

**DEFENDING THE DEFENDERS: WHY  
BUREAUCRATIC INDEPENDENCE IS A NECESSARY  
SUPPLEMENT TO JUDICIAL DEFENSE OF  
DEMOCRACY**

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ABSTRACT

A familiar story is being observed in countries ranging from Brazil to Australia, the United States, and Poland, as elected executives deploy a populist threat narrative to politicize the rule of law and entrench themselves in power. Out of the academy, a growing literature on democratic “backsliding” or “decline” proposes a menu of “guardrails” for shoring up democracy from gradual collapse. Broadly, these guardrails fall under two headings: I call one *judicial*, the other *bureaucratic*. The former looks to the power of judicial review, under which courts may invalidate enactments that threaten, not just the Constitution, but the very democratic order itself; the latter to independent actors seeded through the administrative state (like election monitors, ombudsmen, and inspectors general) to prevent the politicization of the rule of law.

Within the American legal academy, the debate over “militant” or “intolerant” democracy is now vibrant, a stunning reversal of Americans’ long-held faith in the stability of their institutions. Yet the debate is unfolding in a characteristically American way: American militant democracy is still conceived of primarily in terms of judicial, as opposed to bureaucratic, solutions—to echo Damaska’s famous formulation, through *coordinate* and not *hierarchical* modes of authority.

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This paper argues that America's militant democracy regime is doomed to remain inchoate and weak unless it supplements judicial review with deeper institutional reforms in the bureaucratic mode. The judicial remedy is necessary to arrest constitutional decline, but it is insufficient. This is because, at early stages of decline, politicization of the rule of law tends to proceed in procedurally "lawful" ways, and judges lack substantive criteria for what constitutes unacceptable politicization. At late stages, courts themselves become politicized or coopted, leaving them ill-equipped to reverse rule-of-law decline once it has proceeded. The American judiciary has long been celebrated for its independence, but that status is increasingly imperiled by the ongoing politicization of appointments, a symptom of early-stage decline. This article concludes with an exploration of how the bureaucratic remedy could be applied in the American case.

#### INTRODUCTION

In *The Specter of Dictatorship*, David Driesen tells us a story grown eerily familiar.<sup>1</sup> Unlike the many recent books on democratic decline, the book tells it with clarity and economy, so that its main stages can be recognized wherever they occur. That story goes like this:

**Step One:** A democratically elected president (or prime minister) starts to talk of an ominous, rising threat to the nation—say, an economic downturn, terrorist threats, or a crush of refugees at the border. To “meet the threat,” the President organizes a swift, coordinated response, centralizing control over multiple government agencies. This includes independent bodies like courts, public prosecutors, election-monitoring commissions, and the military.

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

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1. DAVID M. DRIESEN, *THE SPECTER OF DICTATORSHIP: JUDICIAL ENABLING OF PRESIDENTIAL POWER* 119–20 (2021) [hereinafter, DRIESEN, *THE SPECTER OF DICTATORSHIP*].

fear and ultimately driving a kind of coerced public consent to the ongoing concentration of executive power.

**Step Three:** The levers of democratic government, now coopted, are now turned against democracy. The *rule of law is politicized and undermined*, as Justice departments or ministries instruct prosecutors to jail political opponents and immunize the President's allies. The *electoral playing field is tilted* to insulate the incumbent from losing future elections: ballots may be suppressed, voters intimidated at the polls, opposition candidates barred from running, or election results falsified. *Finally, the space for public debate is shrunk*: the individual citizen is barraged with false information, threats of unseen enemies, or manipulated depictions of the political opposition as elitists or seditionists. Propaganda—fear, not fact-based—is hard to rebut, and the spectacle of concentrated power is frightening and intimidating. Eventually, the possibility for independent will formation, even democracy itself, is dismantled.

This story is playing out today in political democracies from the United States to Brazil to France and Russia. How far the damage has spread varies. For instance, in the decades since the fall of the Iron Curtain, Russia has disintegrated into full-blown electoral authoritarianism, while in the United States, “constitutional rot” can be still seen only at the margins of the system.<sup>2</sup> But as *The Specter of Dictatorship* makes clear, the problem is far from limited to weak democracies or regions of the globe.<sup>3</sup> To a far lesser degree than Russia, but still to some degree the U.S. has witnessed troubling indices of democratic decline in areas including:

- The growth of the President's powers, especially via de facto delegation of policymaking authority from Congress, whose relative and absolute decline has been underway since the early 20<sup>th</sup> century;<sup>4</sup>
- The manipulation of election rules, both in a spate of gerrymandered state electoral maps along party lines to favor incumbents and, at the national level, the unprecedented presidential conspiracy to overturn the results of the 2020 election through lawsuits, recounts,

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2. See *Russia: Freedom in the World 2021 Country Report*, FREEDOM HOUSE, <https://freedomhouse.org/country/russia/freedom-world/2021> (last visited June 19, 2022); see JACK M. BALKIN, *THE CYCLES OF CONSTITUTIONAL TIME: THE CYCLE OF CONSTITUTIONAL ROT AND RENEWAL*

3. See DRIESEN, *THE SPECTER OF DICTATORSHIP*, *supra* note 1, at 8, 95–120.

4. See *id.* at 6–7, 27–53.

ballot suppression, recruiting state legislatures and legislators to block the results, and even encouraging violence against Congress itself;<sup>5</sup>

- The politicization of neutral institutions like the prosecutorial power and the armed forces, far from limited to President Trump but exacerbated under him nonetheless. Under Trump, national policy was tailored to suit Trump's own personal interests, including visiting diplomats being housed at Trump hotels and the now-notorious attempt to blackmail Ukraine into spying on his campaign rival, Joe Biden.<sup>6</sup> Subordinates were fired who took a rule of law stance against his orders, including former Homeland Security Secretary Kirsten Nielsen, former Attorney General Jeff Sessions, and former FBI Director James Comey.<sup>7</sup> Critically, after the Capitol insurrection of January 6th, 2021, questions arose for the first time in decades about the neutrality of the Capitol police and the military more broadly;
- The trustworthiness of the media has been called into question, largely at political instigation. A polarized media predates President Trump, but Trump heightened rhetorical attacks on journalists, whom he called "enemies of the people";<sup>8</sup>
- Finally, the democratic will-formation so crucial to democracy is under threat from deep cultural divisions, as well as "fractured publics" consuming news with an ideological slant and, in the age of social media, from untrustworthy, unvetted sources.<sup>9</sup>

In 2020, the U.S. skated perilously close to constitutional crisis during the fallout from the presidential election. It should be clear that a book like *The Specter of Dictatorship* is more needed than ever.

The book's aim is more than diagnosis: it argues that democratic decline can be arrested and reversed, and it aims to explain how. According to Driesen, courts must accept the mission of defending democracy, not just because it is existentially necessary, but because

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5. *See id.* at 121–38.

6. *Id.* at 127.

7. *Id.*

8. Brett Samuels, *Trump Ramps up Rhetoric on Media, Calls Press 'The Enemy of the People'*, THE HILL (Apr. 5, 2019), <https://thehill.com/homenews/administration/437610-trump-calls-press-the-enemy-of-the-people/>.

9. *See* DRIESEN, *THE SPECTER OF DICTATORSHIP*, *supra* note 1, at 130.

judges' oath to uphold the Constitution requires it. He writes: "The original intent to craft the American Constitution preventing tyranny and the oath judges swear to support the Constitution give U.S. courts, as guardians of the law, a responsibility to contribute to defending democracy against autocracy."<sup>10</sup> The idea is similar to "militant democracy," a term coined in the 1930s, as fascism metastasized from country to country, to explain how democracies—especially courts—could defend against enemies who used free speech and fair elections to destroy democracy from within.<sup>11</sup> Within the militant democratic toolkit was the same power Driesen invokes, the power of judicial review to strike down laws hostile to the democratic order.<sup>12</sup> According to Driesen, however, America's court-led regime of militant democracy is much older than that, grounded in the Constitution of 1787 itself.

Whether this is true as a historical matter, I'm not sure.<sup>13</sup> I *am* sure, though, that I support this vision as an attractive one for our courts. Where I would like to direct my remarks is toward the thorny dilemmas that arise in carrying out, and how these can be managed. What does it mean for a court to defend democracy—and why would any well-intentioned court *not* do so, anyway? Driesen's hope is that, by making the markers of democratic backsliding clear and widely understood, courts will be able to identify the problem and stop it

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10. *Id.* at 95.

11. See Karl Loewenstein, *Militant Democracy and Fundamental Rights*, I, 31 AM. POL. SCI. REV. 417, 430–31 (Jun. 1937), and Karl Loewenstein, *Militant Democracy and Fundamental Rights*, II, 31 AM. POL. SCI. REV. 638, 653 (Aug. 1937). Today, scholars of militant democracy often invoke the infamous remark of Hitler's associate Joseph Goebbels, "[t]his will always remain one of the best jokes of democracy, that it gave its deadly enemies the means by which it was destroyed." Quote appears in Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1408 (Apr. 2007).

12. See generally Loewenstein, *Militant Democracy and Fundamental Rights*, II, *supra* note 11.

13. One could wonder whether the Framers' silence on this democracy-defending role for courts, not to speak of judicial review, period, suggests that they did *not* envision it. There is mixed evidence on the question, see e.g. Saikrishna Prakash & Christopher Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887 (2003) (arguing that the Framers did intend to grant the Court the power of judicial review). *But see* Larry Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 5 (2001) (finding little evidence that the Framers believed in judicial invalidation of statutes). At a theoretical level, the idea of judicial review to maintain ideal separations between the branches would seem to suffer from the same weaknesses Madison alluded to in Federalist Paper Number 48 (arguing that simply "mark[ing], with precision, the boundaries of these departments, in the constitution of the government" is a remedy whose "efficacy ... has been greatly overrated"). THE FEDERALIST NO. 48 (James Madison).

before it gets too severe. To be clear, courts *can* and *should* play this role, but in doing so they suffer from two problems in particular: **indeterminacy** and **lack of capacity**.<sup>14</sup> That is, on the one hand, identifying symptoms of democratic loss in real time is difficult because we don't know what they are, or because differences in our values may blind us to the meaning of events that, down the road, can lead to democratic decline (though everyone reading Driesen's book could go a long way to helping!), and two, courts simply lack the power to stop the democratic slide. The first problem is epistemological, the second is political.

Here is an example of both. Take the fact that as president, George W. Bush sidelined his Cabinet as an advice-giving body in favor of a tiny circle of advisers.<sup>15</sup> We now know that this practice produced a culture of narrow groupthink in the White House, contributing to the decision to go to war in Iraq in 2003 based on faulty intelligence and selective half-truths marshaled by figures in the inner circle with an anti-Saddam Hussein axe to grind.<sup>16</sup> Not merely the larger Cabinet, but also Congress—institutional players whose views were cooler to war, and who might have exercised a veto on the decision—were kept in the dark.<sup>17</sup> This example illustrates the twin problems of indeterminacy and judicial capacity. It is difficult to square the decision to go to war in 2003 with Congress's primacy in declaring war.<sup>18</sup> And down the line, the Iraq War would have drastic ripple effects on America's constitutional order, entailing breaches of legal ethics by executive branch lawyers, America's compliance with international law, and the President's foreign affairs role in our

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14. There is another potential problem: *illegality*, namely, the fact that a majority of the current Supreme Court believes that the President's power to hire and fire his or her own subordinates is plenary and incapable of being interfered with: this is a theory of the separation-of-powers known as the unitary executive theory, and it is currently being encoded into law. See DRIESEN, *THE SPECTER OF DICTATORSHIP*, *supra* note 1, at 89–90, 156–62; see *infra* note 21. That said, I don't think this is a problem for David because he explicitly argues—and I fully agree with him—that the unitary executive theory must be abandoned. DRIESEN, *THE SPECTER OF DICTATORSHIP*, *supra* note 1, at 171.

15. See Andrew Rudalevige, *The Administrative Presidency and Bureaucratic Control: Implementing a Research Agenda*, 39 *PRESIDENTIAL STUD. Q.* 13 (2009); RICHARD P. NATHAN, *THE ADMINISTRATIVE PRESIDENCY* 87 (1983).

16. See generally ROBERT DRAPER, *TO START A WAR: HOW THE BUSH ADMINISTRATION TOOK AMERICA TO WAR* (2020).

17. Elizabeth Drew, *Power Grab*, *NEW YORKER*, June 22, 2006 <https://www.nybooks.com/articles/2006/06/22/power-grab/>.

18. See LOUIS FISHER, *PRESIDENTIAL WAR POWER* 209 (3d ed. 2013) (“It would be incorrect to say that Congress decided on war. It decided only that President Bush should decide.”).

constitutional order—all cognizable matters for a court. Would a different presidential advisory structure have produced different outcomes down the line? Quite possibly. Is the interior organization of the White House a justiciable question for the judiciary? It is highly doubtful. Is it conceivable that the courts would have inserted themselves into foreign policy decisions, especially while the wounds of 9/11 were fresh? Same answer.

As I argued before, American democracy is witnessing a number of historical-structural trends that are threatening in precisely the ways Driesen describes: presidentialism replacing interbranch cooperation, partisanship edging out independence in the federal bureaucracy, staunch defenses of executive prerogative stymying reasonable attempts at political oversight, law being made the handmaiden of policy goals. And as Driesen points out, the judicial response, overall, to all of these has been to stay at arm's length or active abetment.<sup>19</sup> *Perhaps* if judges knew the markers of decline ahead of time, the track record would be different, but there are reasons to think not. For one thing, the current bench is populated with a generation of former executive branch officials who staunchly believe that in the years following Watergate and Vietnam the Presidency suffered a grave diminution in authority at the hands of an overweening Congress.<sup>20</sup> Yet well before the Roberts Court—at least since the New Deal, in fact—the Supreme Court has a track record of being an active cheerleader of a strong presidency, refusing to use the judicial power to curb a larger pattern of steady presidential growth, and along the way making it more difficult for Congress to snatch back powers it would seem to have frittered away.<sup>21</sup> Hiring and firing is an area where

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19. *See, e.g.,* United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); Goldwater v. Carter, 444 U.S. 996 (1979); Nixon v. Fitzgerald, 457 U.S. 731 (1982).

20. Summarizing a typical statement of this position, David Greene, *Cheney's Plain Talk on Presidential Authority*, NPR (Dec. 23, 2005). Seven of nine current Supreme Court justices have worked in the Executive Branch, all but Justices Sotomayor and Barrett. On the history of unitary views of the presidency, see ANDREW RUDALEVIGE, *THE NEW IMPERIAL PRESIDENCY* 29–30 (2006). In this story of presidential growth, judicial method seems not to matter much in these results. Since the Burger Court (1969–86), the Court can be characterized as separation-of-powers formalist, purporting to *ignore* the changing balance of powers between Congress and the President as something deserving of judicial notice so long as no laws are broken. Before Burger, the Stone, Vinson and Warren Courts applied a pragmatic approach to separation-of-powers questions, largely to the same result: legitimating the President having a greater hand in policymaking of all sorts.

21. *See, e.g.,* Myers v. United States, 272 U.S. 52, 176 (1926) (explaining that Congress cannot insert itself into removals of federal officials); *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 967 (1983) (explaining that Congress

the president's discretion is increasingly treated as plenary, walling off the possibility of a judicial remedy for politicization of the civil service.<sup>22</sup> When it comes to electioneering and skewed maps, the Court treats these as a "political question" not amenable to judicial resolution.<sup>23</sup> On speech and the media, the Court has had relatively little chance to speak, but early cases suggest a continuation of the pattern.<sup>24</sup>

The U.S. Supreme Court has been deferential to the political branches in ways that other constitutional courts perhaps would not, but it's still the case that, by themselves, courts lack capacity to patrol the early stages of democratic decline. It is difficult to establish judicial standards of improper "politicization" of government bodies, for instance. If a prosecutor is fired, that official must prove in court that improper political motives were involved. Sometimes backsliding democracies pass legislation to weaken independent bodies, including statutes requiring a mass exodus of federal judges. Such statutes can—and have—triggered judicial scrutiny, as when the highest court of the European Union invalidated one such law passed in 2018 by the Polish legislature.<sup>25</sup> The U.S. Constitution protects judges with lifetime appointments, but it also permits Congress to create and undo courts and to define their jurisdiction, and we lack a well-developed body of law protecting courts against the political branches.<sup>26</sup> A determined Congress could still pack the federal bench or strip courts of jurisdiction over cases involving how the judiciary is structured.

Even where a court is *willing* to patrol these violations, there remains the problem that, once a country has reached the point where

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cannot create a unicameral legislative veto to stop administrative action); *Bowsher v. Synar*, 478 U.S. 714, 757 (1986) (explaining that Congress could not give the Comptroller General, a legislative official, power to approve or disapprove of the president's budget); *Clinton v. City of New York*, 524 U.S. 417, 448–49 (1998) (explaining that Congress could not delegate to the president a "partial" veto); *Raines v. Byrd*, 521 U.S. 811, 830 (1997) (explaining that individual legislators have no standing to sue to challenge legislation they believe to be unconstitutional).

22. *See, e.g., Myers*, 272 U.S. 52; *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Lucia v. SEC*, 138 S. Ct. 2044 (2018); *U.S. v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021).

23. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019).

24. *See, e.g.*, social media bans on Trump's account and those of other political figures. Twitter, "Permanent suspension of @realDonaldTrump" (Jan. 8, 2021), [https://blog.twitter.com/en\\_us/topics/company/2020/suspension](https://blog.twitter.com/en_us/topics/company/2020/suspension).

25. Jennifer Rankin, *EU Court Rules Poland's Lowering of Judges' Retirement Age is Unlawful*, THE GUARDIAN (June 24, 2019), <https://www.theguardian.com/world/2019/jun/24/eu-court-rules-polands-lowering-of-judges-retirement-age-unlawful>.

26. U.S. CONST. art. III, § 1, cl. 3.



courts are ruling on courts' own fate, the "least dangerous branch" is in a delicate position, to say the least.<sup>27</sup> In countries like Hungary, Poland, Turkey, and Venezuela where judicial independence came into the crosshairs of organized legislative majorities, by the time courts *did* fight back, they were met with further political blowback.<sup>28</sup> The U.S. has no supranational judicial backstop like the Court of Justice of the European Union (CJEU), and although the federal judiciary commands great authority for its independence, in a polarized America, that status, too, is increasingly imperiled by the on-going politicization of appointments.<sup>29</sup>

*Can* the judiciary stop erosion in cases where judicial independence itself is the target? By design, judicial review can only be reactive.<sup>30</sup> For this reason, there is reason to think that system defense should begin *before* democratic decline reaches the courts. This doesn't mean that courts have no role to play in democracy's defense—in fact, as Driesen argues, they have a vital one striking down government acts that violate rights or that distort the proper balance of government powers. The American judiciary is perhaps not entirely unfamiliar with these functions.<sup>31</sup> But it can and should have help.

### *I. Militant Democracy 2.0: An Expanding Menu of Guardrails*

Years after the collapse of the doomed Weimar Republic (1919-1933), Adolf Hitler's chief propagandist Joseph Goebbels gloatingly wrote, "[t]his will always remain one of the best jokes of democracy, that it gave its deadly enemies the means by which it was destroyed."<sup>32</sup>

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27. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

28. PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., DRAFT FINAL REPORT 81–82 (Dec. 2021).

29. Perhaps symptomatic is former Justice Stephen Breyer's recent book, STEPHEN BREYER, *THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS* (2021).

30. I am referring only to the American legal context, in which federal courts are barred from hearing cases over controversies in the abstract, not involving concrete interests advanced by competing litigants. On the "cases or controversy" requirement as a limit upon justiciability, see NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 34–74 (20th ed. 2019).

31. *See* *Dennis v. United States*, 341 U.S. 494, 517 (1951) (upholding the convictions of Communist Party for advocating the violent overthrow of the U.S. government).

32. Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1408 (2007) (quoting Karl Dietrich Bracher et al., *Introduction to NATIONALSOZIALISTISCHE DIKTATUR* 16 (Karl Dietrich Bracher et al eds. 1983)).

Hitler's National Socialist German Workers Party had arisen in 1920 as a fringe far-right organization among former soldiers, failed for about a decade to contest national elections, then rode the massive discontent of the Great Depression to become the largest faction in the German Parliament by 1932.<sup>33</sup> Amidst the chaos presented by a gridlocked parliament, mass unemployment, violence, and the triggering Reichstag Fire of February 27, 1933, Hitler persuaded President Hindenburg and the rest of Parliament to suspend Germans' civil liberties and surrender to him dictatorial powers.<sup>34</sup> The rest, as they say, is history.

For a generation of horrified observers, the lesson of Weimar was that democracy could not be permitted to be turned against itself. At one point during its fall, a majority of seats in Parliament were held by the Communists and the Nazis, ironically making Weimar a "democracy without democrats."<sup>35</sup> This could not be allowed to happen again. For the constitutionalist Karl Loewenstein, a German émigré writing in the 1930s from the safety of Yale University, democracy had to become "militant" to be saved: "when fascism uses with impunity democratic institutions to gain power, democracy cannot be blamed if it learns from its ruthless enemy and applies in time a modicum of the coercion that autocracy will not hesitate to apply against democracy."<sup>36</sup> Fascism had arisen in Europe through abuse of democratic liberties: free speech, a free press, freedoms of association and assembly, universal suffrage, and free formation of political parties. The fascists had flooded these channels with quasi-military symbols and nationalistic and anti-Semitic propaganda, convincing some citizens to join them and coercing the rest.<sup>37</sup> Militant democracy aimed to forbid these undermining practices by banning the democracy's enemies from contesting elections at all.<sup>38</sup> Political parties who called for an end to democracy, as the Nazis and Communists had done, could be barred. Before the Second World

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33. See FRANK McDONOUGH, *HITLER AND THE RISE OF THE NAZI PARTY* (2d ed. 2012).

34. See *id.* at 99–103.

35. Among the many who cite this phrase, see Jan-Werner Müller, *CONSTITUTIONAL PATRIOTISM* 14–19 (2007). The phrase also refers to Weimar citizens' attitudes toward democracy, which had grown quite blasé, perhaps understandably given the humiliation of Versailles, the instability of Weimar parliamentary governments, and the massive economic woes. *Id.*

36. See Karl Loewenstein, *Autocracy versus Democracy in Contemporary Europe*, 29 AM. POL. SCI. REV. 571, 593 (1935).

37. *Id.*

38. *Id.* at 593.

War, this had been done (albeit rarely) by Parliament.<sup>39</sup> After the war, reformers believed democracy required a new “guardian of the Constitution” that was a bit more trustworthy: enter the Constitutional Court.<sup>40</sup>

For centuries, Continental Europe had distrusted strong courts with power to strike down statutes, a vision which called up aristocratic courtiers defending the king’s prerogative.<sup>41</sup> After the Second World War, however, parliamentary supremacy and statutory positivism were cast into doubt, and the merits of an independent court capable of stopping unconstitutional acts came to seem more evident.<sup>42</sup> However obvious it may be to an American audience that not *all* legislative enactments are good law, it was *not* obvious to Europe and much of the rest of the world. But in the second half of the twentieth century and after, “constitutional review” became a vital tenet of constitution-writing, found everywhere from Germany’s Basic Law of 1949 to the 2015 Constitution of the Dominican Republic. Country after country that suffered dictatorial or military excess came to turn to constitutional courts as “guardians.” Many of these new courts have performed well in that mission.<sup>43</sup>

This debate largely did not happen in the U.S., which suffered no calamitous institutional collapse in the 20th century. Instead, it was long assumed that we Americans get high marks both for our strong democratic culture and the design of our institutions.<sup>44</sup> Today, however, the debate over “militant” or “intolerant” democracy is now vibrant in the legal academy, a stunning reversal of Americans’ long-held faith (even among legal progressives) in the stability of their

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39. DAVID JABLONSKY, *THE NAZI PARTY IN DISSOLUTION: HITLER AND THE VERBOTZEIT, 1923-25* (1989).

40. Hans Kelsen, *Who Ought to be the Guardian of the Constitution?*, in *THE GUARDIAN OF THE CONSTITUTION: HANS KELSEN AND CARL SCHMITT ON THE LIMITS OF CONSTITUTIONAL LAW* 174 (2015).

41. JOHN H. MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 48 (4th ed. 2018). Notably, civil law systems like Germany, France, and the nations of Latin America, have built, not a Supreme Court but constitutional courts at the apexes of their judiciary. This is because constitutional courts have a much narrower purview and offend the traditional superiority of the legislature to a lesser degree. *Id.*

42. Michaela Hailbronner, *Rethinking the Rise of the German Constitutional Court: From anti-Nazism to Value Formalism*, 12 *INT. J. CON. L.* 626, 628 (2014).

43. Alec Stone Sweet, *Constitutional Courts*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 817, 826 (1st ed. 2012).

44. *See, e.g.*, Noah Feldman, *On ‘It Can’t Happen Here,’ in CAN IT HAPPEN HERE? AUTHORITARIANISM IN AMERICA* 157–59 (Cass Sunstein ed. 2018).

institutions.<sup>45</sup> Yet it should be pointed out that this debate has for the most part unfolded in a characteristically American way: many commentators continue to assume that, however intimidating the task of defending democracy, our existing institutions are up to the task. Some look to culture, calling for a reconstruction of (or return to) our American civic republican virtues.<sup>46</sup> Others believe the problem of democratic loss will self-correct as we enter a new period of party politics.<sup>47</sup> Driesen addresses himself to the Supreme Court, pointing out the danger of their current path. I share his view that changing portions of our judge-made law—namely, justiciability doctrine that allows the Court to avoid wading into separation-of-powers controversies, and the unitary executive theory, which barricades the Executive Branch from reasonable oversight, for another—is a vital first step.<sup>48</sup> But I would add another: institutional reform that could make constitutional defenses *against* the President a little stronger.

Since the German Basic Law was drafted in 1949, there have been new developments and a wealth of new democratic guiderails *besides* judicial review. Many newer constitutions feature independent actors studded throughout the government whose role it is to prevent a concentration of power and to blow the whistle on abuses and excess. This includes inspectors general to report on malfeasance within government agencies; ombudsmen serving as rights enforcers against the government; as well as public watchdogs like ethics councils, comptrollers and election monitors.<sup>49</sup> We might group these actors and institutions under the heading of **bureaucratic**, as opposed to **judicial**, remedies.

Where I am going here might be obvious at this point. The U.S. Constitution of 1787 predates the advent of modern military democracy, and its defenses are still primarily *judicial*. Part of this is by design, part of it is by temperament, and part of it is simply a failure to update our defenses. The great comparativist Mirjan Damaška once

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45. See, e.g., CAN IT HAPPEN HERE?, *supra* note 42; BALKIN, *supra* note 2, at 1; See JACK BALKIN & SANFORD LEVINSON, DEMOCRACY AND DYSFUNCTION (2019); MARK TUSHNET ET AL., CONSTITUTIONAL DEMOCRACY IN CRISIS? (2018); TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 30–31 (2020).

46. See Feldman, *supra* note 42.

47. Jack Balkin believes that this problem is in part a symptom of a major realignment of the party system, so that (again, in part) it will self-correct as parties recalibrate, gain different shares of the electorate, and learn to share power again. BALKIN, *supra* note 2, at 161.

48. DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 1, at 53.

49. Hailbronner, *supra* note 40, at 630, 640.

made the point that America prefers *coordinate*, or to *hierarchical* modes of authority.<sup>50</sup> According to Damaska, hierarchical systems, the archetypal form of public bureaucracies in Continental Europe, are staffed by long-serving professionals, are organized along clear hierarchical relationships between superiors and subordinates, and employ decision-making procedures based on special technical standards.<sup>51</sup> Coordinate systems, on the other hand, typically favor short-termers and generalists over career officers, informal relationships between rough equals over hierarchy, and decisions based on general community norms over special standards.<sup>52</sup> Damaška was writing in the context of civil procedure, not constitutional law, but his observations apply equally here. Americans have an adversative relationship with bureaucracy. We tolerate bureaucratic independence in certain areas considered particularly technical—and therefore properly insulated from politics—like Federal Reserve Boards defining the monetary supply, or the Food and Drug Administration regulating dangerous chemicals. At the same time, the opportunity to demonize experts and hierarchies seems perennially available to politicians, embodied by the old campaign trope of railing against “pointy-headed intellectuals,”<sup>53</sup> as well as, particularly after the Reagan era, the fact of a public bureaucracy which, while large and powerful, seems increasingly at pains to justify itself.<sup>54</sup> American individualism is certainly at work in these trends, plus the powerful deregulatory impulse that arose in the 1970s—but I would argue that expertise’s more limited presence in our public bureaucracy also reflects America’s happy lack of experience with politicians who set the nation on a course of democratic backsliding, until recently. Either way, a wakeup call is overdue. The point insufficiently grasped is this: *Bureaucratic independence is not just about scientific expertise, but also plays a role in democratic maintenance by counterbalancing concentrated power and by limiting the ability of political actors to turn government’s levers toward illegal ends.* When an anonymous official wrote an op-ed declaring, “I am part of the resistance inside

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50. MIRJAN DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 17 (1986).

51. *Id.* at 16.

52. *Id.*

53. MICHAEL KAZIN, *THE POPULIST PERSUASION: AN AMERICAN HISTORY* 218 (2d ed. 2017).

54. *See*, e.g. President Reagan’s famous axiom, “Government is not the solution, government is the problem.” President Ronald Reagan, Inaugural Address (Jan. 20, 1981).

the Trump Administration,” it was an uncomfortable, uncanny moment for many.<sup>55</sup> Perhaps it should not have been.

Abroad, the bureaucratic remedy is far from unfamiliar. It is, in many contexts, understood to be what guarantees values of *competence*, *impartiality*, and structural *stability*, values without which constitutional democracy cannot survive. And while it would be impossible to sketch out the whole universe of arrangements countries have experimented with for embedding independent bureaucratic officials in their constitutional systems, I will highlight three main headings under which these offices and officers fall.

One group aims at **preventing the politicization of the law** by mandating political independence and insulation for people who enforce the law, to ensure that they do so in an impartial way. Given the primary of electoral rules to the maintenance of democracy, some the most important of these are found in the electoral context. Here, National Election Commissions and the like can be found wielding the power to approve maps (that is, to disapprove of political gerrymandering), organize elections and monitor them for compliance with the law, to count ballots, and to resolve any electoral disputes.<sup>56</sup> In certain countries, these bodies also have the power to allot public campaign funds and public media airtime among candidates and to introduce legislative bills related to their subject areas.<sup>57</sup> They may

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

56. See, e.g., Fed. Election Comm'n, *Mission and History*, FEC, <https://www.fec.gov/about/mission-and-history/> (last visited June 19, 2022) (discussing functions of the Federal Election Commission in the U.S.); *The Federal Returning Officer and His Responsibilities*, FED. RETURNING OFFICER, <https://www.bundeswahlleiter.de/en/ueber-uns/aufgaben.html> (last visited June 19, 2022) (discussing the functions of the election commission in Germany); The Electoral Comm'n, *Functions of the Electoral Commission*, ELECTORAL COMM'N, <https://www.ec.or.ug/functions-electoral-commission> (last visited June 19, 2022) (discussing the functions of the election commission in Uganda); see also United Nations, *Political and Peacebuilding Affairs: Elections*, UN, <https://dppa.un.org/en/elections> (last visited June 19, 2022) (discussing the ways in which the UN assists international election commissions with their various functions).

57. See Juan Fernando Londoño & Daniel Zovatto, *Latin America*, in FUNDING OF POLITICAL PARTIES AND ELECTION CAMPAIGNS 128, 143 (Int'l IDEA 2014); Daniel Smilov, *Eastern, Central and South-Eastern Europe and Central Asia*, in FUNDING OF POLITICAL PARTIES AND ELECTION CAMPAIGNS 173, 187 (Fredrik Sjöberg ed., Int'l IDEA 2014); D.R. Piccio, *Northern, Western and Southern Europe*, in FUNDING OF POLITICAL PARTIES AND ELECTION CAMPAIGNS 207, 220 (Int'l IDEA 2014); Karl-Heinz Nassmacher, *The Established Anglophone*

also be empowered to ban political parties where necessary (a power also held by some constitutional courts).<sup>58</sup> Ordinarily, these positions are not fillable by the President and by law must be filled by civil servants who meet stringent criteria for service, and who sometimes may be barred from holding political office after service.<sup>59</sup> In general, structures like these are founded on the basic idea that there is a fundamental conflict of interest in elected officials defining the rules that get them elected.<sup>60</sup>

Another group of remedies focuses on how officials whose impartiality matters are **appointed** to office. Often, by constitutional or statutory rule, these officials (judges, prosecutors, election monitors, and so forth) will have to be selected by a mixture of elected and non-elected officials, sometimes with a broad participation requirement from various sectors of society. Such provisions are democracy-enhancing because they ensure that no simple legislative majority party can take power, then turn civil servants to their advantage. For instance, in Germany, half of the judges on the Federal Constitutional Court must be appointed by one house of the Parliament (the Bundestag) and the other half by the other (the Bundesrat).<sup>61</sup> In Colombia, Constitutional Court judges are chosen by the Senate based off lists presented by the President, the Supreme Court (a separate body), and the Council of State (Colombia's highest administrative court).<sup>62</sup> By law, the Court must include judges representing different sectors of society and the profession (e.g. academia, private practice).<sup>63</sup> Other procedures are even more intricate. In Honduras, where corruption is a serious problem, Supreme Court judges are appointed by the legislative branch, but several constraints are put upon its discretion.<sup>64</sup> Not only does appointment require a two-thirds majority of the chamber, but the assembly also must choose judges off

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*Democracies*, in FUNDING OF POLITICAL PARTIES AND ELECTION CAMPAIGNS 255, 269–70 (Int'l IDEA 2014).

58. See, e.g., Yigal Mersel, *The Dissolution of Political Parties: The Problem of Internal Democracy*, 4 INT. J. CON. LAW 84, 85–86 (2006) (discussing domestic court bans of parties labeled extremist).

59. See Shaheen Mozaffar & Andreas Schedler, *The Comparative Study of Electoral Governance—Introduction*, 23 INT'L POL. SCI. REV. 5, 16–17 (2002).

60. See, e.g., Daniel P. Tokaji, *Lowenstein Contra Lowenstein: Conflicts of Interest in Election Administration*, 9 ELECTION L. J. 421, 422 (2010) (discussing the inherent conflict of interest as to U.S. election officials).

61. GRUNDGESETZ art. 94 (translation at [https://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html](https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html)).

62. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 239.

63. L. 270, marzo 7, 1996, art. 44, DIARIO OFICIAL [D.O.] (Colom.).

64. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS art. 311.

a list put together by a seven-member Nominating Board.<sup>65</sup> That Board, according to the Constitution, must include: a prior member of the Supreme Court, a member of the federal bar, the National Commissioner of Human Rights (a federal civil servant), a representative of the Council of Private Enterprise (a private citizen), a law professor from the nation's largest law school, a representative of civil society, and a representative of national labor unions.<sup>66</sup> Arrangements like these betray a clear fear of majority-party overreach, and a clear sense that high elected officials like judges must be impartial in the specific sense of being accountable to *many* parties in society at once.

Finally, another cache of bureaucratic remedies takes ordinary federal agencies and place independent actors inside of them for **oversight** purposes. Here we find officials like ombudsmen, inspectors general, and comptrollers. As a class, these officials do two things: first, they increase transparency in government by collecting and sharing information, reporting ethics breaches, or investigating rights violations on the part of the government. They also ensure institutional stability simply by virtue of not being directly accountable to the president. Many of these sorts of officials are familiar in the U.S., but in other countries' public bureaucracies, they are more numerous, dense, better protected, and exercise certain broader functions unknown Stateside (e.g. human rights protection). It is ironic and unfortunate that these days, the U.S. Supreme Court is increasingly treating such independent actors as presumptively *un*-democratic insofar as they limit the president's direct control over executive branch officials.<sup>67</sup> The lesson from abroad appears to be the opposite: to some extent, defending democracy means defending government *from* the President. Taken together, these institutions

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65. *Id.*

66. *Id.*

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



appear to be a wager on institutional independence to make sure that the rule of law is obeyed and not, ultimately, bent to partisan ends.<sup>68</sup>

### *II. Applying Lessons: Bureaucratic Defenses in the U.S.*

Typically, we are used to thinking of “technological innovation” and “progress” in the field of the hard sciences, *not* constitutional law, but when it comes to the art of militant democracy, America’s eighteenth-century Constitution is definitely first-generation technology. America boasts a world-renowned judiciary and a powerful federal bureaucracy featuring inspectors general and government ethics officials, but from a comparative tour of the world, the U.S. belongs to an older generation of constitutional design lacking devices that feature in “newer” constitutions, and its democracy-defending structures are weak compared to those of modern constitutional democracies like Germany, South Africa, and Colombia.<sup>69</sup> Because our administrative state postdates the Constitution, administrative independence is, at best, statutorily mandated—meaning it can be undone by judicial review, which, animated by a conservative deregulatory wave, is precisely what is going on today. America lacks centralized public oversight structures like human rights ombudsmen, and it lacks sufficiently stringent independence protections for other actors like public prosecutors and executive-branch attorneys. Independence in American government is under increasing pressure today, and this exposes us to the risks of democratic loss that Driesen so clearly identifies.

It is deeply ironic that, in 2020, when America came closer to full-blown constitutional crisis than it had since the Civil War, it was independent officials who defended the nation’s institutions. Without a single exception, judges dismissed dozens of lawsuits by the Trump campaign seeking to halt the counting of votes in states where late-counted votes augured a victory for the challenger Joe Biden.<sup>70</sup>

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68. Another group of democracy-defending devices that are often discussed in the literature pertain to the legislature, not the public bureaucracy, and so won’t be discussed here: power-sharing arrangements in the legislature. Most important are minority parliamentary rights of inquiry and investigation and supermajoritarian requirements for a broad array of actions, e.g. triggering emergency powers or appointing high-court judges. These procedural devices help counter the winner-takes-all effect of majority parties.

69. See GINSBURG & HUQ, *supra* note 43, at 144–155.

70. Reuters Staff, *Fact Check: Courts Have Dismissed Multiple Lawsuits of Alleged Electoral Fraud Presented by Trump Campaign*, REUTERS (Feb. 15, 2021), <https://www.reuters.com/article/uk-factcheck-courts-election/fact-check-courts->

Ultimately, after suffering 50 or so losses in court, Trump turned toward a public-facing campaign to pressure state and local election officials—most notoriously Georgia Secretary of State Brad Raffensperger (a lifelong Republican), whom he asked to “find 11,780 votes” to overcome the gap between himself and Biden in the state.<sup>71</sup> These civil servants, too, invariably invoked “professional ethics” to resist the call to politicize their duties. On November 12, a federal cybersecurity agency issued a statement calling the election “the most secure in American history” and attesting to the total absence of evidence of fraud.<sup>72</sup> Tellingly, a week later, Trump fired the head of the agency.<sup>73</sup>

Given the ongoing pandemic, the incumbent’s abuse of the powers of the office to disseminate falsehoods about the election, and the degree of support his message received in the American public, things could have gone much, much worse. The American judiciary proved that there is a difference between judges who share ideological affinities with the executive and those willing to bend the rule of law for their party: not a single Trump-appointed judge entertained the “Big Lie” in their court. Yet it is worth emphasizing how perilously close America came to constitutional crisis. As the weeks went by, President Trump and his team continued to repeat his baseless claims of fraud, making him the first modern candidate to refuse to concede a presidential election.<sup>74</sup> Trump asked state legislatures to ignore the results and appoint new slates of pro-Trump electors to replace the ones chosen in the election: no Republican-led state legislature did so,

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have-dismissed-multiple-lawsuits-of-alleged-electoral-fraud-presented-by-trump-campaign-idUSKBN2AF1G1.

71. John Bowden, *Trump Asked Georgia Secretary of State to “Find” 11.7k Ballots, Recalculate Election Result*, THE HILL (Jan. 3, 2021), <https://thehill.com/homenews/administration/532433-trump-asked-georgia-secretary-of-state-to-find-116k-ballots/>.

72. CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY, JOINT STATEMENT FROM ELECTIONS INFRASTRUCTURE GOVERNMENT COORDINATING COUNCIL & THE ELECTION INFRASTRUCTURE SECTOR COORDINATING EXECUTIVE COMMITTEES (Nov. 12, 2020), <https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election>.

73. Alana Wise, *Trump Fires Election Security Director Who Corrected Voter Fraud Disinformation*, NPR (Nov. 17, 2020), <https://www.npr.org/2020/11/17/936003057/cisa-director-chris-krebs-fired-after-trying-to-correct-voter-fraud-disinformati>.

74. See Amy McKeever, *No Modern Presidential Candidate Has Refused to Concede. Here’s Why That Matters.*, NAT’L GEOGRAPHIC (Nov. 8, 2020), <https://www.nationalgeographic.com/history/article/no-modern-presidential-candidate-refused-to-concede-heres-why-that-matters>.

but many were probably sorely tempted.<sup>75</sup> Disgraced former national security adviser Michael Flynn, who still had the President's ear after resigning following having lied under oath about his contacts with Russian diplomats, suggested during a meeting at the Oval Office in December 2020 that the President invoke martial law and deploy the military to "rerun" the election.<sup>76</sup> Immediately, top military officials issued a joint statement distancing the U.S. military from the election.<sup>77</sup> The next day, Trump's own Attorney General undercut several ideas reportedly being considered by the president, including seizing voting machines and appointing a special counsel to investigate electoral fraud.<sup>78</sup> Then on January 6, 2021, an angry mob stormed the U.S. Capitol as Congress was preparing to count the electoral ballots and certify the results of the election.<sup>79</sup> The outgoing president stood before the crowd and told them, "This the most corrupt election in the history, maybe of the world. . . . [T]oday, in addition to challenging the certification of the election, I'm calling on Congress and the state legislatures to quickly pass sweeping election reforms, and you better do it before we have no country left . . . if you don't fight like hell, you're not going to have a country anymore."<sup>80</sup> Trump failed in his attempts to earn victory, but a crowd of 2,000-2,500 rioters did storm the U.S. Capitol, forcing legislators to flee into

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75. See Michael S. Schmidt, *Trump Says Pence Can Overturn His Loss in Congress. That's Not How It Works*, N.Y. TIMES (Jan. 5, 2021), <https://www.nytimes.com/2021/01/05/us/politics/pence-trump-election.html>.

76. See Kevin Liptak & Pamela Brown, *Heated Oval Office Meeting Included Talk of Special Counsel, Martial Law as Trump Advisers Clash*, CNN (Dec. 20, 2020), <https://www.cnn.com/2020/12/19/politics/trump-oval-office-meeting-special-counsel-martial-law/index.html>; see also David Sherfinski & Andrew Blake, *Army Brass Rejects Calls for Martial Law: "No Role" for Military in Determining Election Outcome*, THE WASHINGTON TIMES (Dec. 19, 2020), <https://www.washingtontimes.com/news/2020/dec/19/army-brass-rejects-calls-for-martial-law-no-role-f/>.

77. Sherfinski & Blake, *supra* note 74 (that statement read, in part, "[t]here is no role for the U.S. military in determining the outcome of an American election.").

78. Matt Zapotsky, *Undercutting Trump, Barr Says There's No Basis for Seizing Voting Machines nor Special Counsels on Election or Hunter Biden*, THE WASHINGTON POST (Dec. 21, 2020), <https://www.adn.com/nation-world/2020/12/21/undercutting-trump-barr-says-theres-no-basis-for-seizing-voting-machines-nor-special-counsels-on-election-or-hunter-biden/>.

79. Julia Jacobo, *This is What Trump Told Supporters Before Many Stormed Capitol Hill*, ABC NEWS (Jan. 7, 2021), <https://abcnews.go.com/Politics/trump-told-supporters-stormed-capitol-hill/story?id=75110558>.

80. *Id.*

bunkers hidden in its passageways.<sup>81</sup> Meanwhile, in the years following these events, the states heeded Trump's call, 19 of them enacting laws restricting access to the vote.<sup>82</sup>

Clearly, all is not well. Were it not for the professionalism demonstrated by judges, the military, and electoral officials, a presidential election could have been overturned and the country, perhaps, plunged into crisis. For this reason, it is profoundly ironic that the value of civil service independence is being called into question as a matter of law. Hence, as Driesen argues, the fight against democratic loss should begin with a fundamental rethinking of judicial doctrine on the executive branch.<sup>83</sup> The misguided theory of the unitary executive must be abandoned, not because it is likely that a future president will attempt to abuse the office as unabashedly as Trump did, but because if one were to do so, they would be stopped only by the ethical scruples of the civil servants around them.

How could the U.S. approximate a more robust regime of democracy defense? The good news is that, to some extent, the U.S. already has experience with bureaucratic remedies aiming, as discussed above, at: the **neutral enforcement of the rule-of-law** (e.g. electoral commissions), **non-politicized appointments** (involving multiple actors in selecting court justices), and **oversight of government conduct** (inspectors generals, ombudsmen, and the like). For instance, under the latter category, America has several federal statutes, especially those passed in the wake of the Watergate scandal like the Ethics in Government Act and the Inspectors General Act of 1978.<sup>84</sup> Under the first category, we find multimember bipartisan commissions like the Federal Communications Commission (FCC), the U.S. Securities and Exchange Commission (SEC), and the Federal Exchange Commission (FEC), the former dating back to the Progressive Era, the latter, again, to the post-Watergate moment.<sup>85</sup> When it comes to appointments, our Constitution contemplates a

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81. Ryan Lucas, *Where the Jan. 6 Insurrection Investigation Stands, One Year Later*, NPR (Jan. 6, 2022), <https://www.npr.org/2022/01/06/1070736018/jan-6-anniversary-investigation-cases-defendants-justice>.

82. Jane C. Timm, *19 States Enacted Voting Restrictions in 2021. What's Next?*, NBC NEWS (Dec. 21, 2021), <https://www.nbcnews.com/politics/elections/19-states-enacted-voting-restrictions-2021-rcna8342>.

83. See DRIESEN, *THE SPECTER OF DICTATORSHIP*, *supra* note 1.

84. See Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824-1867 (1978); *see also* Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (1978).

85. Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 COLUM. L. REV. 9, 11 (2018).

single process for appointing diplomats, Supreme Court justices, and what are now called “principal officers,” understood to be heads of department and other presidential advisers: the President nominates them and the Senate confirms.<sup>86</sup> It appears our Constitution drafters were mistaken to assume that senatorial confirmation would serve the function of preventing unqualified or politicized appointments.<sup>87</sup> That said, even under existing procedures there are ways to encourage depoliticization. For instance, *in practice*, lists of candidates are already submitted to the President by organized groups in private society, for instance, the Federalist Society, which hand-selects conservative judicial candidates for federal office.<sup>88</sup> A statute could conceivably formalize the process of formulating a short-list of candidates and open it up to wider participation, say, by representatives of labor, commerce, consumer protection, environmental advocacy, and others.

As Driesen notes, the present political winds are blowing against these changes. Without an appreciation that our constitutional democracy depends on preserving our governing structures, and without an appreciation for the structure-saving function that neutral and independent government officials play, ongoing trends of concentrated presidentialism will continue undisturbed. Presidential power is *defended* today on the grounds that it vindicates democracy, but democracy cannot do without the rule of law, and the rule of law cannot survive where it is bent to the ends of politics.<sup>89</sup> As recent events (Stateside and abroad) unmistakably prove, America’s defenses against democratic loss will remain inchoate and weak unless we supplement judicial review with deeper and far-reaching reform to protect the rule of law in our constitutional democracy.

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86. U.S. Const. Art. II, s. 2, Cl. 2.

87. *See generally* BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS* (2005) (on the mistaken assumption that branch loyalty, not party spirit, would animate our institutions).

88. *See* STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2010).

89. Is what we are discussing democratic defense, or rule-of-law defense? The two can be opposed, as when a court invalidates a popular law. The democratic theorist Habermas has famously argued, however, that the conflict is overstated and that the two are mutually co-dependent: without laws, neutrally enforced and binding upon all, democracy cannot function. JURGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (1991).

## CONCLUSION

*The Specter of Dictatorship* is an invaluable book, making clear just how similar stories of democratic decline are over the world, the same authoritarian playbook being exploited in context after context. As Driesen describes, first, a population is put on high alert, warned of threats inside or outside the country. Second, the President concentrates powers in their office through delegation and by placing loyalists in important bureaucratic positions. Third and most destructively, the powers of government are turned against groups deemed enemies of the regime: political opponents, ethnic or religious minorities, foreigners, journalists, etcetera. At this point, democracy is no longer truly democracy, and it has now become difficult for the people or the political opposition to push back as a strong regime concentrates its hold on power.

Not just the sobering results observed in once-democratic contexts like Russia and Venezuela but also the milder symptoms displayed here of late in the United States counsel in favor of taking stock of what has worked to stop the democratic slide, and what has not. As I have argued here, judicial review that strikes down unconstitutional, anti-system laws and actions by the government plays a critical role, but it suffers from two limitations: first, backsliding processes ordinarily start in procedurally “lawful” ways that evade judicial review, and two, at late stages of the process courts—the “least dangerous branch” according to common wisdom—tend to lack the capacity to deal with this problem because they lack the institutional strength to push back against a unified front by the political branches.<sup>90</sup>

Within the American legal academy, some are now taking the debate over “militant” or “intolerant” democracy seriously. Yet, as I argue here, America’s defenses are weak compared to those of newer constitutional systems because they depend so heavily on the power of courts and leave civil servants comparatively unprotected. For this reason, I have argued for taking a page from other countries and exploring “bureaucratic” remedies adopted in newer constitutions in places like Germany, South Africa, and Colombia.<sup>91</sup> America lacks centralized public oversight structures like human rights ombudsmen, not to mention multi-party appointment procedures than minimize politicization. We do have a long history of independence protections

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90. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1967).

91. *See generally* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.].

for actors like public prosecutors and executive-branch attorneys, but these protections are statutorily—not constitutionally—derived, and they are subject to increasing pressure.

As Mirjan Damaška noted, we in common-law America tend to be allergic to any institutional arrangements that rely on state bureaucracies and paths of hierarchical authority.<sup>92</sup> In today’s political climate, so deeply suspicious of government power, the “bureaucratic remedy” to democratic loss will inevitably seem a bitter pill to swallow. But, as a comparative lens on democratic backsliding suggests, such strong medicine is probably necessary. It is better to prevent democratic loss before it starts rather than try to stop it once it is too late. For this, as Driesen rightly argues, it is crucial to wean ourselves off a few dangerous judge-made formulas that rule courts out of separation-of-powers controversies or grant a unitary president all the powers he requests.<sup>93</sup> Americans are not used to treating our presidency as a structural liability, but at this point, such unbending faith in the office is naïve. This is not because all presidents are power-hungry would-be autocrats, but because over time, the office has grown unmanageably large and powerful. And while, as the Framers knew, presidential power is crucial to running an “energetic” government, a strong presidency does not necessarily mean a presidency with limitless power over the legislature or the bureaucracy.<sup>94</sup> Democratic decline, as we’ve seen the world over, is increasingly being carried out through a centralization of executive power. Where this happens, only a new separation of powers featuring countervailing centers of power are sufficient to arrest it. Other countries achieve this by walling off areas of the government from presidential intermeddling. Such arrangements may be a radical about-face for American government, but our democracy has faced great challenges before and adapted to meet them head-on. Hyper-presidentialism is the next great test.

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92. See DAMAŠKA, *supra* note 48, at 46.

93. See DRIESEN, *THE SPECTER OF DICTATORSHIP*, *supra* note 1.

94. FEDERALIST NO. 70 (Alexander Hamilton).