nomination as candidate for a second term.

Franklin Delano Roosevelt<sup>28</sup> was perhaps the most muscular commander in chief of those previously mentioned. He was president during the Great Depression, and then the Second World War and throughout his twelve years in the White House he ran a command economy. For a time, he shut down the nation's banks; he directed human and natural resources to where he judged they were most needed; he controlled prices; and he supervised the growth of an unprecedented defense and national security state, including surveillance of public and private communications; he interned both Italian and Japanese Americans<sup>29</sup> and sanctioned the development of the most lethal weapon used in history. All of it without any substantial oversight or checks by Congress or the judiciary<sup>30</sup>. Roosevelt stayed in charge of his administration by drawing fully on his formal and informal powers as Chief Executive. His style was to inspire personal loyalty and to strengthen his own position by «handing out one job to several men and several jobs to one man» thus strengthening his own position as a court of appeals by ignoring or bypassing collective decision-making agencies, such as the Cabinet<sup>31</sup>. Except for the Supreme Court's opposition in the first term and of the resistance of the conservative coalition in the second term, as already mentioned and as it will be further analysed *infra*<sup>32</sup>, Roosevelt was sustained in this muscular exercise of the executive powers because of the economic crisis and because of the war efforts. Clearly the ratification of the amendment establishing a limit to presidential terms was a reaction to his election to a fourth presidential mandate<sup>33</sup>.

<sup>28</sup> 32<sup>nd</sup> president from 1933 to 1945.

<sup>29</sup> He based his actions on the *Alien Enemies Act* which is a U.S. law passed in 1798 that grants the president broad powers to detain and deport non-citizens of enemy nations during wartime or when facing invasion or predatory incursion.

<sup>30</sup> As professor Russell Riley (co-chair of The Presidential Oral History Program at the University of Virginia's Miller Center of Public Affairs) competently summarized in *We have had "Constitutional Dictatorship" Before. Trump is different*, in *The Washington Post*, 29 April 2025.

<sup>31</sup> J. MacGregor Burns, *Roosevelt: The Soldier of Freedom*, New York, 1970, 347-348.

<sup>32</sup> *Infra*, paragraph 4.

<sup>33</sup> The process to amend the Constitution to introduce the two terms limit was eventually initiated when Twenty-first Amendment was approved by Congress on 21 March 1947 and proclaimed on 27 February 1951, on the same day of reaching the necessary ratifications from 36 out of 48 State's legislatures.

Richard M. Nixon<sup>34</sup> also known as the imperial president is yet one more example of the successful implementation of checks and balances. In fact, his presidency, particularly in its later years, is characterized by an expansion of executive power beyond what was traditionally considered appropriate. Just to name a few cases in point: Nixon frequently used executive orders, proclamations and National Security decision's Memoranda<sup>35</sup> to bypass Congress and implement policies without legislative approval; his administration emphasized secrecy and control of information, shielding the presidency from oversight and scrutiny; he kept an "Enemies List" of those who criticized him and he had them targeted for tax audits or trailed by private detectives; he abused the war powers during the Vietnam war, particularly the use of military force in Cambodia and Laos; Nixon's handling of foreign policy, including détente with China and the Soviet Union, also involved a degree of unilateral action; the abuse of power and the cover-up of the Watergate break-in demonstrated a willingness to disregard constitutional norms and legal constraints. Each abuse and each excess matched an equal reduction of congressional power and authority and each subpoena issued by Congress or by the Special Prosecutor showed his contempt of Congress and of the Courts. Both other branches eventually reacted. Congress began an impeachment procedure; approved several regulations and legislation to prevent future presidents from acting without scrutiny, transparency and oversight while the Supreme Court penned a scathing reprimand in *United States v. Nixon*<sup>36</sup>. The unanimous opinion<sup>37</sup> written by Chief Justice Burger has been considered a crucial precedent limiting the power of any president to claim executive privilege. Indeed, the Court found that a qualified privilege existed while the President is in office, but it could not extend to all circumstances and especially not to those in which serious wrongdoing was convincingly alleged. Once again, the other branches reigned in the imperial president who was forced to resign.

<sup>34</sup> 37<sup>th</sup> president from 1969 to 1974.

<sup>35</sup> In fact, Nixon signed 346 executive orders, 344 proclamations, 264 National Security memoranda.

<sup>36</sup> *United States v. Nixon*, 418 U.S. 683 (1974) was decided on 24 July 1974 and was important to the late stages of the Watergate scandal, amidst an ongoing process to impeach Richard Nixon.

<sup>37</sup> In fact, the opinion was 8-0 as Associate Justice Rehnquist recused himself as he had served in the first Nixon administration as Assistant Attorney General. [supreme.justia.com/cases/federal/us/418/683](https://supreme.justia.com/cases/federal/us/418/683).

Ronald W. Reagan<sup>38</sup> skilfully cooperated with the legislative branch and thus was able to pass important legislation, yet during his eight years' administration, he incurred in several scandals resulting in investigations, indictment or conviction of over 138 administration officials<sup>39</sup>. Furthermore, Congress twice considered impeaching him, yet eventually, decided against proceeding. The first time was in 1983 when Congress passed a Resolution<sup>40</sup> to investigate: «1. the high crime or misdemeanor of ordering the invasion of Grenada in violation of the Constitution of the United States and 2. preventing news coverage of such invasion». The second attempt occurred in the aftermath of the Iran-Contras scandal. In fact, an inquiry to evaluate the existence of impeachable offenses committed by Reagan was launched but again was not put to a vote of the House<sup>41</sup>. While no further action towards an impeachment was taken on this latter Resolution, it did lead directly to joint hearings of the subject that dominated the news later that year. After the hearings were over, articles of impeachment were discussed anew but decided against since the Congressional Committees concluded their investigation with a final report in November 1987 that said they had uncovered no evidence to challenge Mr. Reagan's public statement that he did not know of the diversion until he learned of it from Mr. Meese in November 1986<sup>42</sup>.

George W. Bush<sup>43</sup> is responsible for breaking the steadiness of the *pendulum* of checks and balances the most amongst the last five administrations. In fact, and only indicatively, his administration reduced federal employees by privatizing and out sourcing especially in the military; re-directed the purpose of governmental agencies; instructed Universities to remodulate their criteria for selecting students; forced government scientist to publish statistics and research that would endorse the policies to be implemented by the administration; hired friends and like-minded people even when not qualified; and defunded the dissenters. Most of the above-mentioned actions resulting in drastic changes of governmental policies were faced with some media reporting and some citizens protests yet received little or no oversight by Congress since they were accomplished

<sup>38</sup> 40<sup>th</sup> president from 1981 to 1989.

<sup>39</sup> H. Johnson, *Sleepwalking Through History: America in the Reagan Years*, New York, 1991, 184.

<sup>40</sup> House Resolution 370 – 98<sup>th</sup> Congress 1983-1984.

<sup>41</sup> On March 5, 1987, Rep. González introduced House Resolution 111, with six articles against Reagan regarding the Iran-Contras scandal to the House Judiciary Committee, where no further action was taken.

<sup>42</sup> D. Johnston, *Meese Testifies that Impeachment Was a Worry*, in *The New York Times*, 29 March 1989, Section A p. 17.

<sup>43</sup> 43<sup>rd</sup> president from 2001 to 2009.

without fanfare, through legal memos or introducing procedural changes and regulations<sup>44</sup>. Following the attacks on 11 September 2001, Bush benefitted of the “rally to the Commander in Chief” that traditionally occurs in times of national emergencies and a bipartisan unanimous Congress conceded all powers «necessary and proper» to secure the nation<sup>45</sup>. Still there were measures that received attention and criticism even if closely related with the “war on terrorism”. The reference here is to the establishment of a “special” detention camp in Guantanamo; to the disappeared; to the suspension of *habeas corpus* and due process; to deportations of US citizens; to torturous interrogations<sup>46</sup>; to surveillance of citizens through a complex technology; to data mergers from various Departments that became widespread and many more. For all these actions, there was either an investigation by Congressional Committees<sup>47</sup> or Supreme Court’s opinions<sup>48</sup> or media reporting and citizens protests yet no real accountability for either the President or his Cabinet members. Perhaps the most troublesome aspect of his administration was the theory of inherent powers which the president invoked to justify most of the actions mentioned<sup>49</sup>. But for a Congress that reacted – albeit late and not forcefully – and a Supreme Court that defended the separation of powers, the *pendulum* was once again back in its physiological stance.

As the ascensions and falls of the above-mentioned presidents demonstrate, the system was indeed devised to adopt to exceptional situa-

<sup>44</sup> T. McKelvey, *How Bush broke the Government*, in *The American Prospect*, 11 December 2008.

<sup>45</sup> House bill H.R. 3162 whose formal name is the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism* (USA PATRIOT), Act of 2001 was signed into law by Bush on 26 October 2001.

<sup>46</sup> A series of memos, particularly the Attorney General memorandum of 2002 (dated 1 August 2002) explored the legal definition of torture and its application to interrogation techniques and allowed American interrogators to inflict almost any sort of pain on detainees to obtain information. So were interrogation techniques, regarded as torture, approved in US-run detention facilities in Iraq and to the abuses at the Abu Ghraib prison in late 2003. *Ibidem*.

<sup>47</sup> In fact, several politicians sought to either investigate Bush for possible impeachable offenses or to bring actual impeachment charges. Indeed, on 10 June 2008, House Resolution 1258 was introduced containing 35 articles of impeachment against Bush. The House voted 251-166 to refer the impeachment resolution to the House Judiciary Committee on 11 June 2008, yet no further action was taken on it.

<sup>48</sup> The reference here is especially to the so called “Guantanamo cases”: *Yaser Esam Hamdi and Esam Fouad Hamdi v. Donald Rumsfeld*, 542 U.S. 507 (2004); *Rasul et al. v. Bush*, 542 U.S. 466 (2004); *Rumsfeld v. Padilla et al*, 542 U.S. 426 (2004). The opinion penned by Justice Sandra Day O’Connor in *Hamdi v. Rumsfeld* was a scanting rebuttal of the excessive powers claimed by Bush and of the dereliction of duties by Congress that should have not delegated to the president powers that are not delegable.

<sup>49</sup> P. Starr, *Bush v. Constitution*, in *The American Prospect*, March 2006.

tions and to resist muscularity when this is not required by extraordinary events thus consolidating a durable pattern of the checks and balances scheme that lasted until the Trump era. In fact, the axiom was that during normal times, the government by design and political habit is divided, while in times of genuine crisis, when strong action is needed without delay, Americans typically turn to a single, vigorous national leader<sup>50</sup>.

A comparable president to the present one, is Andrew Jackson<sup>51</sup> who was the first to be elected by appealing directly to the masses of voters; the first not from the eastern part of the country as he was from west of the Appalachians Mountains; the first common man and the first to mistrust the wealthy. He did not run on a specific platform and did not have a presidential agenda rather he dealt with each problem as it arose and made decision consulting with those who had helped him get elected. He is attributed the paternity of the spoils system in the bureaucracy although he removed fewer than one fifth of all federal office holders. He implemented a strong hand policy against the native Americans forcing them away from their lands and prairies thus decimating their populations and gaining public land that would be sold during his second term. He challenged state sovereignty when he rejected South Carolina's nullification of federal tariffs and threatened to send there the military. His tariffs policies would ultimately lead to a recession that exploded under the watch of his successor<sup>52</sup>. Jackson is mostly remembered for his fight against the local and state-run banks forcing them in 1836 to change guarantees from paper money to silver and/or gold, ultimately favouring their cloture as well as a long battle to gain control of and eventually to replace the Second Bank of the United States by questioning its constitutionality and the soundness of its money. Eventually the Bank's executive was convinced by the leadership of the party in opposition to ask Congress for an early approval of a new Bank charter. Albeit engaged in a re-election campaign, Jackson decided to veto the congressionally approved new charter and when he was elected by a landslide, he interpreted his victory as a mandate to continue fighting the Bank. In 1833 he issued an executive order ending the deposit of treasury receipts in the Bank. However, the Secretary of the Treasury refused to execute the order and Jackson decided to replace him but to no avail since also the new ap-

<sup>50</sup> These departures from the norm have been defined "constitutional dictatorships". C. Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies*, Princeton, 1948, now in a new printing by Rossiter Press, place of publication not identifiable, 2008.

<sup>51</sup> Andrew Jackson, 7<sup>th</sup> president from 4 March 1829 to 4 March 1837.

<sup>52</sup> Martin Van Buren, 8<sup>th</sup> president from 4 March 1837 to 4 March 1841.

pointee refused to implement the order. Finally, Jackson appointed Roger B. Taney as acting Secretary who did implement the policy. In March of 1834 the Senate censured Jackson for taking authority over the Treasury and refused to confirm Taney and yet in April of that same year the House declared the Bank should not be rechartered and by 1836 the Bank no longer held any federal deposits. Those who opposed Jackson formed a new political party (the Whigs) and referred to Jackson as “King Andrew the First”. Notwithstanding the political fights and constant confrontations with the institutions Jackson was able to implement all his policies completing his two mandates.

#### 4. Historical precedents of Proclamations and executive orders

Whilst the Constitution clearly entrusts the legislative power upon the people and their representatives, presidents have some tools at their disposal especially when the nation is at risk or there is an emergency. Emergency powers are not enumerated powers, rather they are implicitly drawn from the «necessary and proper» clause<sup>53</sup> that was included in the Constitution since Congress was not expected to be convened almost permanently as it is today. In fact, as it is well known, Congress met twice a year with a six-month interval, thus the Founding Fathers bestowed on the president the implicit and elusive duties derived from «taking care of the laws» and recommending to Congress «such measures as he shall judge necessary and expedient».

From the very beginning the form chosen by the presidents has been that of releasing an official act whereas the president proclaimed or ordered certain behaviours or policies or both<sup>54</sup>. Albeit they are usually grouped under the category of executive orders, they can be subdivided in three categories: *memorandum*, proclamation and order. Their legal standing and force are the same while their scopes differ. In fact, the difference between the three rests in the fact that executive orders and memoranda are aimed at those inside government while proclamations are aimed at those outside government.

A presidential *memorandum* is a type of directive issued by the president to manage and govern the actions, practices, and policies of the vari-

<sup>53</sup> Art. II, sec. 3 of the Constitution.

<sup>54</sup> While these orders are nowadays accepted tools of the executives, they are nowhere to be found in the constitution they should be considered as *extra ordinem* powers.

ous departments and agencies found under the executive branch. It has the force of law and is usually used to delegate tasks, direct specific government agencies to do something, or to start a regulatory process. There are three types of presidential memoranda: presidential determination or presidential finding; *memorandum* of disapproval, and hortatory *memorandum*. In the past they were referred as presidential letters. Obama<sup>55</sup> issued 644 of them while Trump in his first term issued 167. They are not required to be published in the Federal Register, but publication is necessary to have «general applicability and legal effect». The Federal Register gives publication priority to executive orders and proclamations over memoranda. Memoranda can be amended or rescinded by executive orders or another *memorandum*, but executive orders take legal precedence and cannot be changed by a *memorandum*.

Proclamations are often dismissed as presidential tools for policy making because of the perception that they are largely ceremonial or symbolic in nature, yet they did have important political and historical consequences in the development of the United States, encompassing Washington's Proclamation of Neutrality in 1793, Lincoln's Emancipation Proclamation in 1863 and the declaration of federal lands for national monuments issued by Clinton<sup>56</sup>. Proclamations have also been used for granting presidential pardons as did Ford<sup>57</sup> to pardon Nixon<sup>58</sup> and Carter<sup>59</sup> when he pardoned draft evaders in Vietnam. One more recourse to proclamations has typically been to honour a group, a situation or to call attention to issues or events. For instance, H.W. Bush<sup>60</sup> issued a proclamation to honour veterans of World W II and Reagan<sup>61</sup> called attention to the health of the nation's eyes by proclaiming a «Save your Vision Week»<sup>62</sup>.

Executive orders have always been used as an expedient tool especially in the early days and weeks of a new administration as to allow the president to direct the departments and agencies on how to enforce

<sup>55</sup> 44<sup>th</sup> president from 2009 to 2017.

<sup>56</sup> 42<sup>nd</sup> president from 1993 to 2001.

<sup>57</sup> 38<sup>th</sup> president from 1974 to 1977.

<sup>58</sup> 37<sup>th</sup> president from 1969 to 9 August 1974.

<sup>59</sup> 39<sup>th</sup> president from 1977 to 1981.

<sup>60</sup> 41<sup>st</sup> president from 1989 to 1993.

<sup>61</sup> 40<sup>th</sup> president from 1981 to 1989.

<sup>62</sup> P.J. Cooper, *By Order of the President: The Use and Abuse of Executive Direct Action*, Lawrence, 2002.

laws or manage government operations<sup>63</sup>. They carry the force of law but are limited since they must be rooted in the Constitution or in a law. They may not create law, allocate funds without Congress's involvement or violate constitutional rights. In fact, the legal or constitutional basis for executive orders has multiple sources. Article Two of the United States Constitution<sup>64</sup> gives presidents broad executive and enforcement authority to use their discretion to determine how to enforce the law or to otherwise manage the resources and staff of the federal government. Yet, presidents may legally utilise their discretionary power to issue executive orders when the subject matter that will be covered is indeed supported by a congressional law or the Constitution itself<sup>65</sup>. Typically, most executive orders are proposed by federal agencies and only then issued by the president<sup>66</sup>.

Until the early 1900s, executive orders were mostly unannounced and undocumented, and they were seen only by the agencies to which they were directed. That changed in 1907, when the Department of State instituted a Registry and a system based on sequential numbering, starting retroactively with United States Executive Order 1, issued on 20 October 1862, by Lincoln<sup>67</sup>. While the official recording of the Executive Orders only started with Lincoln, every single president<sup>68</sup> from Washington to Trump has issued them. Whereas some executive orders can be considered mundane, such as declaring a federal holiday or a day of mourning, others have been among the most important actions the United States government has ever taken. In fact, and to name a few, Franklin Delano Roosevelt issued an executive order to incorporate the shipyards and other military contractors; Truman signed an executive order to integrate the military; Lyndon Johnson used an executive order to impose civil rights obligations on all federal contractors and, more recently, Biden signed an executive order to require every federal agency to find ways to facilitate voter registration. But some of the federal gov-

<sup>63</sup> For example, Congress can declare a certain drug legal or illegal. But with an executive order, the president can tell the Department of Justice if prosecuting certain drug cases is a priority or not.

<sup>64</sup> Art. II, sec. 3 of the Constitution: «He shall take care that the laws be faithfully executed».

<sup>65</sup> J. Contrubis, *Executive Orders and Proclamations*, Congressional Research Service Report for Congress #95-722A, 9 March 1999, pp. 1-2.

<sup>66</sup> A. Rudalevige, *By Executive Order: Bureaucratic Management and the Limits of Presidential Power*, Princeton, 2021.

<sup>67</sup> [en.wikipedia.org/wiki/Executive\\_order](https://en.wikipedia.org/wiki/Executive_order).

<sup>68</sup> Except for William Henry Harrison 9<sup>th</sup> president from 4 March 1841 to 4 April 1841.

ernment's worst actions also came via executive order. Franklin Delano Roosevelt, for example, used an executive order to force the relocation and internment of Japanese and Italian Americans to concentration camps<sup>69</sup>. And in his first week of his second presidential term, Trump used an executive order to rescind Johnson's historic executive order requiring government contractors to comply with civil rights obligations<sup>70</sup>.

There are three provisions offered by the checks and balances to offer remedial obstruction to executive orders. The first remedy is that any future president can issue a new executive order that rescinds or amends an earlier executive order. This is the case of Trump issuing an executive order to rescind Johnson's executive order on civil rights, and of Biden's executive order rescinding the executive order by Trump to regulate and intrude on the career of federal employees<sup>71</sup>. A second possibility provided through checks and balances is for Congress to enact a law that reverses what the president has done. Nevertheless, this can only occur if Congress has the constitutional authority to legislate on that issue or when Congress is willing to deny the funding necessary to implement policy measures contained in the executive order, however, with the polarization of politics, this procedure has become increasingly unattainable. Furthermore, the president retains the power to veto this decision, and an override vote requires a two-thirds majority. The third remedy against an executive order is through the involvement of the judiciary whereas a federal court and/or the Supreme Court can hold that an executive order is unlawful if it violates the Constitution or a federal statute. Cases in point are the five executive orders specifying and regulating manufacturing businesses to align them to the *National Recovery Act* of Franklin Delano Roosevelt<sup>72</sup> that were overturned in 1935, by the Supreme Court because the Act itself exceeded congressional power to regulate interstate commerce and invaded the states' rights to regulate manufacturing<sup>73</sup>. Even an economic emergency such as the Great Depression did not justify the federal government interference

<sup>69</sup> This Executive Order was, later in the war effort, also used for the internment of Italian and German non-US residents.

<sup>70</sup> C. Anders, *What Is an Executive Order and How It Works?*, ACLU organization, 4 February 2025, [www.aclu.org/news/privacy-technology/what-is-an-executive-order-and-how-does-it-work](http://www.aclu.org/news/privacy-technology/what-is-an-executive-order-and-how-does-it-work).

<sup>71</sup> See *infra*, paragraph 6, footnote 82.

<sup>72</sup> Executive orders no. 6199, 6204, 6256, 6284a and 6855.

<sup>73</sup> *Panama Refining Company v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corporation v. United States*, 295 U.S. 495 (1935).

with the states' economic activities. Likewise, 17 years later, the Supreme Court invalidated executive order 10340 by which Truman directed private steel production facilities seized to support the Korean War efforts. In *Youngstown Sheet & Tube Co. v. Sayer*<sup>74</sup> the Court held that the executive order was not within the power granted by the Constitution to the president.

## 5. Some comparative statistics

In general, all presidents have found executive orders and proclamations useful and expedient tools of government and the recourse to them has increased as the *apparatus* of the administrative state has become more intertwined and complex or in the presence of national crisis and/or emergencies. While Franklin D. Roosevelt holds the record for the most executive orders signed by any president, issuing a total of 3,721, to implement policies related to economic recovery during the Great Depression and the wartime management during World War II, his record high number of executive orders was spread throughout his 12 years in office, thus for the purpose of this comparison, the data relevant to his presidency will be reported by terms of office and not as a whole<sup>75</sup>. A birds-eye analysis of the overall recourse to executive orders by all presidents throughout the 236 years of the validity of the Constitution, indicates that it is possible to group presidents in categories. In fact, there are periods of low recourse and periods of high recourse as well as periods of national crisis and periods of pacification, thus a first generalized conclusion is that during crises the president must be muscular and therefore issues many more executive orders than at any other time and conversely after a crisis and after a muscular president follows a time of placation and a less frequent recourse to these *extra ordinem* tools. The records show that in the early days of the Republic the recourse to these instruments was not frequent at all<sup>76</sup>. In fact, George Washington issued only 8 executive orders while John Adams only 1 in his four years as president, whereas Thomas Jefferson 4 times while James Madison 1 and John Quincy Adams 3 times.

<sup>74</sup> *Youngstown Sheet & Tube Co. v. Sayer*, 343 U.S. 579 (1952).

<sup>75</sup> For all other presidents in fact, the data available spans either one or two terms in office and thus it is more homogeneous.

<sup>76</sup> This data and all data here forth in this paragraph, is from G. Peters and J.T. Woolley (Eds.), *Executive Orders: The American Presidency Project*, Santa Barbara, 1999-2025 [www.presidency.ucsb.edu/node/323876](http://www.presidency.ucsb.edu/node/323876).

The low recourse by the first five presidents – who were also Founding Fathers – can be explained considering the interpretation they themselves espoused of the constitutional separation of powers that they had contributed to devise and by their desire to “set an example for posterity” of being respectful of the attributions of each branch. Yet, in those early times even presidents in constant contrast with the legislative power, as it was the case of Andrew Jackson and Buchanan, kept themselves within the bounds of the enumerated powers by only issuing respectively 12 and 16 executive orders.

War time presidents issued more executive orders than other presidents. In fact, Lincoln issued 48 executive orders whereas Wilson<sup>77</sup> faced with the war efforts of World War I resorted to them 1.803 times and Truman 907, Eisenhower 484 and Lyndon B. Johnson 325 times. While Franklin Delano Roosevelt fittingly belongs to this group of presidents, as mentioned earlier and for the purpose of the present comparison, his four terms mandate can be split in two sets of data. In the first, covering the period 1932 to 1940 when he was primarily focused on repairing the damages of the Great Depression and establishing the foundations of The New Deal, he issued 2.819 executive orders, and in the second from 1940 to 1945<sup>78</sup> when he was focused on the war efforts in World War Two, he issued 906 such orders.

Another category is that of muscular presidents not necessarily in times of war, presidents who had a clear reformist program and vision they wished to impose on the nation. Theodore Roosevelt<sup>79</sup> issued 1.081 executive orders pursuing his “New Nationalism” agenda as did Coolidge<sup>80</sup> issuing 1.203 executive orders albeit he was known for his hands-off governing approach and pro-business stance.

Presidents who succeeded muscular presidents tended to resort to these instruments only when, and if, the executive order represented the only mean to reach the desired outcome. During their time in office, Ford, G.H. Bush and Biden each respectively issued 169, 166 and 162 executive orders.

In more recent times, when strong political partisanship and low levels of cooperation between Congress and the White House have become, in the view of this scholar, the «pathological norm», presidents

<sup>77</sup> 28<sup>th</sup> president from 4 March 1913 to 4 March 1921.

<sup>78</sup> His fourth term was extremely short starting on 20 January 1945 and ending on 12 April 1945 upon his death.

<sup>79</sup> 26<sup>th</sup> president from 14 September 1901 to 4 March 1909,

<sup>80</sup> 30<sup>th</sup> president from 1923 to 1929.

have been increasingly attracted towards the alluring executive orders as demonstrated by the data whereas Carter employed it 320 times, and Reagan 381 times, or Clinton utilised it for 364 times, while G.W. Bush and Obama respectively 291 and 276 times. Separate from all others is Cleveland who, like Trump, was the only other president with two non-consecutive terms<sup>81</sup> yet, unlike Trump, Cleveland issued only 113 executive orders in the first term and 140 in his second term. Unlike Cleveland, Trump issued 220 in first term and by 30 June 2025, already 165.

Likewise, the recourse to executive orders on the first day in office can also be taken into consideration while comparing presidents albeit if only as one variable in a predictability index for the style of leadership the newly installed president wishes to imprint for the term in office and/or for the perceived urgency to complete the fundamental policies by the midterm benchmark in times of divided and highly contentious politics. The relevant data shows that this cluster usually is not as significant of the whole term in office, in fact, Franklin Delano Roosevelt issued zero executive orders on his first day in office while on their first day in office Reagan, Clinton, G.W. Bush, Obama and Trump's first, only issued one. Biden, on the other hand issued 14 executive orders versus the 41 issued by Trump on 20 January 2025. While the record-breaking number of executive orders directed by Trump in the early hours of his second term in office shows the determination to hit and shock the nation or to «flood the zone»<sup>82</sup> with a multitude of orders on a variety of topics, these numbers only confirm how unique Trump is compared to all others.

Lastly, one more set of data that can be useful when comparing presidential recourse to executive orders, focuses on each president's performance in the first 100 days of their mandate. This window of time was introduced by Franklin Delano Roosevelt in his first inaugural address as the period by which he projected to have accomplished most of the groundwork to successfully instigate the economic recovery. Albeit one is conscious that 100 days is too narrow a time span to usually have any significant new law approved by Congress or to have accomplished

<sup>81</sup> Cleveland was the 22<sup>nd</sup> president from 1885 to 1889 and the 24<sup>th</sup> president from 1893 to 1897. He was in fact denied by Benjamin Harrison an immediate second term by winning the popular vote but losing the electoral college and therefore the election. In the 1892 election, Cleveland defeated Harrison in both the popular vote and electoral college, returning to the White House.

<sup>82</sup> G. Peters, J.T. Woolley, *Trump's First 100 Days in 2025: The Astonishing Launch of the Second Trump Administration*, in *The American Presidency Project*, 18 February 2025, [www.presidency.ucsb.edu/analyses/trumps-first-100-days-2025](http://www.presidency.ucsb.edu/analyses/trumps-first-100-days-2025).

any of the other elements on which usually a president's leadership is measured, still 100 days might be sufficient to gage the true direction, the determination and the policy priorities of a new Administration. Thus, the 100 days benchmark is a perfect fictitious timeframe to compare presidential performance especially when examining executive orders. During the first 100 days as president, Franklin Delano Roosevelt in his first term, issued 93 executive orders directing unprecedented federal legislation and instructing the federal government on how to implement the New Deal. Those executive orders were then included in subsequent legislation such as the National Industrial Recovery Act, the Emergency Banking Act, the Agricultural Adjustment Act, the *Federal Emergency Relief Act* and the *Tennessee Valley Authority Act* all of which were passed by Congress in 1933<sup>83</sup>. Whereas Clinton issued 13, G.W. Bush 11 and Obama 19 executive orders, Trump issued 33 executive orders during the first 100 day of his first term while Biden issued 42 in the first 100 days of his presidency, more than any other president since Truman<sup>84</sup> who in his first term issued 54 and in second term 25 executive orders.

## 6. The first 100 days of Trump's second term and beyond

Upon taking office, Trump signed a record 26 executive orders and 12 memoranda on his first day. While the executive orders covered a vast variety of subjects they can be organized in 6 categories. 1). The first set can be identified as organization and finalities of the Executive branch. In fact, the orders span from instructing departments and agencies to prioritize the new administration's policies such as prohibiting the weaponization of federal agencies against political opponents; banning Diversity, Equity and Inclusion (DEI) in federal agencies; reorganizing the United States' Digital Service into the Department of Government Efficiency (DOGE); reviving Schedule F as Schedule Policy/Career<sup>85</sup> and

<sup>83</sup> In his second term's 100 days he issued 62 E.O. and in the third term's 100 days, 80 E.O.J. Wendling, *Executive Orders by President in the First 100 Days*, in *Visual Capitalist*, 07 May 2025, [www.visualcapitalist.com/sp/in01-ranked-executive-orders-by-president-in-the-first-100-days](http://www.visualcapitalist.com/sp/in01-ranked-executive-orders-by-president-in-the-first-100-days).

<sup>84</sup> Trump and Biden are the only presidents from the last 50 years to hit the top 10 list.

<sup>85</sup> Schedule Policy/Career removes due process protections for thousands of federal employees and threatens to upend the merit principles that have governed personnel policy since the *Civil Service Reform Act* of 1978. The implementation of Schedule Policy/Career will politicize the federal workforce and erode the capacity of federal agencies to perform the tasks delegated to them by Congress and the president. The Trump administration's attack on the Civil

order a 90 day pause on most foreign aid. 2). The second group gathers subjects that more typically fall within the realm of the executive orders such as repealing many of Biden's executive actions; quashing the Family Reunification Task Force<sup>86</sup>; ending the electric vehicle (EV) mandate and pardoning over 1,500 January 6 rioters. 3). To the third cluster belong those executive orders dealing with treaties and international matters such as starting the second withdrawal process of the United States from the World Health Organization and the Paris Climate Accords<sup>87</sup>; ordering federal agencies to refer to the Gulf of Mexico as the "Gulf of America"<sup>88</sup> and to refer to Mount Denali as Mount McKinley. 4). The fourth grouping falls under the category of emergency proclamations with a series of executive orders to facilitate their executions. In fact, a National Southern Border Emergency was proclaimed from which derived more executive orders such as those designating certain international drug cartels as foreign terrorist organizations; prioritizing the removal and identification of illegal migrants; and expanding the US-Mexico border wall. Furthermore, a National Energy Emergency was declared ensued by an executive order encouraging energy exploration and production. 5). A fifth assortment gathers executive orders that fall more technically in the legislative realm such as delaying the (impending) ban of TikTok in the USA<sup>89</sup>; banning federal censorship of online speech and defining gender by an immutable male-female binary. 6). To the sixth and last set belong those executive orders that dealt with constitutional rights such as reaffirming the existing constitutional right to free speech and attempting to end birthright citizenship for children born on American soil.

On that same first afternoon in office, Trump also issued a total of 12 memoranda. A subdivision by subject matters, similar to the one just illustrated for the executive orders, can also be arranged for the memoranda.

Service will continue to frustrate the basic government services that protect American lives. N. Bednar, *The Return of Schedule F*, in *Lawfare*, published by the Lawfare Institute in cooperation with Brookings, 19 May 2025, [www.lawfaremedia.org/article/the-return-of-schedule-f](http://www.lawfaremedia.org/article/the-return-of-schedule-f).

<sup>86</sup> This task force was created by Biden to try to "correct" the forced separation of minors from their parents that the previous immigration policy of the first Trump term had initiated.

<sup>87</sup> In the first Trump term the administration had initiated both these processes that were, however, reversed by President Biden on his first day of office.

<sup>88</sup> The Republican-led House passed a bill on 8 May 2025, that would rename the Gulf of Mexico as the Gulf of America and direct federal agencies to update their documents and maps to incorporate the new name. House Republicans are looking to show their support to Trump, though it is unclear whether the Senate will go along. The bill passed by a vote of 211-206.

<sup>89</sup> The 118<sup>th</sup> Congress approved a bipartisan law signed by Biden in April 2024, mandating that TikTok's Chinese parent company, ByteDance, sell the US operations of the app to a neutral party, or face a ban in the United States.

In the organization and finalities of the Executive branch cluster it is possible to tally the following memoranda: to begin a 90-day hiring freeze; to require all government employees to work in office and end federal remote work; to prohibit federal department and agencies from issuing new regulations until they are reviewed and approved; to ensure federal buildings are visually identifiable as civic buildings and to create a list of personnel eligible for Top Secret/Sensitive Compartmented Information (TS/SCI) security clearances for a six month period. Other memoranda belong to the legislative realm such as those establishing an American First Trade Policy; delivering emergency price relief and implementing improvements to California's water infrastructure. Others yet, would fall under the headline repeals of policies of the Biden administration, such as pausing offshore wind projects and restarting efforts to reroute water from the Sacramento San Joaquin Delta to other parts of California.

This first day of presidential activism was part of a rehearsed choreography portraying just how eager, ready and energetic Trump was, to fulfil his campaign promises, and how muscular the leader was by immediately tackling the "woke government"<sup>90</sup>. It proved indeed, to be once again, a successful visual communication whereas just a few believed he was only keeping faith to one of his promises of the campaign, the one and overreaching promise «to be a dictator on day one». Yet, with the traditional fair play of the American people, with an attitude of "wait and see" and a wish to grant more time before passing judgements, the new administration began revealing its goals and its preferred means to those goals, and thus it was taking shape. Almost every day henceforth to the 100<sup>th</sup> was witness to a flurry of executive orders building up to a record total of 143 by 30 April 2025. Although they can all be grouped in the same categories as those executive orders directed on the first day in office, here and for the purpose of this paper, it is preferred to group them by actual spheres of actions in three very large and yet exemplificative categories namely by the infringement of constitutional rights; by the encroachment of the functions of Congress; and the curtailment of the independence of the Judiciary.

<sup>90</sup> The Merriam Dictionary's definition of Woke is «politically liberal or progressive as in matters of racial and social justice, especially in a way that is considered unreasonable or extreme».

## 6.1. *Infringement of constitutional rights*

Within the rights enshrined by the First Amendment, freedom of speech is the first and the foremost infringed upon throughout all its declinations which encompass freedom of political speech and the right to express opposite views or criticise policies and/or people; freedom of the press; freedom to peaceably assemble; freedom of religion and academic freedom.

Notwithstanding the executive order<sup>91</sup> officially protecting and reinforcing the constitutional right to free speech, almost immediately thereafter, freedom of speech as freedom of the press and freedom to inform and be informed have been prosecuted, limited and curtailed for those media whose journalists were either dubious about the events and actions coming from the White House, or were keen to oppose Trump and perhaps criticize his appointees for their inadequacies to hold the positions they were being appointed to, or were openly speaking about the real consequences and harm caused by some executive orders. In all the above-mentioned cases they were threatened to be sued, were indeed sued, or were indicted by the Department of Justice resulting in a freedom being heavily curtailed. Indeed, major print newspapers and their web versions, apparently spared by the limitations imposed on others, are in fact, owned by the same multi-millionaires who contributed to Trump's campaign expecting tax cuts for their revenues to be included in the next Budget Bill whereas cable news are either being sued for a variety of reasons such as "damaging Trump image" or just because they are "too liberal" or are being threatened with legal retributions or worst having their permits revoked if their anchors are to continue criticizing the administration by giving information not always complimentary of the administration. Others yet, have seen their licenses revoked and were taken off the air with only days from receiving notice or suffered cuts in their funding<sup>92</sup>. Access to the White House press room is no longer decided by the White House Correspondents Association but determined by Trump and his communication team. The case of the denied access to the White House and to Air Force One inflicted upon the Associated Press

<sup>91</sup> Executive Order 14149 "Freedom of Speech" among others clarifies, in section 2, that «It is the policy of the United States to: (a) secure the right of the American people to engage in constitutionally protected speech; (b) ensure that no Federal Government officer, employee, or agent engages in or facilitates any conduct that would unconstitutionally abridge the free speech of any American citizen...».

<sup>92</sup> National Public Radio (NPR) and Public Broadcast Service (PBS) have both sued Trump over executive order 14290 "Ending Taxpayer subsidization of biased media".

because it refused to obey the directives of the executive order<sup>93</sup> imposing the change of name to the Gulf of Mexico is illustrative of the serious reduction of freedom of the press<sup>94</sup>.

Freedom to peaceably assemble, closely intertwined with the freedom of speech, the freedom of thought and the freedom to criticize, is confronted by a series of limitation by a coordinated effort between the Federal Bureau of Investigations, the Department of Homeland Security and the Department of Justice. Notwithstanding the efforts and the threats, people across all 50 states are coordinating days of peaceful protests that are seeing increasing participation, even though organizers and participants alike are aware that provocations are looming to allow Trump to invoke the *Insurrection Act of 1807*<sup>95</sup> and martial law.

Freedom of religion as stated by the First Amendment prohibits the establishment of any one religion for all, further prohibiting any law that limits the free exercise of religion. Yet, based on the executive orders directing the departments to investigate and eventually quell all non-Christian expressions<sup>96</sup> by individuals and/or organizations, the Department of Homeland Security is now indeed investigating and prosecuting them as well as all expressions/or perceived expressions of antisemitism<sup>97</sup>.

Lastly but certainly not less relevant are the limitations to Academic Freedom imposed by Trump on universities ordering them to implement the many restrictions on diversity and antisemitism included in the executive orders; threats to halt federal grants if they did not abide by them; demanding private information about their foreign students and demanding to control all teaching content. The first to be “attacked” was Columbia University soon others followed. Some, like Columbia, chose to appease Trump by modifying their admission’s criteria and their courses but, the appeasement backfired since the administration added more demands while still withholding the grants. At the time of writing, it appears that

<sup>93</sup> Executive Order 14172 “Restoring Names that Honor American Greatness”.

<sup>94</sup> To be re accepted in the press pool, the Associated Press sued Trump who was then forced by a Federal Judge to re admit the Associated Press’s envoys.

<sup>95</sup> This 19<sup>th</sup> century law would allow the use of active-duty military personnel, including the National Guard traditionally reserved for domestic emergencies and disasters, to perform law-enforcement duties within the US. US presidents can invoke the law if they determine that «unlawful obstructions, combinations, or assemblages, or rebellion» against the government make it «impracticable to enforce» US law «by the ordinary course of judicial proceedings». Once invoked, troops could be thus tasked with quelling civil unrest and enforcing court orders to arresting and detaining either protesters or migrants.

<sup>96</sup> Executive Order 14202 “Eradicating Anti-Christian Bias”.

<sup>97</sup> Executive Order 14188 “Additional Measures to Combat Anti-Semitism” reaffirms Executive Order 13899 of 11 December 2019.

these universities and colleges lost their independence and damaged their reputations. Others, led by Harvard, not only refused to accept the terms imposed by Trump but have mounted a resistance to the aggressive attempt to limit academic freedom by suing the administration. As of the end of June, Harvard's legal challenges in court are multiple, reacting to every move by the administration, and although Harvard has already suffered substantial cuts in grants, it has increased its reputation and the esteem while defending its independence<sup>98</sup>. Furthermore, students and faculty of several universities are being investigated, detained, lost their student or working visas and have been expelled from the US or deported to third countries, all for exercising freedom of speech by engaging in political speech.

Likewise, other fundamental rights, those that can be categorized by the due process criteria, have also been curtailed. In fact, «the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures»<sup>99</sup> unless a search warrant be issued by a judge, all of these have been shattered by the United States Immigration and Customs Enforcement (ICE) abductions of people on the streets, in offices or in shops. The targets having been seemingly singled out through facial identifications from media reporting, for having expressed worries for the inhumane treatment of the Palestinian people; and authors of books and essays who dared describe, chronicled or criticized the first Trump term and/or the violent aggression to democracy on 6 January 2021, being indicted by the Department of Justice. ICE's unlawful and violent irruption in homes without search warrants or the seizures, at ports of entry, of mobile phones of tourists<sup>100</sup>; the right to privacy also being infringed upon when Musk and his Department of Government efficiency (DOGE) staff violated, copied and integrated each department and each agency's data bank. Whereas the Fifth Amendment's «no person [...] shall be deprived of life, liberty, or property without due process of law» has been likewise infringed. The right to due process has also been

<sup>98</sup> According to Reuters, on 22 April 2025, there were more than 200 university and college presidents that signed a joint statement accusing Trump's administration of political interference in higher education. These presidents banded together after Harvard University said the government was threatening its independence. The statement, signed by presidents from institutions such as Princeton, Brown, Harvard, Columbia, the University of Hawaii and Connecticut State Community College, criticized what it described as «the unprecedented government overreach and political interference now endangering American higher education».

<sup>99</sup> Fourth Amendment to the Constitution.

<sup>100</sup> Phones are being searched for possible (not probable) anti-American and anti-Trump messages and/or photos etc.

curtailed when major Law firms<sup>101</sup> were threatened to be denied access to government buildings – including courts, department of justice offices and data – thus impeding, *de facto*, the exercise of their profession by hindering their ability to duly represent their clients. Some capitulated to the threats and were inflicted obligations for *pro-bono* work in defense of the government yet, as of the time of writing, have been losing partners and clients while the four who challenged the executive order have been vindicated by the courts<sup>102</sup>. These rights are further curtailed when in the presence of a *de facto* suspension of *habeas corpus* as in those cases where liberty and property have been subjected to all types of infringements, and all due process warranties, have been violated when kidnappings and arrests occur without indictments, without a hearing in court and without the presence of a lawyer, or when homes are breached without search warrants. Likewise, when people are brought to detention camps and then deported to third countries without due process. The latter instances infringe also the Eighth Amendment, whereas no cruel and unusual punishment shall be inflicted, as in the cases of those immigrants who have been abducted and then deported to third countries.

Special relevance and attention should be given to the privileges and immunities of citizens and the birthright privileges affirmed in the Fourteenth Amendment. This is perhaps the clearest, bluntly stated, unconstitutional executive order issued on the first day in office. This is the one that “with the stroke of a pen” repeals Section 1 of the Fourteenth Amendment whereas it affirms the privileges of birthright<sup>103</sup> that are granted to everyone who is born on US soil. The aim of this executive order was not to curtail citizenships requisites but to abolish them altogether for children of non-citizens or illegal immigrants. It provoked immediate chaos in hospitals and townhalls and it was amongst the first executive orders to be challenged in courts by many organizations and 22 States. Of the many legal challenges on this specific executive order, four have received notoriety because of either the harsh and berating language used by the judges or because of their temporarily blocking the effects of the executive order as well as issuing a nation-wide injunction. The ruling

<sup>101</sup> All of which were involved defending those who gave testimony in court against Trump, or those who Trump accused of wronging him.

<sup>102</sup> *Infra*, paragraph 7.

<sup>103</sup> Especially where it affirms that «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».

from Leo T. Sorokin<sup>104</sup> came three days after judge Joseph N. Laplante<sup>105</sup> and follows similar rulings in Seattle, by judge John C. Coughenour<sup>106</sup> and in Maryland by judge Deborah Boardman<sup>107</sup>. Three of these judges (all but Laplante) issued national pause injunctions and three Circuit Courts of Appeal (the First Circuit, the Ninth Circuit and the Fourth Circuit) and nine appellate judges have weighted over the matter overwhelmingly rejecting to lift the pause imposed by the lower courts with only one judge<sup>108</sup> dissenting to express his favourability to lifting the nation-wide pause injunction. All these losses are indeed at the heart of Trumps emergency relief request to the Supreme Court. Actually, the administration has asked the Supreme Court to remove the nation-wide injunctions issued by the District court judges while it did not ask for a pronouncement on the merits knowing full well that the only way to abolish an amendment is to have a new amendment ratified declaring the previous one on that subject null and void<sup>109</sup>; that the Supreme Court has already and definitively cleared the interpretation of birthright citizenship in 1898 in a landmark case<sup>110</sup> that established that the Fourteenth Amendment grants citizenship to anyone born on U.S. soil, regardless of the parents' citizenship status; and that in 1940 Congress approved a Statute that clearly establishes a uniformity of requisites valid throughout the United States. The administration strategy appears to be twofold: a ban on nation-wide injunctions would not only block those related to birthright citizenship but the effect would also ripple across to all the other hundreds cases throughout the US that are impeding executive actions on many policies; and at the same time, were the Supreme Court not to confirm the validity of nation-wide injunctions, the administration will try to enforce the executive order on birthright citizenship and, predictably some states will fight back in court on the merits only to have the administration succumb. Yet in the meantime, citizenships will have been granted at random depending on the place of birth and it will be close to impossible to right the wrongs in a post Trump era.

<sup>104</sup> United States District Judge of the District of Massachusetts, appointed by Obama.

<sup>105</sup> United States District Court of the District of New Hampshire, appointed by G.W. Bush.

<sup>106</sup> United States District court for the Western District of Washington, appointed by Reagan.

<sup>107</sup> United States District Court for the District of Maryland appointed by Biden.

<sup>108</sup> Circuit Judge Paul Niemeyer of the Fourth Circuit Court of Appeals, appointed by H.W. Bush.

<sup>109</sup> See Eighteenth Amendments "Prohibition of intoxicating Liquors" and Twenty-first "Repeal of Eighteenth Amendment".

<sup>110</sup> *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

The right of citizens to vote and have their votes counted is perhaps the most contentious right in the history of this country and it has undergone many judicial and political interpretations to restrict it or to expand it. While it is a federal established right<sup>111</sup> it however needs the individual States to introduce and implement laws to guarantee such a right and many a time, States, especially southern States, have tried and are still trying to manipulate the exercise of this vital right. In more recent times<sup>112</sup> the Republican party, historically a minority party, has been pursuing a policy of restricting voting rights as to reduce the support for the democratic party. It is not the place or time to evaluate here the political expediency of this choice, but it is necessary to mention it because it will most certainly affect the agenda of the second administration of Donald Trump and his possible success with the implementation of Project 2025 that foresees only white male voters. The executive order “Preserving and Protecting the Integrity of American elections”<sup>113</sup> is aimed at codifying a series of restrictions on individuals “voting rights and on the states” rights<sup>114</sup> whereby it foresees a centralized role for the Department of Justice and the Department of Homeland Security while enabling fraud through a removal of responsibility from the officers of each state and a lack of accountability at the federal level. If the elections were safe and most Americans did not question their integrity until yesterday, they might start in 2025. The manipulation of the voting districts by population and geographical sizes; the requirements of clear and certain voters’ identification<sup>115</sup>; the restrictions on the use of absentee ballots and their deadlines for arrivals; the newly introduced regulations for women’s last names (birth name v married name); the prohibition to serve water to voters waiting in long lines (especially in black district); the introductions of new rules for appointments and membership on the electoral

<sup>111</sup> The Fifteenth Amendment ratified in 1870 affirmed «the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude». Then reinforced by the Nineteenth Amendment ratified in 1920 «The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex».

<sup>112</sup> This strategy started with Ronald Reagan, and it intensified after the *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>113</sup> Executive Order number 14248 issued on 25 March 2025.

<sup>114</sup> Art. I, sec. 4.1 of the Constitution, in fact, reads: «The Times, Places and Manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof».

<sup>115</sup> The Trump administration prefers the identification occur by birth certificate or passport. Proof of citizenship is both self-serving and convenient. It weakens turnout among voters of colour, lets Republican candidates question election results, and bolsters the immigration agenda that energizes Trump’s base.

boards; and the purges of voters lists (on a county by county basis) are all happening under our very eyes and under the radar, in fact if and when reported by the media, these gross manipulations of the voting rights are constantly explained with performative neutrality of convenience for both sides of the political spectrum<sup>116</sup> when in effect they tend to reduce or even disenfranchise the Democratic leaning voter and by so doing obtain stronger and vast Republican leaning population whereas numerically the Republicans are still a minority<sup>117</sup>. All these policies are now being tested by and contested in courts. Just to name a few: in North Dakota the courts are dealing with a redistricting case; North Carolina is the defendant in a lawsuit filed by the Trump administration for failing to collect required information from people registering to vote; New York is being challenged for the use of touch screen voting machines; in Arizona and Wisconsin state election officials have received letters from the Department of Justice warning of potential administrative violations; The Department of Justice demanded Colorado provide election records going back to 2020; and in Oregon, Justice Department lawyers weighed in on an ongoing lawsuit alleging the state has failed to comply with federal laws on maintaining voter lists and making these records available for public inspection. Each one of these challenges deserve a meticulous and deeper analysis than possible here and now, since they will affect, no doubt, the “off year” elections scheduled for November 2025 and the midterm national elections of November 2026 if indeed elections will be held and if there will still be free elections. The conditional is here required since Trump himself told his supporters during the last campaign, that the 2024 election was going to be the last time people would be «disturbed» to go to the polls<sup>118</sup>.

## 6.2. *Curtailment of the functions of Congress*

Infringements of the separation of powers have occurred in as far as circumventing the functions of the coequal legislative branch endowed

<sup>116</sup> M. Elias, *Suppression of Voting Rights*, in *Democracy Docket*, 17 June 2024.

<sup>117</sup> Even in the celebrated Trump second victory, the party reached a 49 per cent with a large contribution of independent voters.

<sup>118</sup> At a gathering of Christian nationalists in Florida on 27 July 2024, Trump told his supporters: «You know what, it’ll be fixed! It will be fine, you won’t have to vote anymore, my beautiful Christians», he said as he shook his head and placed his hand on the pledge position on the left side of his chest. «I love you», Trump declared. «Get out – you gotta get out and vote. In four years, you don’t have to vote again. We’ll have it fixed so good, you’re not gonna have to vote». J. Wojcik, *Trump Says This Will Be the Last Election If He Wins*, in *People’s World*, 29 July 2024, [peoplesworld.org/article/trump-says-this-will-be-the-last-election-if-he-wins](https://peoplesworld.org/article/trump-says-this-will-be-the-last-election-if-he-wins).

by the Constitution with the duty/responsibility to check and force accountability from the executive branch through investigative Committees; to create independent agencies, determine their breath of activity and eventually legislate their termination; to finance policies through budget and appropriation bills; to «regulate commerce with foreign Nations» and determine tariffs<sup>119</sup>; to establish «a uniform rule of naturalization»<sup>120</sup>; to check that no person holding «any office shall, without the consent of Congress, accept any present, emolument, office or title of any kind whatever, from any King, Prince or foreign state»<sup>121</sup>; to advice and eventually consent to the selection of the appointees to the Cabinet and other positions<sup>122</sup>; and lastly, but certainly the most important task of Congress that was totally encroached on by Trump is the legislative power. These are just a few of the constitutionally enumerated powers of Congress that have indeed been breached by Trump who has chosen to immediately and heavily rely on executive orders rather than work with the legislative branch. These encroachments are particularly noticeable since the electorate on 5 November 2024 chose to have a trifecta that accords the president the support of both chambers. In fact, Republicans control all the elected branches of the federal government, a Republican is in the White House, and Republicans in the House of Representatives control legislation while Republicans in the Senate control consensus and validations. The constitutional pattern of the past would have seen the Republicans in Congress work alongside the president to approve legislation that would honour campaign promises. Instead throughout the first 100 days, while the Senate found that being “an adviser” would be too cumbersome and thus chose to overall be a silent partner to Tump by condescending to his choices for appointments and allow the president alone to determine foreign policy, the House of Representatives chose the path to relinquishing most of its fundamental duties, Trump leaned heavily on executive actions, *de facto* bypassing Congress that only managed in that same frame of time, to have five bills signed into law<sup>123</sup>. The assessment

<sup>119</sup> Art. I, sec. 8.3 of the Constitution.

<sup>120</sup> Fourteenth Amendment to the Constitution.

<sup>121</sup> The so called “Emolument Clause” can be found in Art. I, sec. 9.8 of the Constitution.

<sup>122</sup> While it is true that most Cabinet appointments are usually confirmed by the Senate on the basis that the nominees will be the closest advisers and associates of the president and thus should have fundamentally his trust and approval, it is also true that in the past the Senate did hold very serious and critical hearings of the nominees and not always confirmed all of them further reserving the right to investigate and thus check on their performance and progress in developing the tasks assigned to the individual departments.

<sup>123</sup> Starting with the *Laken Riley Act* which Congress passed just before he took office. The others were a stopgap funding bill and three *Congressional Review Act* resolutions

is unmistakably grim when compared to Trump's first term record of 28 bills signed into law within the same 100 days or with the performance of former presidents, in fact, Biden signed 11 bills<sup>124</sup> by his 100th day in 2021, whereas Obama signed 14 in 2009, and G.W. Bush signed 7 in 2001.

### 6.3. *Curtailment of the independence of the Judiciary*

Within the larger frame of the separation of powers and of the checks and balances, the Founding Fathers did not foresee a prominent front-line role for the federal judiciary, to the contrary they had envisioned the judiciary as the last line of defense since a conflict and a struggle for power were considered typically political and thus expected to occur between the legislative and executive branches, furthermore they envisioned that, of those two «equal and political» branches, the one with most authority was to be the legislative because it derived its powers directly from the people<sup>125</sup>.

Yet, ever since the first hours of the second Trump administration, and in the following weeks and months it has become apparent that, absent Congress, the judiciary is indeed the only institutional bulwark and the only substantial check on Trump's aggressive attempts to achieve the largest expansion of executive power in modern U.S. history by seeking to solidify control over the executive branch and to steal power from the other branches. In fact, many of the Trump administration's actions have been challenged in courts, particularly those related to its assault on immigration; its efforts to shrink the federal workforce; its vindictiveness against layers and Law firms; its squashing of education and crippling of universities; and the curtailment of freedoms<sup>126</sup>.

But the judiciary has also been drawn into direct challenges and litigations. Indeed, on 25 April in New Mexico, Jose Luis Cano a former judge of the Dona Ana County Magistrate Court (who had retired in March 2025) was arrested for tampering with evidence related to illegal immigrants, and his wife, Nancy Cano, is charged with one count of conspiracy

overturning Biden-era rules.

<sup>124</sup> Most notably his \$1.9 trillion coronavirus relief package.

<sup>125</sup> J. Madison, *The Federalist Papers*, op. cit., in n. 51 defends the separation of powers by illustrating the origin of each branch being from the people. Yet, he argues that the legislative branch is the only one that is directly dependent on the people.

<sup>126</sup> A litigation tracker from Just Security (on June 25 2025) counts 316 legal challenges, including ten that are closed. For more see [www.justsecurity.org/107087/tracker-litigation-legal-challenges-trump-administration](http://www.justsecurity.org/107087/tracker-litigation-legal-challenges-trump-administration).

to tamper with evidence<sup>127</sup>. On the same day, judge Hannah Dugan (a Wisconsin judge of the Milwaukee County Circuit court) was arrested for allegedly helping an undocumented immigrant, Eduardo Flores-Ruiz a 30-year-old from Mexico. In fact, on 18 April, Flores-Ruiz was in court before judge Dugan to answer charges of battery and domestic abuse. When the judge learned that ICE and FBI agents were to arrest Flores-Ruiz she reminded them the arrest could not take place in her court room and invited them to wait for the man to appear in the courthouse corridor. She is accused of letting Flores-Ruiz out another door that took him to an elevator<sup>128</sup>. Flores-Ruiz was arrested outside the courthouse, and the Department of Justice charged the judge for obstructing the law<sup>129</sup> and, on the 25 of April, while she was in her courtroom, she was handcuffed and arrested in a highly publicized manner. On 29 April, she was suspended from her duties pending her trial. Judge Dugan's case is very similar to a case that had occurred during the first Trump administration when, on 2 April 2018 in Newton Massachusetts a "sanctuary city" state court judge Shelley M. Richmond Joseph was presiding over an arraignment of an undocumented immigrant whom an ICE agent had come to arrest following the proceeding. Like Dugan, Joseph directed the ICE agent to leave the courtroom with assurances that the immigrant would be released to the courthouse lobby and like Dugan, Joseph devised instead a plan for the immigrant to exit through the back door of the courthouse. Judge Joseph was then accused of committing the same violations than those of which judge Dugan is accused today, but unlike judge Dugan judge Joseph was not arrested and eventually on 22 September 2022 the federal prosecutor overseeing the case announced that all charges against Joseph would be dismissed as part of an agreement requiring Joseph to self-refer to the Massachusetts Commission on Judicial Conduct.

Since Trump's inauguration, threats to Judges have increased and their lives and the lives of their families have been threatened<sup>130</sup>. Indeed,

<sup>127</sup> If convicted, the defendants face a maximum penalty of 20 years in prison, three years of supervised release, and up to a \$250,000 fine. A federal District court judge will determine any sentence after considering the U.S. Sentencing Guidelines. For more see Department of Justice, Office of Public Affairs, [www.justice.gov/opa/pr/justice-department-announces-two-cases-involving-judicial-misconduct-and-obstruction-law](http://www.justice.gov/opa/pr/justice-department-announces-two-cases-involving-judicial-misconduct-and-obstruction-law).

<sup>128</sup> J. Pearce, *The Judge Dugan Case Is More Complicated Than It Seems*, The Lawfare Institute in cooperation with Brookings, 29 April 2025.

<sup>129</sup> The official charge is concealing an individual to prevent his discovery and arrest and obstructing or impeding a proceeding.

<sup>130</sup> See also: D. Hawkins, *Spike in Threats to Judges Prompts Call for More Security*, in *The Washington Post*, 29 May 2025; D. Gilbert, *Violent Threats against US Judges Are Skyrocketing Online*, [www.wired.com/story/violent-threats-us-judges-increase-online](http://www.wired.com/story/violent-threats-us-judges-increase-online), 14 May 2025; C. Johnson,

the number of threats is staggering; the type of threats is varied and innovative. The New York Times reported that in the five months leading to 1 March 2025, 80 judges have received threats, and over the next six weeks, an additional 162 judges were threatened, a dramatic increase that coincided with a flood of harsh rhetoric. Then between 14 April and 27 May, 35 additional judges reported receiving threats. In total, as of 27 May, in this fiscal year<sup>131</sup> there were 277 judges who were threatened, almost a third of the federal judiciary<sup>132</sup>.

As for the methodology of delivering the threats, in addition to emails, and network posts, some judges have received unwelcomed and unordered pizza deliveries (103 pizza deliveries) at their homes, and at the homes of their family members just to let the judges know their home addresses and their families' home addresses were known. And so it is that after Justice Amy Coney Barrett was "attacked" by right-wing commentators for voting along Chief Justice Roberts and the liberal Justices against Trump's effort to freeze foreign aid, her sister received a bomb threat; when judge Boasberg ruled in April that officials of the Trump administration could face criminal contempt charges for deporting migrants in defiance of a court order, he received threats in addition to many alarming social posts (some even advocating the judge's execution) addressed to him, his brother and his daughter; and District Judge McConnell's family was equally attacked after he ruled the president had overstepped his authority in freezing grants for education. Threats against judges and their families «are ultimately threats to constitutional government. It's as simple as that» U.S. Circuit Judge Richard Sullivan, who chairs a security committee for the federal judiciary's policymaking arm, said in an interview to Reuters<sup>133</sup>.

Last but certainly not less relevant to the present curtailment of checks and balances is the attempt of overreach by the executive in the exclusive competence of the judiciary, in fact, April also saw a direct challenge to the Chief Justice who was sued, in his official capacity as Presiding Officer of the Judicial Conference of the United States, along with

*Judges Threatened with Impeachment, Bombs for Ruling against Trump Agenda*, in NPR, 14 March 2025; P. Stone, *US Judges Who Rule against Trump Are Being Barraged with Abuse and Threats, Experts Warn*, in *The Guardian*, 17 May 2025.

<sup>131</sup> In the United States the fiscal year is from 1 October to 30 September.

<sup>132</sup> M. Schwartz, *Marshals' Data Shows Spike in Threats Against Federal Judges*, in *The New York Times*, 27 May 2025.

<sup>133</sup> N. Parker, M. Spector, P. Eisler, L. So, N. Raymond, *These Judges Ruled against Trump: Then Their Families Came under Attack*, *Reuters Special Report*, 02 May 2025.

Robert J. Conrad<sup>134</sup> in his official capacity as Director of the Administrative Office of the United States Courts. The plaintiff is America First Legal Foundation, a legal group founded by the same Stephen Miller who is now Senior advisor to Trump, seeking to seize control of the federal court system arguing that both the Judicial Conference of the United States and the Administrative Office of the United States' Courts are executive branch agencies and that they should be overseen by the President, not the courts. The lawsuit is yet one more example of the Trump administration's effort to break down the separation of powers and usurp the constitutional powers of the other federal branches. In targeting the conference and the administrative office, American First Legal is threatening both the courts' independence and Congress's authority to organize article 3 courts below the Supreme Court. Thus, the increase in threats, the violent and dividing rhetoric spurred by the president, and the blind obedience of some of his followers, are taken into serious consideration by the judiciary that sees these threats as significant, endangering their lives and the lives of their family members but also endangering the independence of the judiciary itself. In fact, judges should be able to judge without hope and without fear<sup>135</sup>. To protect their lives and to be without fear, the judicial conference has been evaluating the effectiveness of their traditional security force, The United States Marshals Service that, being a federal agency, was also reduced in size and funds by the so-called Department of government Efficiency. In fact, traditionally, and since they were first created by Congress through the *Judiciary Act* of 1789, the United States Marshals Service has served amongst other tasks, as the enforcement and security arm of the judiciary. Yet, precisely because it is a federal law enforcement agency, it operates under the Department of Justice and its directors are appointed by the president of the United States yet, after Trump's dangerously violent rhetoric has been followed by violent actions against them, and the heavy politicization of the Department of Justice and the loyalty expressed by the US Attorney General to the president, the judiciary is now considering establishing their own armed security under the direct control of the Chief Justice since they now fear that perhaps either the president or the United States Attorney General may prevent

<sup>134</sup> R.J. Conrad is a former United States District judge of the United States District Court for the Western District of North Carolina.

<sup>135</sup> *Nec spe nec metu* refers here to no hope of promotions and no fear of punishment. In Common law it has been a guiding principle behind the independence of the Judiciary.

the Marshals from giving them true protective service<sup>136</sup>. The Wall Street Journal reported that the idea of creating their own armed security detail emerged at a meeting of about 50 federal judges two months ago when a security committee at the twice-yearly judicial conference, a policymaking body for federal judges, raised concerns about the increasing number of threats against judges following Trump's relentless criticism of court rulings against his policies<sup>137</sup>. And the mere fact that they are seriously thinking of establishing such police force it sadly proves that the judges have fully embraced Nicholas Kristof's cry «It's time to protect America from America's president»<sup>138</sup>.

In sum, the checks and balances, as known and practiced till January 2025, have been experiencing stressful times that could lead to their demise. At the same time the excessive recourse to executive orders combined with the deafening silence of Congress and the apparent complicity of the Supreme Court command to question the direction this Administration is imposing on the American people. A plausible course could be that of the unitary executive based on the namesake constitutional theory according to which the president has sole authority over the executive branch based on the vesting clause which vests the president with the executive power and places the office atop the executive branch and the take care clause which would favour a hierarchical executive department under the direct control of the President<sup>139</sup>. Albeit this theory received a return of attention at the time of the Reagan and G.W. Bush's administrations<sup>140</sup> whose then legal advisers and counsels form today's Supreme Court conservative majority, it never conquered mainstream academia because of its foundational belief in a strong and unchecked executive. Yet, it became the object of academic exercise in conservative think-tanks amongst which The Federalist Society and The Heritage Foundation are to be considered the most notable. The latter elaborated a plan to dismantle the existing constitutional regime to create a contemporary form of government based on the unitary executive and unveiled Project 2025 in time for the 2024 presidential elections. It is not yet clear how much of Project 2025 is shared and approved by Trump (who has made revenge his

<sup>136</sup> E. Pilkington, *US Federal Judges Consider Creating Own Armed Security Force as Threats Mount*, in *The Guardian*, 25 May 2025.

<sup>137</sup> *Ibidem*.

<sup>138</sup> N. Kristof, *It's Time to Protect America from America's President*, in *The New York Times*, 16 April 2025.

<sup>139</sup> S. Calabresi, K. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, in 105(6) *Harvard Law Review* 1165 (1992).

<sup>140</sup> S. Calabresi, C.S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush*.

priority agenda) but two of its most important contributors (Vought and Miller) have been respectively appointed Director of the Office of Management and Budget and White House Deputy Chief of Staff for Policy and are universally considered the puppeteers of this Administration. As mentioned, the unitary theory was rejected by the Founding Fathers because of the danger of it degenerating into corruption and authoritarianism and the evidence thus far indicates that both Vought and Miller envision to establish not just a muscular and unitary executive, but a Carl Schmitt's "true leader" entrusted with plenary powers. Were such a leader to emerge, it would undoubtedly be the end of the American experiment.

## 7. The role of the Judiciary: from the last line to the front line

The judiciary has been notably marginal thus far in this analysis. This was a deliberate choice made through respect of its physiological function as the third equal branch and as the exceptional balancer when either one of the others tries to become unequally stronger than provided for by the constitution. Thus, it was a deliberate choice "to save for the last" the judiciary, since the judiciary has been, perhaps unwillingly and certainly unnaturally, positioned to be much more than an equalizer and much more than an observer of political confrontations between the executive and the legislative, and hence, it deserved a special analysis, albeit brief, in this context.

While all the challenges are in their early stages and at present engage mostly the federal District courts, a very small number has arrived at the appellate stage and even fewer have been brought by the administration to the Supreme Court for emergency relief<sup>141</sup>. Every one of these cases has received a Temporary Restraining Order or TRO, by the District Court Judges before a full hearing could be scheduled<sup>142</sup> and when adjudicated, most of them have been adjudicated in favour of the plaintiffs. As highlighted in paragraph 6 the courts are dealing with infringements of First,

<sup>141</sup> The Supreme Court can grant emergency relief in the form of stays, injunctions, or by vacating lower court orders. This relief is often sought on the "shadow docket", meaning it's granted in expedited proceedings with limited briefing and without oral argument. The Court's decisions on emergency applications, particularly those involving stays, can significantly impact the trajectory of a case, even before a full ruling on the merits. For more, T.N. McFadden, V. Kapoor, *The Precedential Effects of the Supreme Court's Emergency Stays*, in 44 *Harvard Journal of Law & Public Policy* 828 (2021).

<sup>142</sup> To obtain a TRO, a party must convince the judge that they will suffer immediate irreparable injury unless the order is issued.

Fourth, Fifth, Sixth and Fourteenth Amendments and, as Adam Bonita has argued, «the administration is presenting courts with executive overreach built on demonstrably false claims and flimsy legal foundations»<sup>143</sup>. At present, Trump is not faring well in court and with a staggering 96% rate of rebuttal of the executive orders, the District courts judges are holding the front line, are doing their part, are applying law over loyalty at rates that should make us both hopeful and worried. Hopeful because it shows the judiciary's capacity for independence even in polarized times, whereas Trump has been accusing the judiciary of being «communist radical-left judges» it appears that their political ideology, as reflected by the party affiliation of the president who appointed each of them, is irrelevant to their legal opinion, in fact, those losses were nonpartisan: 72.2% of Republican-appointed judges and 80.4% of Democratic-appointed judges ruled against the administration. Yet, there is cause to be worried because this resistance faces a hostile environment at the appellate level, where conservative Circuit judges usually rule for the administration 88% of the time. A case in point is what has occurred with the executive order authorizing the president to establish tariffs based on the *Emergency Economic Powers Act* (IEEPA) of 1977. In fact, a three-judge panel from the U.S. Court of International Trade, all appointed by Trump in his first term, blocked most of Trump's tariffs in a sweeping ruling that found the president overstepped his authority by imposing across-the-board duties on imports from U.S. trading partners. The Court said that the Constitution gives Congress exclusive authority to regulate commerce with other countries, and that said authority is not overridden by the president's emergency powers to safeguard the U.S. economy. «That use is impermissible not because it is unwise or ineffective, but because [federal law] does not allow it»<sup>144</sup>. The court's decision was almost immediately stayed by the U.S. Court of Appeals for the Federal Circuit in Washington, D.C. while it considers the administration's arguments and, most likely, ultimately it will reach the Supreme Court.

Yet, this Supreme Court has already signalled its priorities. So far, the court has acted on six emergency applications<sup>145</sup>, addressing issues such as deporting immigrants without due process, firing government workers

<sup>143</sup> Adam Bonita is Associate Professor of Political Science at Stanford University also publishes [substack.com/@adambonica](mailto:substack.com/@adambonica).

<sup>144</sup> D. Knauth, D. Wiessner, *US Court Blocks Most Trump Tariffs, Says President Exceeded His Authority*, in *Reuters*, 29 May 2025, [www.reuters.com/world/us/us-court-blocks-trumps-liberation-day-tariffs-2025-05-28](http://www.reuters.com/world/us/us-court-blocks-trumps-liberation-day-tariffs-2025-05-28).

<sup>145</sup> One of which was "dismissed as moot" and of the remaining five, three were in Trump's favour and two against him.

and reductions in government spending in which the Trump administration has sought to block lower court rulings. The court has not included any language rebuking the administration for its conduct, although liberal justices have done so in separate opinions<sup>146</sup>. All five the court's decisions, however, included implicit rebukes of district court judges that appear to give at least some credence to the Trump administration's criticisms. They seem to be looking for reasons not to engage with the administration.

At best, then, the resistance of the District Courts is allowing time for the people to learn about the infringements on freedoms and unconstitutionality of the orders; to grow in awareness of the danger for democracy; and to record and document the abuses.

As it is possible to match the executive orders with categories, so it is viable with their challenges. Yet here, for the purpose of this paper, and to further illustrate the depth of the infringements, only a few exemplificative cases will be given consideration, albeit briefly. In fact, it is believed that these will be explanatory of the personalized executive orders that, while fulfilling Trump's campaign promises, present further legal and constitutional problems since they seem to be inspired by the same principles of the Bill of Attainder and of the *post facto* laws that the Constitution explicitly forbids Congress from issuing<sup>147</sup>. As mentioned before<sup>148</sup> some of the most egregious Law firms were also targeted through executive orders as part of Trump vindicative campaign promise. In fact, in the first 100 days at least 17 orders attacked them for opposing him in the past or for having either partners or clients involved in investigation or prosecutions of Trump himself. Repeatedly Trump directed that those firms be denied security clearances, be excluded from government contracts, and be restricted from accessing Federal Government buildings including courts. While nine Law firms<sup>149</sup>, have pledged nearly \$1 billion in free legal services to causes the White House supports and made other concessions to avoid being targeted by Trump, others<sup>150</sup> instead decided to fight back and sued the administration. The first ruling by a judge deciding the legal merits of any of the several directives Trump has aimed at Law firms was in the Perkins Coie challenge. The ruling by Judge Beryl

<sup>146</sup> L. Hurley, *Supreme Court Avoids Confronting Trump so Far, even When It Rules against Him*, in *NBC News*, 12 April 2025, [www.nbcnews.com/politics/supreme-court/supreme-court-avoids-confronting-trump-far-even-rules-rca200433](http://www.nbcnews.com/politics/supreme-court/supreme-court-avoids-confronting-trump-far-even-rules-rca200433).

<sup>147</sup> Art. I, sec. 9.3 of the Constitution.

<sup>148</sup> *Infra* paragraph 6.1.

<sup>149</sup> Including: Paul Weiss, Milbank, Simpson Thacher and Skadden Arps.

<sup>150</sup> Perkins Coie, Jenner and Block; WilmerHale and Susman Godfrey.

Howell<sup>151</sup> was a rebuke of Trump's pressure against Law firms, and in a sharply worded opinion said Trump's executive order was a violation of the Constitution's protections of free speech and due process, and an attack on foundational principles of American jurisprudence and the role lawyers play in ensuring the fair and impartial administration of justice, furthermore, the judge castigated Trump for «settling personal vendettas by targeting a disliked business or individual for punitive government action that is not a legitimate use of the powers of the U.S. government or an American President»<sup>152</sup>. Another Law firm attacked by Trump is Jenner and Block. The executive order referred to the firm's past employment of Andrew Weissmann<sup>153</sup>; attacked Jenner's internal diversity policies and its work providing free legal services on matters including transgender rights and protections for immigrants and accused the firm that is representing the University of Harvard in its challenges against Trump, of engaging in what it described as partisan "lawfare" and taking on cases that undermined U.S. interests. Here, another Judge<sup>154</sup> similarly ruled that the directive violated core rights under the U.S. Constitution. He further clearly rebuked Trump who did not conceal his motives to target this Law firm, in fact «it picked Jenner because of the causes Jenner champions, the clients Jenner represents, and a lawyer Jenner once employed. Going after Law firms in this way is doubly violative of the Constitution», the judge said, finding it infringed Jenner's rights to free speech and sought to «chill legal representation the administration doesn't like, thereby insulating the Executive Branch from the judicial check fundamental to the separation of powers»<sup>155</sup>. On Tuesday 27 May 2025, Judge Richard Leon<sup>156</sup> handed the opinion on Trump's executive order against New York-based WilmerHale. His ruling marked the third time that a federal judge deemed the orders targeting Law firms unconstitutional and permanently barred their enforcement. The judge characterized the executive order as imposing severe sanctions on WilmerHale for its constitutionally protected conduct.

<sup>151</sup> Senior Judge of the U.S. District Court for the District of Columbia and an appointee of Obama.

<sup>152</sup> *Perkins Coie LLP v. U.S. Department of Justice*, 1:25-cv-00716, (D.D.C.) [www.courthouse-news.com/wp-content/uploads/2025/03/perkins-coie-sues-trump-retaliation-order.pdf](http://www.courthouse-news.com/wp-content/uploads/2025/03/perkins-coie-sues-trump-retaliation-order.pdf).

<sup>153</sup> A top federal prosecutor involved in former U.S. Special Counsel Robert Mueller's investigation that detailed Russian contacts with Trump's 2016 presidential campaign. Trump has called the Russia investigation a «hoax» and a «witch hunt».

<sup>154</sup> U.S. District Judge John Bates, an appointee of G.W. Bush.

<sup>155</sup> *Jenner & Block LLP v U.S. Department of Justice*, 1:25-cv-00916, (D.D.C.) [www.courtlistener.com/docket/69807126/jenner-block-llp-v-us-department-of-justice](http://www.courtlistener.com/docket/69807126/jenner-block-llp-v-us-department-of-justice).

<sup>156</sup> Senior Judge of the US district court for the District of Columbia, appointed to the federal bench by former republican president G.W. Bush.

Any one of those sanctions would cause clients to strongly reconsider their engagements with WilmerHale, Leon said of the restrictions the executive order imposed, yet taken together they constitute violations of the firm's First Amendment and an infringement of its clients Fifth Amendment's right to counsel. Judge Leon then went on to highlight what he called the "retaliatory" nature of the executive order – which explicitly cited the fact that the firm employed former Justice Department special counsel Robert Mueller, who led the investigation into alleged collusion between Trump's 2016 campaign and Russian authorities. «The Order shouts through a bull-horn: If you take on causes disfavoured by President Trump, you will be punished!» he concluded<sup>157</sup>.

Susman Godfrey has also sued the administration to permanently overturn the executive order<sup>158</sup> Trump issued against them because, in the aftermath of the 2020 presidential elections, they represented Dominion, a manufacturer of voting machines, helping Dominion secure a \$787.5 million settlement in a defamation case against Fox News. Judge Loren L. AliKhan<sup>159</sup> ordered a Temporary Restricting Order against the administration in April saying that the executive order stemmed from a "personal vendetta" and finding it violated the First and Fifth Amendments and had the potential to badly harm the firm's business interests and reputation<sup>160</sup>. The Judge is expected to rule soon.

Two final annotations to the ever-evolving conflict of the law firms with the administration are: 1. The lawyers of the four firms that sued Trump are defending each other and 2. The firms that appeased Trump are experiencing a loss of partners and clients.

On another front, the fight on educational institutions, albeit part and parcel of the administration's attempt to frustrate what are believed to be the birthplaces and the greenhouses of critical thinking, is to be considered equally fundamental. In fact, amongst the many ideological battles that Trump has been entertaining to appease his base, the legal and financial clashes with universities and colleges is possibly the best

<sup>157</sup> *Wilmer Cutler Pickering Hale and Dorr LLP v. Executive Office of the President*, 1:25-cv-00917, (D.D.C.) at Court listener [www.courtlistener.com/docket/69807328/wilmer-cutler-pickering-hale-and-dorr-llp-v-executive-office-of-the](http://www.courtlistener.com/docket/69807328/wilmer-cutler-pickering-hale-and-dorr-llp-v-executive-office-of-the) and at Courthouse news service [www.courthousenews.com/trump-persecution-of-wilmerhale-ruled-unconstitutional](http://www.courthousenews.com/trump-persecution-of-wilmerhale-ruled-unconstitutional).

<sup>158</sup> [www.whitehouse.gov/presidential-actions/2025/04/addressing-risks-from-susman-godfrey](http://www.whitehouse.gov/presidential-actions/2025/04/addressing-risks-from-susman-godfrey).

<sup>159</sup> United States District Judge of the Federal District Court for the District of Columbia appointed by Biden.

<sup>160</sup> Z. Montague, *Judge Blocks Trump from Retaliating Against Susman Godfrey Law Firm*, in *The New York Times*, 15 April 2025.

suites to exemplify the divide between educated and liberal culture versus uneducated and conservative ideology. MAGA identity politics, considers college education as elitist, and campuses as places of perversion where communism and gender studies are cultivated and whites are discriminated to favour policies of inclusion and diversity. Thus, many schools have been targeted by the Trump administration both directly or by the Department of Education either because of their curricula or because of their policies curtailing “Diversity, Equity and Inclusion” and all were threatened to have federal funds reduced or even upended if they did not comply to the directives of several pertinent executive orders dealing with DEI in hiring staff and faculty but also in the admission of students; and did not introduce policies to eliminate antisemitism and anti-Christian content in the classrooms and attitudes on campuses.

In March, Trump’s interim U.S. attorney for the District of Columbia, Edward Martin, demanded Georgetown University’s law school eliminate DEI from its curriculum or lose Department of Justice career opportunities for students<sup>161</sup>. Not only was the threat of a hiring boycott legally questionable, but Martin’s demands also clearly infringed on the university’s academic freedom, which is protected by the First Amendment as it was evidenced in the Dean’s response to Martin<sup>162</sup>.

Trump’s administration devoted particular attention to the big Universities such as Brown; Columbia; George Washington University; Harvard; Johns Hopkins University; New York University; Northwestern; Princeton; the University of California, Berkeley; the University of California, Los Angeles; the University of Minnesota; the University of Pennsylvania; the University of Southern California. Many stand to lose large financial contributions mostly in the form of grants for research, some also as contracts<sup>163</sup>. Brown University could lose \$510 million while the loss for Cornell University could be of at least \$1 billion; Northwest-

<sup>161</sup> In his letter dated 17 February but emailed on 3 March, to the Dean of Georgetown, Martin wrote «At this time, you should know that no applicant for our fellows program, our summer internship, or employment in our office who is a student, or affiliated with a law school or university that continues to teach and utilize DEI will be considered». H. Schlumpf, *Trump’s US Attorney in DC Fires Salvo at Georgetown Law School. Dean fires back*, in *National Catholic Reporter*, 7 March 2025, [www.ncronline.org/trumps-us-attorney-dc-fires-salvo-georgetown-law-school-dean-fires-back](http://www.ncronline.org/trumps-us-attorney-dc-fires-salvo-georgetown-law-school-dean-fires-back).

<sup>162</sup> The Dean of Georgetown University’s law school called the threats an «attack on the University’s mission as a Jesuit and Catholic institution» in his March 6 response. He added that the U.S. Supreme Court has «continually affirmed that among the freedoms central to a university’s First Amendment rights are its abilities to determine, on academic grounds, who may teach, what to teach, and how to teach it». *Ibidem*.

<sup>163</sup> The Constitution and the *Impoundment Control Act* of 1974, both explicitly prevent the president from withholding funds appropriated by Congress and the funds and grants

ern could be stripped of \$790 million. Princeton has already seen over two dozen of grants being suspended and could further lose \$210 million while the University of Pennsylvania has seen \$175 million in federal funding suspended and John Hopkins University has seen at least \$800 million in federal spending cuts.

As it is for the Law firms, so it is with the responses given by the universities to the harassment from the administration. On the two ends of the spectrum Columbia and Harvard<sup>164</sup>: the former decided to appease Trump immediately adhering to all the requests, while the latter sued Trump. Notwithstanding the compliance, Columbia was told that meeting its demands was a precondition for formal negotiations that most likely have not restored the flood of funds while having substantially reduced academic freedom. Most negotiations are occurring with no media coverage and beyond some statements of frustration and concern, they have generally not done much publicly. It is known, however, that Northwestern University immediately complied with the demands the administration had given to Columbia hoping it would be spared the harassment only to be targeted several days later. Indeed, the capitulation by Columbia opened a dangerous path for other universities. On 14 April, Harvard tried a different strategy. It rejected proposals from the federal government, including one for the use of an outsider to audit those programs and departments that most fuel antisemitic harassment or reflect ideological capture. The government also wanted Harvard to curb the power of its faculty and report international students who committed conduct violations. Harvard refused and filed a lawsuit a week later. The tension and the lawsuits have been increasing since. To many veterans of academia, Harvard's choice to fight the Trump administration marked a potential turning point<sup>165</sup>. Harvard's resistance to presidential overreach, has spurred and encouraged others to take a public stand against the threats and real cuts Trump was directing to the oldest university and in fact, presidents of more than 200 universities and colleges have joined forces and signed a statement accusing the administration of political interfer-

Trump threatened to withhold had all been allocated by Congress in the previous Budget bill, thus raising doubts on the constitutionality of his actions.

<sup>164</sup> Columbia received the administration requests on 13 March 2025 while Harvard a month later.

<sup>165</sup> Lee C. Bollinger, a former Columbia president, said Harvard's resistance was «precisely what has been needed». The university's pushback, he said, amounted to «a major institution willing to defend the fundamental values at stake, not only with universities but also with other institutions and organizations vital to American democracy». Aired in an interview on CNN's "GPS by Fareed Zakary" held on 20 April 2025.

ence in higher education<sup>166</sup>. While it is too early to know how the challenges to academic freedom will fare in higher courts, it is not too early to affirm that also in the cases of the universities as it is with the Law firms, those who resist the pressure and stand for lawful and ethical principles do not remain isolated.

Most of Trump's actions and policies as illustrated hitherto: the war on illegal immigrants; to build and populate deportation camps; to attack the "deep State" through DOGE; to overreach over independent agencies; to manufacture tariff wars; to enact his personal vendettas and to combat "the enemy within", all of these, were predictable either because coherently in line with his campaign's promises or with Project 2025. His betrayal of the Constitution<sup>167</sup>; his devastation of the checks and balances; his obliteration of the rights enshrined in the "American Bill of Rights" and his meticulous limitations of voting rights all, with hindsight, should have been likewise foreseen after his demands that the 2020 election be overturned or rerun, or when he explicitly called to set aside the supreme law of the land<sup>168</sup>. But what appears to be inexplicably non predictable is the approach to the division of powers between the federal government and the States that is not only new but also, in some measure, in contrast with words and actions of the first Trump administration and the underlining Republican party-Maga's deference towards the States, their powers, and the Tenth Amendment that clearly intended to preserve for the States the most part of their original sovereignty<sup>169</sup>.

In fact, as most may remember, up to a very recent past, Republicans would have vehemently opposed the current federalization of the California National Guard, and the threats to withhold federal funds to Maine and California. Republicans would have denounced them as violations of the Tenth Amendment's states' rights on the long-held conservative insistence that political power should reside with individual states and not

<sup>166</sup> The statement concluded «We are open to constructive reform and do not oppose legitimate government oversight. However, we must oppose undue government intrusion in the lives of those who learn, live, and work on our campuses». H. Coster, *US College Presidents Unite against Trump's Higher Education Policies*, in *Reuters*, 22 April 2025, [www.reuters.com/world/us/us-academic-leaders-unite-against-trumps-higher-education-policies-2025-04-22](http://www.reuters.com/world/us/us-academic-leaders-unite-against-trumps-higher-education-policies-2025-04-22).

<sup>167</sup> Notwithstanding his oath to «preserve, protect and defend» the Constitution as per Art. II, sec. 1.8 of the Constitution.

<sup>168</sup> «A Massive Fraud of this type and magnitude allows for the termination of all rules, regulations, and articles, even those found in the Constitution», he wrote in a post on Saturday 3 December, on his social network, Truth Social, as reported by M. Astor, *Trump's Call for "Termination" of Constitution Draws Rebukes*, in *The New York Times*, 04 December 2022.

<sup>169</sup> «The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people».

the federal government<sup>170</sup>. And indeed, they did condemn similar situations, and it was not so long ago. Early last year Texas Governor Greg Abbott, lawlessly usurped the federal government's border enforcement authority and lased a section of the southern border with razor wire and by doing so kept the Biden administration in a standoff until a narrow majority order from the Supreme Court<sup>171</sup> vacated a previous injunction from the Fifth U.S. Circuit Court of Appeals that prevented Border Patrol agents from cutting the concertina wire allowing the Border Patrol to indeed cut through the wire, but Abbott ignored this ruling, declaring an invasion that gave Texas the right to «defend itself». Every Republican governor supported Abbott's defiance to the federal government, including then-South Dakota Governor Kristi Noem, who proclaimed that if «Joe Biden federalizes the National Guard, that would be a direct attack on states' rights»<sup>172</sup>. Yet, when Trump federalized the California National Guard, deployed more than 2.000 National Guard troops and 700 Marines into Los Angeles earlier this month, he did so without the consent of California Governor Gavin Newsom or Los Angeles's Mayor Karen Bass and justified his actions by affirming that Los Angeles «is a war zone under siege by foreign invaders». When the Governor sued the Administration for federalizing the National Guard and when the District Court Judge<sup>173</sup> ordered Trump to immediately return control of the Guard to Governor Newsom, now Homeland Security Secretary Kristi Noem, claimed that they (the Guards, the Marines, ICE enforcement and DHS) would stay in Los Angeles to liberate the city from their legally and duly elected officials and immediately announced an appeal to the Ninth Circuit Court of Appeals where a panel of three judges (two appointed by Trump in the first administration and one appointed by Biden) instantly stayed the lower court decision allowing temporarily for Trump to continue control of the National Guard until oral arguments and a written opinion would be available. Whatever the appellate court's decision, this case will almost certainly go to the Supreme Court for yet another emergency relief, while

<sup>170</sup> S. Robinson, *What Happened to "States' Rights"? Federalism for Me, MAGA Dictatorship for Thee*, in *Public Notice*, 17 June 2025.

<sup>171</sup> The "Miscellaneous Order 01/22/2024" Order in pending case 23A607. *Department of Homeland Security et Al v. Texas* was decided 5 to 4.

<sup>172</sup> Noem said in an X post on 6 February 2024.

<sup>173</sup> Senior Judge Charles R. Breyer (appointed by Clinton) for the Northern District of California. Case no. 25-cv-04870-CRB, kesq.b-cdn.net/2025/06/gov.uscourts.cand\_.450934.64.0.pdf.

the violent rhetoric dangerously continues with Trump's border czar Tom Homan threatening to arrest Newsom<sup>174</sup>.

Furthermore, Republican states' rights stalwarts are silent when Trump threatens to withhold federal funding from Democratic-run states that don't obey his often-lawless commands. After California suffered devastating wildfires earlier this year, Trump demanded that the state adopt his preferred voter ID laws in exchange for aid. House Speaker Mike Johnson supported offering aid with strings attached while bashing California's Democratic government, even though Biden had just months earlier approved more than \$65 million in disaster assistance for Louisiana related to Hurricane Francine without conditions<sup>175</sup>. And they remained silent also in April when the Transportation Secretary tried to coerce those states that are recipients of DOT grants to cooperate with ICE, implying that those who did not cooperate would lose the funds. Democratic state attorneys general across the United States filed a lawsuit<sup>176</sup> in the District of Rhode Island and in June District Judge John McConnell, Jr. issued a preliminary injunction that prevents the administration from withholding those funds because «Congress has not granted the U.S. DOT any power to conscript the State government into federal immigration enforcement efforts». The Judge further suggested that this behaviour by the federal government violates the Spending Clause<sup>177</sup> of the Constitution. The relevance of this case stands in testing if the present administration will have the power to hold States hostage to compliance with its policies. The final answer will reshape federalism and the division of powers.

And again, during a highly televised and widely posted White House lunch for the nation's Governors on 21 February, Trump called out Maine Gov. Janet Mills for defying his executive order barring trans athletes from playing sports. When Mills responded that she was complying with state and federal law, Trump answered, «we are the federal law!» and threatened, «you better do it because you're not going to get any federal funding at all if you don't». Governor Mills fought the White House in

<sup>174</sup> When asked by the White House press corps about arresting Newsom, Trump replied that he thought it to be a «great idea». Furthermore, when confronted by the same question, rather than distancing himself from this authoritarian rhetoric, Speaker Johnson brought it to a new disturbing level. «I'm not going to give you a legal analysis on whether Gavin Newsom should be arrested» Johnson told reporters on 10 June 2025. «But he ought to be tarred and feathered», in E. Helmore, *Mike Johnson Suggest Gavin Newsom Should Be "Tarred and Feathered"*, in *The Guardian*, 10 June 2025.

<sup>175</sup> S. Robinson, *op. cit.*

<sup>176</sup> *State of California v. United States Department of Transportation*, 1:25-cv-00208.

<sup>177</sup> Art. I, sec. 8, clause 1 of the Constitution.

court and won<sup>178</sup>. In 2021 Republicans vowed to bring Biden to court if he tried to mandate vaccines; then in 2022, Senators Ted Cruz and Ron Johnson met with truckers from the so-called People's Convoy that disrupted traffic in the Washington D.C. area to protest covid mandates and Sen. Rand Paul claimed that civil disobedience was a time-honoured tradition in the country. Instead, when Illinois Gov. JB Pritzker recently addressed New Hampshire Democratic Party's McIntyre-Shaheen 100 Club Dinner, «It's time to fight everywhere and all at once, they must understand that we will fight their cruelty with every megaphone and microphone that we have»<sup>179</sup>. Stephen Miller immediately told reporters, that Pritzker comments could be easily construed as inciting violence, adding that «This war that Democrat governors and mayors are waging against federal law enforcement – I mean, this is nullificationist behaviour. This is secessionist behaviour»<sup>180</sup>. The second Trump administration has gone far beyond securing the borders from illegal crossings when imposing its will at the state level. To satisfy his narcissism, to accomplish the unitary presidency so dear to Stephen Miller and to the Heritage Foundation, Trump, with full Republican support, has embraced federal supremacy to the expense of the American experiment.

## 8. Congress holds the pivot of the *pendulum* between stress or crisis

There is a missing piece in this variegated and complicate puzzle of actors and actions assembled here to help answer the question that spurred this research, and without it, it is impossible to complete the puzzle as it is impossible to foresee the surviving of the constitutional framework devised by the Founding Fathers. Indeed, it is not just any piece but rather it is the pivot of the *pendulum*; it is the corner piece that prevents all others from falling apart; it is the piece in the center that holds them all and gives life to the puzzle; it is the variable that has the potential to change everything. What has been missing is the legislative branch. Indeed, Congress has been missing in action most of the time, almost always and yet, Con-

<sup>178</sup> N. Modan, *Maine Scores Victory in Title IX Feud with Trump Administration*, in *K12 News*, 5 May 2025, [www.k12dive.com/news/maine-usda-rollins-title-ix-victory-trump-administration-transgender-athlete-policy/747181](http://www.k12dive.com/news/maine-usda-rollins-title-ix-victory-trump-administration-transgender-athlete-policy/747181).

<sup>179</sup> J. Cappelletti, H. Ramer, *JB Pritzker Calls Out "Do-Nothing" Democrats for Failing to Push Back against Trump*, in *Associated Press*, 28 April 2025, [apnews.com/article/pritzker-democrats-new-hampshire-illinois-governor-president-f2a26ec7139298e15f54879a4f20e6f1](https://apnews.com/article/pritzker-democrats-new-hampshire-illinois-governor-president-f2a26ec7139298e15f54879a4f20e6f1).

<sup>180</sup> [x.com/cspan/status/1916965070375944537](https://x.com/cspan/status/1916965070375944537).

gress could be the variable that can either confirm the present direction or initiate a return towards the reestablishing of the constitutional order because it is Congress that is the pivot of the *pendulum* that keeps checks and balances working.

What is missing is the active role of the legislative branch rightly considered the strongest branch of government due to its powers to tax and spend, originate legislation and impeach and to its representation of the people. The compliance to the president's overreach and expansion of executive power is the principal element, in fact, that isolates the first months of the Trump second term from all the previous periods of stress<sup>181</sup>. Indeed, it is hard to believe that with the current trifecta, the Republican party, in control of both Houses of the Congress, rather than offer concrete legislative support to the president's agenda, has accepted his excessive recourse to *extra ordinem* tools such as executive orders, memoranda and proclamations, while it has completely ignored its duty to check the executive and hold it accountable.

Although there starts to be some timid legislative initiative in both the House and Senate, it is all focused, as per Trump's request, to either investigate Biden or, again, the 2020 election, or to inflict more restrictions on voting rights to prevent a turnover of majorities in the 2026 midterms and the 2028 election. To be sure, there has been some level of investigative activity by congressional committees through "shadow hearings" however these were not part of the official work of either House or Senate, rather they were convened and run by the minority party as a tool to denounce the maladministration and inform the public at large<sup>182</sup>. These inquiries were so nonofficial that they have not even been entered into the records of Congress. In paragraph 6.2 a very short overview of the overreach of Trump was already sketched, yet and as much as it could sound surreal to be affirming it, Trump's efforts to concentrate the powers of all three branches upon himself can be understood by taking into consideration a) the unitary theory of the executive office that is foundational to Project 2025 and b) the personality of the present commander in chief. To be equally fair, a distinction should be made between a) Congress as a branch of government and b) the majority within Congress. It is in fact the latter that should be the focus of attention as the missing in action and as the one that abdicated all the constitutional power of Congress in favour of the leader of the party going from a position of checking and balancing

<sup>181</sup> *Infra*, paragraph 3.

<sup>182</sup> The intent to inform is so openly admitted that the meetings were televised by independent news media on YouTube.

to one of accomplice. Without the latter's dereliction of duties, the former would have been either an active actor and partner in these past months, or an active check on the excesses of the president. The result of the simultaneous abdication of the latter and of the contempt for the former by Trump has resulted in a betrayal of «We the People» and of the Founding Fathers, and especially of Madison whereas he was the staunchest advocate of the separation of powers: «The great security against a gradual concentration of the several powers in the same (branch), consists in giving to those who administer each (branch), the necessary constitutional means, and personal motives, to resist encroachments of the others... Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place»<sup>183</sup>.

In decades past, whenever a more muscular president tried to accumulate Article 1 powers, Congress responded as a unified group, regardless of political affiliation, it either held to its prerogatives or it fought to take them back, and then once in control, Congress imposed accountability to castigate the defying president. This scenario from the past is absent at present. In fact, not only are we witnessing a lack of congressional legislative initiative in lieu of executive orders, allowing the executive branch to legislate by decree, but also, we are observing the absence of interest to retain the prerogatives or to challenge the seizing of prerogatives by the president. Members of Congress swear an oath to support the Constitution and to «faithfully discharge the duties of the office»<sup>184</sup>. When the Speaker of the House turns over his constitutional duties to the president, he is not discharging his duties. Republican Senators are not supporting the constitution when they seed their specific constitutional obligation to exercise independent judgement in providing advice and consent on cabinet designations. Regardless of whether it is deliberate or not, Trump appears to be intent on destroying American democracy, but the people with the power and the constitutional obligation to stop him are the Republicans in Congress. Their failure to act is a constitutional crisis and a stain on their legacy that will hardly ever be removed.

Trump is guilty of overreach, yet the Republican party bears a bigger responsibility by being the accomplice in the destruction of the American experiment.

There are multiple cases in point but, for the purpose of this paper, only three of them will be briefly discussed to demonstrate the consistent and constant dereliction of duty.

<sup>183</sup> J. Madison, *The Federalist Papers*, op. cit., n. 51.

<sup>184</sup> Art. VI, clause 3 of the Constitution.

## 8.1. *TikTok*

Toward the end of the Biden administration a bipartisan law was approved imposing TikTok divestiture by 19 January 2025 or be banned. Hours after being inaugurated Trump signed an executive order<sup>185</sup> extending the life of the Chinese owned company for 75 days. Then again, on 4 April 2025 a new extension of 75 more days was ordered with yet another executive order, “Extending the TikTok enforcement Delay”<sup>186</sup> and on 19 June 2025 a further 90 days postponement was issued by “Further extending the TikTok enforcement Delay”<sup>187</sup>. All in all, Trump has delayed the enforcement of the law three times already even in the absence of a provision allowing enforcement of the law to be extended and even if the Supreme Court on 17 January 2025, upheld the law 9-0<sup>188</sup>. Trump’s contempt of the law and of the role of the legislative branch has been evidenced and denounced by representatives of the minority party and by the independent media and yet, it was totally ignored by Republicans and “legacy” media<sup>189</sup>. It might be redundant to repeat but perhaps still useful to say that an executive order cannot evade the law, although that is exactly what the president is trying to do, and nobody is saying anything about it.

## 8.2. *Impoundment powers*

Many traditional programs at home and abroad, countless grants for research and special academic curricula as well as several federal incentives for infrastructures and the environment have been threatened to be cut either by executive orders or by Elon Musk through the Department of Government Efficiency, in turn, created by executive order. The constitution clearly gives Congress the power «of the purse» as repeatedly reaffir-

<sup>185</sup> “Application of Protecting Americans from Foreign Adversary controlled application Act to TikTok” Executive Order no.14166.

<sup>186</sup> Executive Order no.14258.

<sup>187</sup> Executive Order no 14310.

<sup>188</sup> In an unsigned opinion, *TikTok Inc. v. Garland*, 604 U.S. (2025) the court wrote «There is no doubt that, for more than 170 million Americans, TikTok offers a distinctive and expansive outlet for expression, means of engagement, and source of community. But Congress has determined that divestiture is necessary to address its well-supported national security concerns regarding TikTok’s data collection practices and relationship with a foreign adversary».

<sup>189</sup> Democratic Sen. Mark Warner of Virginia, vice chair of the Senate Intelligence Committee, denounced that the Trump administration is indeed flouting the law and ignoring its own national security findings about the risks posed by a China-controlled TikTok.

med by the Supreme Court and again in a 1975 case<sup>190</sup>, while the clause of “faithful execution of the law”<sup>191</sup> does not allow the president to substitute his own policy preferences for those that Congress has enacted into law. In the course of time Congress has reaffirmed its prerogative on expenditures with two major pieces of legislation, the *Antideficiency Act* (ADA) of 1884 with all its subsequent amendments and expansions<sup>192</sup> and the *Impoundment Control Act* (ICA) of 1974<sup>193</sup>. The *Antideficiency Act* affirms the executive branch cannot spend more than appropriations have determined and establishes procedures for verifying whether violations have occurred and for reporting such violations. It is usually invoked to prevent government shutdowns. The *Impoundment Control Act* ensures congressional control over the budget process and curtails the power of presidents to impound funds appropriated by Congress in the Budget Resolution.

In general, when Congress approves funds, federal agencies are required to spend it. While historically, presidents have used impoundment, the *Impoundment Control Act* significantly curtailed this power, requiring congressional approval for rescissions and limiting deferrals. In fact, the Act requires the President to notify Congress of any proposed deferrals or rescissions. Congress then has a set period to review and potentially reject the President’s proposal. If Congress disapproves of a proposed deferral or rescission, the funds must be made available for spending. Thus, presidents cannot legally withhold funds and may not simply refuse to spend funds because of disagreement with Congress’s policy choices. Some exceptions were contemplated in the *Impoundment Control Act*, but presidents must follow the procedures introduced by the ICA. In fact, the *Impoundment Control Act* is the main legal mechanism for the president to seek to delay or permanently cancel federal funding once it has been enacted by Congress. Thus, impoundments are only legal when the President adheres to the procedures and limitations in the *Impoundment Control Act*.

All the funds that Trump has ordered be cut, or has threatened to cut, are included in executive orders and were appropriated in a Budget

<sup>190</sup> *Train v. City of New York*, 420 U.S. 35 (1975).

<sup>191</sup> Art. II, sec. 3 of the Constitution.

<sup>192</sup> The *Antideficiency Act* (ADA) was first enacted in 1884 but was amended and expanded several times most significantly in 1905 and 1906. It was further modified in 1933 and significantly updated in 1950. The current version was enacted on 12 September 1982.

<sup>193</sup> The *Impoundment Control Act* was enacted on 12 July 1974 and is a law responding to the muscular presidency of Nixon who had refused spending funds appropriated by Congress.

Resolution and since these cuts can only be considered presidential impoundments, they are unconstitutional.

Yet again, Republicans in Congress are not denouncing Trump's overreach and only democrats criticize it.

### 8.3. *War powers*

Article 1, Section 8.11 unquestionably assigns the war powers to Congress when it affirms that Congress alone shall have power «to declare war». Yet, and to ensure such power would not be curtailed, Congress enacted the War Powers Resolution passed on 7 November 1973. This joint Resolution was primarily a response to Nixon and the Vietnam War and the perceived overreach of presidential power in committing troops to military action without a formal declaration of war. Specifically, it aimed to reassert congressional authority over the deployment of American forces and limit the president's ability to engage in military conflicts without congressional consent. In fact, it provides that the president can send the armed forces into action only by Congress' statutory authorization or in case of «a national emergency created by attack upon the United States, its territories or possessions, or its armed forces». That same resolution also says: «The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances». If an emergency appears to require military action without congressional input, the president must brief both party leaders in each chamber of Congress, and both party leaders of each chambers' intelligence committee, within 48 hours<sup>194</sup>. It further forbids armed forces from remaining for more than 60 days, with a further 30-day withdrawal period, without congressional authorization for use of military force or a declaration of war by the United States. Therefore, the war power was intentionally split between Congress and the Commander in Chief to prevent unilateral executive action that is contrary to the wishes of Congress. While it is true that past presidential administrations have engaged the United States in conflict as well as directed military efforts

<sup>194</sup> This is usually done by sending a written brief to Congress illustrating and justifying the intervention. Trump has complied after the airstrikes in Yemen and Iran. Biden complied twenty times during his term.

without the approval of Congress<sup>195</sup>, the bombing of Iran is perceived as one more infringement of congressional prerogatives. Democrats and some Republicans maintain that while no one wants Iran to have nuclear capabilities, the strikes on Iran were not an emergency and the president had no right unilaterally to involve the U.S. in a situation that could have triggered a war. In the aftermath of the attack, Trump found the pretence of an alleged leak to proclaim stoppage of intelligence sharing with Congress whereas the Speaker of the House has declared the *War Powers Act* unconstitutional signalling a growing willingness to cede unilateral authority to the White House<sup>196</sup>.

These are only three additional demonstrations of Trump's disrespect of the Constitution and determination to ignore Congress constitutional authority. He has in fact, eliminated departments and agencies created by Congress; he has refused to spend money they have appropriated; he has issued executive orders claiming powers over elections that belong only to the states and Congress and, most recently, he has limited the ability of members of Congress to visit ICE detention facilities in direct contravention of federal law<sup>197</sup>. As already mentioned, this disregard appears particularly at odds with the reality of the trifecta whereas the Republican party would be more than willing and eager to accommodate all his requests even to aggrandize his powers, yet he has not asked Congress, perhaps because he wants Congress to know he does not need Congress to achieve his goals. Sadly, Republicans in Congress seem to agree with him.

<sup>195</sup> Just to name a few, in 1980 Carter did not involve Congress on the hostages rescue mission because he did not deem it an act of war; Reagan notified Congress after the invasion of Grenada of 25 October 1983 was already terminated since the mission was completed within two day although the troops stayed on the island for a total of 8 days; while Obama argued that the United States use of airpower in Libya did not rise to "the level of hostilities" set forth in the War Powers Resolution.

<sup>196</sup> B.S. Weiss, *Speaker Johnson Suggest the War Power Resolution Unconstitutional Following Iran Strikes*, in *Courthouse News Service*, 24 June 2025, [www.courthousenews.com/speaker-johnson-suggests-war-powers-resolution-unconstitutional-following-iran-strikes](http://www.courthousenews.com/speaker-johnson-suggests-war-powers-resolution-unconstitutional-following-iran-strikes).

<sup>197</sup> Several government officials have been arrested, charged and removed from ICE premises or in migrants related activities. Ras Baraka, Newark (NJ) mayor was in fact, arrested for protesting outside an ICE facility; Democratic Representative (NJ) LaMonica McIver has been indicted for allegedly interfering with immigration officers. She was arrested at the same protest as Mayor Baraka, and she is now facing trial. Senator Alex Padilla (D. California) was forcibly removed from a Department of Homeland Security press conference in Los Angeles; Brad Lander, NYC comptroller and mayoral candidate, was arrested while visiting an immigration court.

## 9. Conclusions

On the last day of the Philadelphia Convention, doctor Benjamin Franklin, who was not a delegate but who had participated to every meeting as an observer, decided to take the floor and encourage all the delegates to undersign the Constitution they were about to send out to the States's legislatures for ratification. He was convinced they had been pursuing the right cause but he had some perplexities on the form of government and the structure they had chosen «In these sentiments, I agree to this Constitution, with all its faults, if they are such; because I think a General Government necessary for us, and there is no form of government, but what may be a blessing to the people, if well administered; and believe further, that this is likely to be well administered for a course of years, and can only end in despotism, as other forms have done before it, when the people shall become so corrupted as to need despotic government»<sup>198</sup>. Asked later that evening which form of government had the delegates chosen, whether a monarchy or a republic, he answered «It is a Republic, if you can keep it». In a nutshell, Franklin described the fragility of the American experiment and foresaw its end because of corruption and despotism<sup>199</sup>.

The research began because of an exceedingly high number of executive orders did not seem appropriate and necessary with a trifecta electoral victory and because all those orders appeared problematic on the premise that an extensive use of executive orders has always been considered clear evidence of presidential abuse of power. The question that spurred the initial investigation was then a simple one: is the present Commander in Chief one of the many muscular presidents in American history or are we possibly witnessing the end of the experiment in government by the people for the people? Looking for the answer has unveiled many actions and activities in a cacophony of hundreds of individual and collective stories on a daily basis, and on occasions, at multiple times in a day, purportedly presented by the government in this fashion to overwhelm and confuse the bystander to a point that it is hard to see the full picture and thus, discouraging the observer to act, react, criticize and fight. Yet, it is the chaos, although challenging, that spurred the attempt to organize the executive orders and the government initiatives by categories, while the search for the answer to the initial question

<sup>198</sup> J. McHenry, *The Journal of the Constitutional Convention*, Manuscript Division of the Library of Congress, 14 May 1787.

<sup>199</sup> *Ibidem*.

did not falter amidst the confusion. At the end of June, we are now only five months into Trump's second term and by most scientific criteria it is too early to evaluate a president and its administration, yet extracting relevant events from the tumultuous leadership and stumbling execution of the executive orders, it seems reasonable and evident that the chronicled events, the multiple challenges and the abuses of power presented in this paper, allow this researcher to conclude that the United States of America is experiencing times of turmoil and uncertainties of such a magnitude to raise serious doubts of the survival of the checks and balances and thus allow the legitimate doubt that we could be in the presence of a constitutional crisis whereas the president encourages his cabinet to ignore the opinion of the courts when he does not like them; attempts to amend the constitution through executive orders and to deport to third countries migrants without due process and *habeas corpus*. The last five months do not and cannot, in truth, be compared to any other time of governmental stress in the history of this country. In this researcher's opinion in fact, what has emerged is that there are clear differences between previous challenges to the checks and balances discussed, albeit briefly in paragraph 3, and the present situation. In all previous stressful times two branches of government would eventually join forces engaging and participating together in actively reigning in the exceptional actions of one of their equals, while at present the complicity of the executive and legislative branches, with the support of the highest court in the land, is regrettably apparent. All three branches seem determined to walk the government towards a unitary presidency that was not chosen by the Founding Fathers, indeed it was abhorred by them, and most importantly was not chosen by the American people in the 2024 presidential election. Trump's 2024 win was not a sweeping victory. But Trump had the support of a highly disciplined Congressional party, a popular base that was faithful, active, and eager to act, and the effective engagement of the world's wealthiest man who has shown his willingness to spend money to support him. And while it is true that Trump beat Harris by millions of votes (2.3 million) it is also true that in the swing states, the vote was still close. In fact, a shift of only 230,000 total votes in three states (Michigan, Pennsylvania and Wisconsin) would have given Harris a victory in the electoral college. In percentage terms, that is a shift of 0.7 percent of the total swing state vote. The 2024 election was indeed rather close between the two major contenders, and the majority of those who chose to vote, voted for others (Harris + 3<sup>rd</sup> party candidates) and not Trump. The government by a minority, is the premise to understanding the urgency

for this Administration to achieve policy reversals in a very short time. The president is trying to undo the checks and balances and to execute the largest expansion of executive power in modern American history, seeking not only to solidify control over the executive branch but purloin power from the other branches as well. To achieve his goal, he is also undermining the fundamental freedoms and foundational legal principles, like the rule of law, due process and *habeas corpus* besides the separation and division of powers, each one of the above are being questioned and threatened at present, while in previous stressful times, they were either respected, or they served to rebalance the original *equilibrium*.

Furthermore, and on the same premise that this researcher is fully aware that the time span of the present administration is too short for a solid and secure performative evaluation, the same researcher believes nevertheless that five months are long enough to indicate a tendency that sadly appears clear. The fatal combination of those pursuing the dream of white male supremacy and a president who, in his pursuit of personal vendetta, could rally a faithful popular base and gather the support of the richest men in the country and the world, has brought about the opportunity to achieve the unitary presidency. Madison warned that «the accumulation of all powers, legislative, executive and judicial in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny»<sup>200</sup> and for that reason, while the Founding Fathers desired one person accountable for the executive branch, they certainly were against the unitary presidency that would result in a concentration of all power of government in the one person at the helm of the executive branch.

This research project is by no means completed, indeed as professor Woodrow Wilson used to say to his constitutional law students<sup>201</sup> before becoming the 28<sup>th</sup> president, the American Constitution is a work in progress, and so will this project be a work in progress for the weeks, months and years ahead to verify the validity of these conclusions and to evaluate future eventual changes in one or the other direction. One variable, that most certainly needs to be observed on the eve of the 250<sup>th</sup> anniversary of the Declaration of Independence (4 July 1776) is whether and how and to what extent the people will defend the American experiment; whether and how and to what extent the protests will be effective and yet peaceful; whether or not and to what extent will there be contemporary style Lex-

<sup>200</sup> J. Madison, *The Federalist Papers*, op. cit., n. 51.

<sup>201</sup> W. Wilson, *Constitutional Government in the United States*, Columbia University Lectures, New York, 1908, 4.

ington's and Concord's minutemen or whether will there be blood spilled in a pristine Civil War. Thus far the people have been eager to peacefully protest and to organize themselves in new local and national factions substituting with modern technology and independent sources the Paul Reveres of the past. The phrase «We the People» was used in the Preamble to the Constitution and in The Federalist Papers to establish the foundation of American democracy, emphasizing that the government is created by and for the people, and that their consent is essential for its legitimacy and success. «It is a Republic, if you can keep it», said Franklin, so the question now is whether the people will be willing to defend it. It is now the end of June 2025 and from these months' observations, this researcher believes in a positive answer to the present challenges and further believes that the people will do the outmost to keep the Republic. If they fail, it will be the end of the American experiment and the insurgence of a different regime. If they succeed, some corrections to the constitutional provisions will most certainly need to be introduced to avoid the reiteration of the present challenges to the checks and balances.

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