Trump's First Year: How Resilient is Liberal Democracy in the US?

John Shattuck
Senior Fellow, Carr Center for Human Rights Policy

Amanda Watson
Masters in Public Policy Candidate, Harvard Kennedy School

Matthew McDole
Masters in Public Policy Candidate, Harvard Kennedy School
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Trump’s First Year: How Resilient is Liberal Democracy in the US?

About the Authors

John Shattuck, Professor of Practice in Diplomacy, Fletcher School of Law and Diplomacy, Tufts University; Senior Fellow, Carr Center for Human Rights Policy, Harvard Kennedy School; and Visiting Scholar (Spring 2018), Institute of International Studies, University of California Berkeley.

Amanda Watson, Masters in Public Policy Candidate, Harvard Kennedy School.

Matthew McDole, Masters in Public Policy Candidate, Harvard Kennedy School.

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EXECUTIVE SUMMARY

In its 2016 “Democracy Index” report, the Economist Intelligence Unit downgraded the United States from a “full” to a “flawed democracy”. The report cited “an erosion of trust in political institutions” as the primary reason for the downgrade.1 In January 2018 Freedom House offered an equally dire assessment: “democratic institutions in the US have suffered erosion, as reflected in partisan manipulation of the electoral process . . . and growing disparities in wealth, economic opportunity and political influence.”2

Declining levels of political participation and public confidence in government in the US are not new, but the populist forces that propelled the election of Donald Trump in 2016 signaled a new level of public disillusionment with democratic politics as usual. There has been a sharp increase in public discontent with the system of governance in the US over the last fifteen years. An October 2017 Washington Post/University of Maryland poll found that 71% of Americans believe that political polarization and democratic dysfunction have reached “a dangerous low point”.3 Three years earlier, in 2014, a Gallup Poll showed that 65% of Americans were “dissatisfied with their system of government and how it works,” a dramatic reversal from 68% satisfaction twelve years earlier in 2002.4

The US is a flawed liberal democracy.5 In theory, liberal democracy is the antithesis of authoritarianism. Its ingredients include free and fair

elections, freedom of speech and media freedom, an independent judiciary, minority rights and civil liberties, a diverse civil society, the rule of law and a system of checks and balances against concentrations of power. The institutions and elements of liberal democracy are designed to be a bulwark against tyranny by both the executive and the majority.

How resilient are the institutions and elements of liberal democracy in the US? On a global level there is evidence of both resilience and erosion. A November 2017 report of the Institute for Democracy and Electoral Assistance, an intergovernmental organization that assesses the state of democracy worldwide, put it this way: “The current situation is more positive than suggested by an increasingly gloomy view that democracy has been in decline for the last ten years or more. This period appears to be one of trendless fluctuations in which gains and downturns in individual countries tend to balance each other out at the global level.”6 From this vantage point, liberal democracy in the US may be resilient when compared to “illiberal democracies” where neo-authoritarian leaders -- such as Viktor Orban in Hungary, Jaroslav Kaczyński in Poland, and Recep Tayyip Erdoğan in Turkey -- are undermining the independence and functioning of pluralist institutions.7

But the relative strength of liberal democracy in the US is in question. Experts are divided on whether the situation reflects an internal struggle over populist forces,8 or a long-term trend toward democratic deconsolidation.9 This discussion paper considers a sampling of evidence about key institutions and elements of liberal democracy in the US during the first year of the Trump administration, and potential sources of resilience in the media, the federal judiciary, law enforcement, democratic norms and principles, the electoral process, civil society, state and local government, the federal civil service, and the Congress. The paper takes into account conflicting recent public opinion surveys that show, on the one hand, a decline of public trust in the performance of US


democratic institutions,\textsuperscript{10} and, on the other hand, opposition to the concentration of authority in the presidency.\textsuperscript{11} The stakes are high. A central question, posed by a provocative new book, \textit{How Democracies Die}, by Harvard scholars Stephen Levitsky and Daniel Zieblatt, is whether liberal democratic institutions in the US can withstand anti-democratic pressure, or whether instead they “will become political weapons, wielded forcefully by those who control them against those who do not.”\textsuperscript{12}

Following is a summary of the Trump administration’s attacks on liberal democratic institutions during its first year and an assessment of their institutional resilience:

**The Media**

Donald Trump has gone beyond previous presidents in attacking the media, undermining its credibility, distorting truth and proliferating falsehoods. The media response has been strong but uneven, and damage has been done. There has been a surge in investigative reporting, a rise in subscriptions, and even a slight increase in public trust, but by breaking norms of presidential communication and using partisan and social media to circumvent mainstream channels, Trump has mastered new methods of commanding attention, polarizing the media and attacking truth and fact.

**The Federal Judiciary**

President Trump has extended his influence over the federal judiciary by nominating 77 judges in his first year, some of whom are unqualified and ideologically extreme. The President has criticized individual judges and the federal judiciary as an institution for failing to support his agenda. Some federal courts have played a role in restraining the President from violating constitutional rights and in defending the rule of law, notably in cases involving travel and immigration, minority rights, environmental protection and political gerrymandering.


The Rule of Law

The most dramatic threat Trump has presented to liberal democracy in the US – and the most significant evidence of pushback so far – involves the rule of law and federal law enforcement. The President has sought to derail investigations of his presidential campaign and his administration in connection with Russian meddling in the 2016 election, and has lied about his efforts to do so. The appointment by the Acting Attorney General in May 2017 of a Special Counsel to conduct the investigation demonstrated law enforcement defense of the rule of law, as did a threat by the White House Counsel in June 2017 to resign if ordered by the President to fire the Special Counsel. This has yet to play out.

Presidential Norms

Longstanding norms of presidential conduct and principles of transparency and accountability are targets of attack by the Trump presidency. President Trump has made statements denigrating and demeaning domestic and foreign leaders and countries, appointed family members to sensitive positions, refused to release his tax returns, failed to meet conflict of interest standards and mixed government and personal business activities. This has created a growing public perception that the Trump administration is a breeding ground for corruption, favoritism and furthered erosion of trust in the political system. President Trump has accelerated the removal of normative guardrails of liberal democracy – mutual tolerance and institutional forbearance – by denigrating rather than challenging opponents and dismissing rather than engaging them.

Electoral Process

Serious flaws in the US electoral process preexisted the Trump presidency. The Electoral College, which propelled Donald Trump into office despite his loss of the popular vote, is an archaic and controversial vestige of constitutional history that may be difficult to reform. Similarly, a decision by the Supreme Court in 2012 invalidating the regulation of political spending and enabling wealthy individuals and corporations to exercise untrammeled influence over the political process has skewed the electoral process. The imposition of new voting restrictions by 23 states since 2010 is another threat to the electoral process. Once in the White House President Trump leveled a spurious attack on “voter fraud” and created a national commission to investigate it.
Civil Society

The Trump administration has attacked civil society by stirring up racial and religious animosity, and stimulating social and cultural division. His anti-pluralist statements have encouraged racial and religious extremists, denigrated minorities, discouraged moderates and increased political polarization. His appointments and policies have reinforced these messages on issues of minority rights, gender equality, immigration, education and the environment. But civil society across the political spectrum has proven resilient, pushing back against Trump’s attacks on pluralism, reaching new levels of civic activism, and increasing political participation in off-year elections and the fielding of candidates for the 2018 congressional elections.

State and Local Government

State and local governments have been a source of resistance to Trump administration anti-pluralist initiatives, particularly on immigration and voting issues, with varying degrees of intensity along partisan lines. But some state governments have also been a source of support for anti-pluralist politics, making it difficult for racial or political minorities to participate by allowing partisan gerrymandering of legislative districts. There has been some resistance to these practices in the federal courts, and the Supreme Court is now reviewing lower court decisions invalidating gerrymandering practices on constitutional grounds.

The Federal Civil Service

The Trump administration has denigrated and decimated the professional civil service in many federal departments and agencies, promoting partisanship and undermining morale and efficiency, particularly in the State Department, the CIA, the FBI and the Environmental Protection Agency. In the face of these attacks, some federal civil servants have responded by speaking up about policies with which they disagree, disclosing information about wrongdoing or the abuse of power, and resigning in protest. Despite protests and resignations by some professional civil servants, cabinet members and agency heads have remained silent in the face of presidential assaults on the integrity of their departments.
Congress

Two related trends have undermined the Congress’s effectiveness in fulfilling its constitutional role during the first year of the Trump presidency: increased political polarization and the erosion of norms and principles of bipartisanship. These trends have been exacerbated by one-party control of both houses of Congress and by the President’s contribution to increased polarization. A few individual members of Congress and some Congressional committees have demonstrated a degree of institutional independence and concern about potential overreaches of presidential power. Congress ranks lowest in public opinion polls on the level of public trust in government institutions, with a 13 percent approval rating.

THE MEDIA

A free, independent, and diversified media is essential to the functioning of liberal democracy. Compared to other developed nations, the United States has a strong legal tradition of not constraining the domain where free speech should prevail. Freedom of speech and expression are guaranteed by the First Amendment to the US Constitution. These rights have been supported by the judicial branch in a legal tradition that has historically struck down government attempts at censorship and protected the media from broad defamation and libel charges. The US Supreme Court has interpreted the First Amendment as “designed and intended to remove governmental restraints from the arena of public discussion,” fostering a marketplace of ideas. In liberal democracies like the United States, this marketplace is sustained and perpetuated by a variety of free and independent media organizations.

President Trump and members of his administration have taken unprecedented action to break important presidential norms regarding the media. The administration has made public attacks on the media, has threatened to selectively apply the law against media organizations, has repeatedly lied and knowingly disseminated false information and has frequently made outlandish and sensational statements to capture and sustain media attention.

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President Trump has declared the news media to be “the enemy of the people.” Trump’s attacks on the media may cause long-lasting damage to American civil discourse if they become the “new normal.” Harvard law professor and former GW Bush Justice Department official Jack Goldsmith writes: “because Trump’s extreme media-bashing is perceived to have served him relatively well, others will likely perpetuate his strategy.”

Goldsmith notes that Ron Unz, former publisher of The American Conservative, stated in a 2016 memo: “The media is the crucial force empowering the opposition and should be regarded as a primary target of any political strategy.” University of Georgia Professor of First Amendment Law Sonja R. West notes that “while other presidents have certainly had their disagreements with particular stories or journalists, they still showed a basic level of respect to the press as an institution and acknowledged the important role it plays.”

The Trump administration has frequently and consistently launched public attacks on the media. The day following his inauguration, Press Secretary Sean Spicer surprised reporters by dedicating the majority of his first press conference to attacks on the media over reporting on the inauguration crowd size. He accused the press of “dishonesty” and “deliberately false reporting,” ending with a warning that “we’re going to hold the press accountable.” The press is the primary object of Trump’s comments on Twitter. From Jan 20 to Oct 11, 2017, 89 of Trump’s 167 Twitter attacks (53%) were against the media. At political events, Trump has often incited his followers against reporters, encouraging them to heckle the press. Stephen Bannon, serving as Trump’s Chief

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17 Via Trump, Donald (@realDonaldTrump), “The FAKE NEWS media (failing @nytimes, @NBCNews, @ABC, @CBS, @CNN) is not my enemy, it is the enemy of the American People!” 17 Feb 2017, 1:48pm, Tweet, https://twitter.com/realDonaldTrump/status/832708293516632065.
19 Ibid.


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using the term “fake news” in December 2016 in response to a story in Variety reporting that he planned, as president, to continue serving as an executive producer for “The
Celebrity Apprentice.” He has since tweeted the term “fake news” 164 times and used it over 40 times in press conferences, speeches, and interviews. Nearly every instance has been in response to critical news coverage. His most frequent targets have been CNN, NBC, the New York Times, and the Washington Post, although at times he has simply equated the entire US press establishment with fake news.

The President has threatened to apply the law selectively against media outlets. Using routine and legitimate bureaucratic procedures, such as regulation and licensing, in a selective way to target the media is a tactic that has often been employed in democratic nations which have regressed into autocracy. In October 2017, Trump threatened to revoke NBC's broadcast license in retaliation for NBC News having published a report stating that the President’s proposal to increase the US nuclear arsenal tenfold surprised his national security advisers and allegedly led Secretary of State Rex Tillerson to call the President a “moron.”

President Trump also threatened to have the Federal Trade Commission (FTC) bring an antitrust action against Amazon in retaliation for negative coverage in the Washington Post (both the Post and Amazon are owned by Jeff Bezos).

President Trump’s animus toward the US media has undermined traditional US support for free media in other nations. Many Eastern European countries face a disinformation assault from Russian intelligence services, but the Trump Administration’s stance on the media resembles the Russian position.

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33 Ibid.
34 Via Trump, Donald (@realDonaldTrump), “Now that Russian collusion, after one year of intense study, has proven to be a total hoax on the American public, the Democrats and their lapdogs, the Fake News Mainstream Media, are taking out the old Ronald Reagan playbook and screaming mental stability and intelligence.....” 6 Jan 2018, 4:19am, Tweet, https://twitter.com/realdonaldtrump/status/949616329463615489.
The President and his administration have repeatedly lied and disseminated false information. The New York Times published a study of Trump’s lying, which found that he told a public lie or falsehood every day for the first 40 days of his presidency. As of December 22, 2017, Politifact calculated that 69% of Donald Trump’s public statements (334 out of 482) are falsehoods. Some examples of the President’s lies include:

- Nov 28, 2016: “Between 3 million and 5 million illegal voters caused me to lose the popular vote” and “there was serious voter fraud” in California, New Hampshire, and Virginia.
- Jan 21, 2017: “[My inaugural] audience was the biggest ever.”
- Feb 6: “Any negative polls are fake news, just like the CNN, ABC, NBC polls in the election.”
- Feb 7: “The murder rate in our country is the highest it’s been in 47 years.”
- Mar 4: “Obama had my ‘wires tapped’ in Trump Tower just before the victory.”
- July 7: “Nobody knows” whether Russia interfered in the 2016 election.

These statements are not one-time gaffes. The President has frequently repeated them. For example, he first made the inaccurate claim that massive voter fraud had cost him the popular vote in a tweet on Nov 27th. He repeated that statement several times the following day. On January 25th, he demanded a major investigation into voter fraud, and later created a commission to investigate it, which eventually demanded personal

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voter data from states.\textsuperscript{46} He repeated the same allegation at meetings, events, and in tweets over a period of six months.\textsuperscript{47}

Traditionally, the American press has relied upon politicians for access to information, and politicians have relied on the press to get their message out to the public. This informal quid-pro-quo ensured that government officials would never shut out the press entirely.\textsuperscript{48}

President Trump has disrupted the relationship between the media and the presidency in two important ways. The first is his use of social media. Previous presidents have had social media accounts, but Trump is the first to use this channel frequently and personally. Second, as president, Trump has enhanced the value and effectiveness of this communication through techniques honed in the entertainment industry. Like other populist leaders such as Hugo Chavez\textsuperscript{49} with his popular television program, “Aló Presidente,” Trump sustains media attention via entertainment delivered directly to voters. He has been adept at attracting attention in the same way that reality TV stars increase their ratings: by doing the unexpected, making sensational statements, and acting outside of accepted norms. During the campaign\textsuperscript{50} and the first year of his presidency, Trump has used sensationalism to garner “earned media value”,\textsuperscript{51} far surpassing previous politicians and even prominent celebrities. According to MediaQuant, “Trump earned more than three and a half times the media value of Barack Obama [in the 2012 campaigns] and more than six times that of Mitt Romney.”\textsuperscript{52}

During his first 100 days in office, Trump received three times more news coverage than any previous president. In his first 100 days in office, he was the topic of 41% of all US


\textsuperscript{52} Ibid.
According to a Pew Research Center report, “In 45% of the stories, the reporter produced the piece in response to something the president or his staff said or did. The news media itself initiated only 19% of stories.”

How has the media responded?

Following a trend in many democratic countries, US media have become significantly more polarized. The Pew Research Center found in a 2014 report that “when it comes to getting news about politics and government, liberals and conservatives inhabit different worlds. There is little overlap in the news sources they turn to and trust.” This polarization undermines pluralism by creating a divided society with two distinct narratives.

The rise of Fox News (founded in 1996) and Breitbart (founded in 2007) has driven much of this recent polarization. As Republicans viewers flocked to Fox in the early 2000s, other networks were left with Democratic viewshhips. A Columbia Journalism Review study showed that “a right-wing media network anchored around Breitbart developed as a distinct and insulated media system, using social media as a backbone to transmit a hyper-partisan perspective to the world. This set the agenda for the conservative media sphere, but also strongly influenced the broader media agenda.”

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55 Such as Australia, Britain, Canada, and Poland.


57 Ibid.


In an increasingly polarized media landscape, some mainstream media outlets have set up special investigative reporting teams, or teams dedicated to fact-checking. Investigative reporting is expensive, but some papers believe they can take advantage of heightened demand for investigative stories in the Trump era to meet their costs. Cameron Barr, a managing editor at the Washington Post, claims that the positive reader reactions to reporting on Trump’s lack of charitable giving “showed that doubling down on investigative work ‘would pay dividends in terms of subscribers and digital audience.’” The New York Times has dedicated an additional $5 million to investigative reporting on Trump, and has created a new Washington DC investigative team. The Washington Post has established a DC investigative unit.

However, this increase in investigative reporting has been characterized by the Trump administration and its core supporters as substantiating the President’s accusations of media bias against him, presenting the media with a Catch-22. Legal scholar Jack Goldsmith writes: “Trump’s extremes require the mainstream press to choose between appearing oppositional or, if it tones things down, ‘normalizing’ his presidency. Either way, Trump in some sense wins.”

During the first year of the Trump presidency media subscription increased. The New York Times added 276,000 subscribers, and Wall Street Journal subscriptions increased 300%. In response to this increased revenue, media outlets have been able to hire more staff. The Washington Post has hired 60 new writers. Along with an increase in subscriptions, public trust in the media appears to have increased slightly, bucking a

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long-term trend of declining trust.\textsuperscript{67} The media have also become more effective at obtaining and publishing information from within the government about actual or potential presidential abuses of power.\textsuperscript{68}

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\caption{Americans’ Confidence in Newspapers Is Rising}
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Source for graph: \url{http://news.gallup.com/poll/212852/confidence-newspapers-low-rising.aspx}

How do Trump’s attacks on the media compare to those taking place under newly anti-democratic governments?

Although the Trump administration’s open hostility and public statements attacking mainstream US press outlets are unprecedented in the modern presidency, in comparative perspective, the United States has not yet witnessed the direct suppression of media freedom that has occurred under illiberal governments in countries such as Hungary, Poland and Turkey. Instead, Trump’s assault on the media has indirectly undermined the role the media have traditionally played in the US, curtailing the possibility of generally shared standards and outlets for truth.


The following chart outlines some of the steps leaders have taken against the media in other nations that have recently moved away from liberal democracy.

THE FEDERAL JUDICIARY AND THE RULE OF LAW

An independent, impartial federal judiciary acts as a check on executive and legislative power. It protects democratic freedoms and individual rights guaranteed in the Constitution, including rights to freedom of expression, freedom of assembly, and nondiscrimination. Judicial independence both rests on and promotes norms and principles of rule of law, transparency and accountability, separation of powers and access to justice. Impartial enforcement of the rule of law is the responsibility of federal, state and local law enforcement agencies.

The Trump administration’s principal impact on the federal judiciary has been the nomination of new judges, some of whom are unqualified and ideologically extreme.
President Trump inherited 103 judicial vacancies\(^{69}\), and as of late January 2018 he had nominated 77 judges for federal court positions at all levels since April 2017, 23 of whom have been confirmed.\(^{70}\) The administration is consulting closely with the Federalist Society, an organization of conservative lawyers and legal scholars that has called on Congress to enact legislation that would enable the President to create over two hundred new judgeships to “undo the judicial legacy of President Barack Obama” and reestablish a “conservative majority” on circuit courts.\(^{71}\)

The Trump administration has worked with the Federalist Society to identify candidates for nomination, eschewing traditional practices of seeking bipartisan support for nominations.\(^{72}\) In March 2017 the administration eliminated the official role of the American Bar Association (ABA) in vetting judicial candidates prior to their names being sent to the Senate.\(^{73}\) The ABA has provided independent evaluation of prospective candidates for judicial appointments to presidential administrations since the Eisenhower administration. Under the new process, the ABA can only issue its opinions on candidates after they have been nominated and put forth for Senate consideration. The ABA has declared four nominees to be “not qualified” to serve in the federal judiciary based on lack of trial experience and/or perceived inability to remain impartial.\(^{74}\)

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The memo calls on the Senate and House of Representatives to pass a bill that would enable the president to create new judgeships and appoint between 260-447 new judges through expanding the size of circuit and district courts and replacing 158 administrative law judges.


President Trump has made verbal attacks on the credibility of the federal judiciary, not only criticizing court decisions, but also publicly criticizing individual judges. In February 2017, he called Washington District Court Judge James Robart a “so-called judge” in a tweet after Robart ruled to temporarily block implementation of Executive Order 13769 restricting travel of residents from seven Muslim-majority countries to the US. In April, President Trump called the ruling of a judge in the 9th Circuit Court of Appeals that temporarily blocked an executive order threatening to cut off federal funding for “sanctuary cities” “ridiculous” on Twitter. A White House statement on the ruling also disparaged the judge.

The Trump administration’s response to the investigations into Russian interference in the 2016 election challenge the rule of law. In May 2017, President Trump fired FBI director James Comey, raising questions of obstruction of justice. A memo Comey released after he was fired revealed that the President had previously requested Comey to end his department’s investigation into former national security advisor Michael Flynn. The President has cited the FBI’s Russia investigation as a motivation for his firing Comey. Members of Congress and legislative aides have told the press that the President pressured Republican senators to end the Senate’s investigation into Russian interference in the 2016 election. Senior Republican officials are attempting to discredit Special Counsel Robert Mueller, who is carrying out an independent investigation authorized by the Department of Justice, by questioning his ability to be impartial. In June 2017 President Trump informed members of the White House staff that he would fire Mueller, but the White House Counsel threatened to resign if ordered

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to carry out the firing and the President backed off and has since publicly denied that he intended to fire the Special Counsel.\textsuperscript{81}

Another example of President Trump’s challenge to the rule of law was his August 2017 pardon of former Arizona county sheriff Joe Arpaio, who was charged with contempt of court and was found to have used racial profiling in detentions.\textsuperscript{82} The pardoning of a state official for criminal conduct that federal courts had found to be in violation of the Constitution raised questions about abuse of the presidential pardon power.\textsuperscript{83}

The Trump administration is engaged in a deregulatory effort that may have a negative effect on the rule of law by eliminating tools needed by government agencies charged with enforcing federal legislation, particularly on the environment and civil rights. Steve Bannon, in his position as White House chief strategist, declared in February 2017 that "deconstruction of the administrative state" was a central objective of the Trump administration.\textsuperscript{84} President Trump issued a “Two for One” Executive Order requiring that "for every one new regulation issued, at least two prior regulations be identified for elimination", so that the net cost of new regulations is zero.\textsuperscript{85}

Rolling back regulations is not itself an abuse of presidential power. Congress is the only body with the constitutional authority to pass laws, but since the New Deal era the Supreme Court has held that Congress may delegate specific rulemaking authority – especially in the case of complicated regulations – to executive branch agencies.\textsuperscript{86} Rulemaking authority is delegated with the proviso that the agency must conform to an “intelligible principle” laid out in existing legislation enacted by Congress.\textsuperscript{87} The Trump

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administration has used its regulatory authority to curtail or complicate the enforcement of existing legislation. For example, the administration issued an executive order in March 2017 revoking federal guidance on climate change and National Environmental Policy Act reviews, rescinding federal estimates for the social costs of carbon and greenhouse gases, and directing the EPA to suspend, rescind, or revise the Clean Power Plan implementing a statutory curb on methane emissions and setting emissions standards for new power plants. Another executive order revoked the Federal Flood Risk Management Standard for federal investments located in or near flood plains.

The Trump administration has circumvented administrative law in rolling back environmental regulations in several instances. The Administrative Procedure Act of 1946 governs the process by which federal agencies make rules. It requires agencies to give notice and a public comment period for any new regulations, revisions, or repeals of existing regulations. The administration’s attempts to delay, postpone, or rescind EPA regulations that limit emissions of harmful pollutants did not comply with the requirements of the Administrative Procedures Act.

Efforts by the Trump administration to curtail federal regulations have reduced the tools available to some government agencies to carry out their mandates and enforce the laws. Cuts in the budget of the Internal Revenue Service, supported by Congressional Republicans seeking to scale back the role of the IRS, have limited the ability of the agency to carry out its statutory responsibility to enforce restrictions on political activity by tax-exempt nonprofits and charities. Deregulation and policy changes by the Justice Department have undercut civil rights protections. For example, Attorney General Jeff

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91 Under the Internal Revenue Code, charitable and religious organizations who have 501(c)(3) tax-exempt status are prohibited from participating in political activity, including contributing to political campaigns, making public statements in favor or opposition of a political candidate, or attempting to influence legislation as a “substantial part of its activities”. “Exemption Requirements - 501(c)(3) organizations,” Internal Revenue Service website, accessed January 31, 2018, https://www.irs.gov/charities-non-profits/charitable-organizations/exemption-requirements-section-501c3-organizations.
Sessions revoked federal guidelines that granted transgender students in public schools the right to use restrooms that match their gender identity.92 As of mid-January 2018, the Trump administration was considering a proposal by the Department of Health and Human Services to revise a regulation enacted under the Affordable Care Act that prohibits discrimination by health care providers, and establish a new division of “conscience and religious freedoms” that would protect health care workers who refused to treat patients due to moral or religious objections.93 If promulgated, these regulatory changes could allow health care workers to refuse to treat individuals on the basis of their sexual orientation or gender identity. The Justice Department has taken restrictive positions in other civil rights cases, including dropping the Department’s previous objection that a voter-identification law in Texas discriminated against minority voters94, and siding with a baker who refused to make a wedding cake for a same-sex couple in the Masterpiece Cakeshop v. Colorado Civil Rights Commission case currently with the Supreme Court.

How have the federal courts and law enforcement institutions pushed back against Trump administration attacks on pluralism and the rule of law?

In response to the Trump administration’s challenges to judicial independence and the rule of law, the federal courts and law enforcement institutions have provided some check on executive power. Notable instances of resilience include the Special Counsel’s criminal investigation in the Department of Justice, federal courts’ reactions to Trump’s “travel ban” executive order, and judicial enforcement of the Administrative Procedure Act. Access to the courts has also remained open for civil society groups to challenge Trump administration actions.

The criminal investigation being led within the Department of Justice by Special Counsel Robert Mueller is a prime example of law enforcement resilience. Counterintelligence investigations into whether the Trump campaign was involved

Russia’s meddling in the 2016 elections were first carried out by FBI Director James Comey. In March 2017, Attorney General Jeff Sessions recused himself from federal investigations involving the Trump campaign. Democratic lawmakers began calling for an independent investigation in May, after Trump fired FBI Director James Comey and a leaked memo from Comey revealed that Trump had asked him to end the investigation into former national security advisor Michael T. Flynn. Acting Attorney General Rod J. Rosenstein appointed Mueller as Special Counsel to lead the investigations into potential violations of federal law by Trump administration officials related to connections with Russia, stating that it was “in the public interest” for the investigation to be carried out by someone independent of the normal chain of command.

The Special Counsel has the authority to investigate potential crimes that he may uncover in the process of the investigation into “any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump”. The Special Counsel has his own budget and staff independent of the Justice Department. Despite the legal and procedural independence of the investigation, prominent Republican lawmakers have accused the Special Counsel of failing to be impartial. Upholding principles of judicial independence and impartiality within the Department of Justice, Acting Attorney General Rosenstein has publicly defended Mueller’s character and impartiality in the face of this criticism.

An example of judicial pushback and resilience in the face of attacks on judicial independence and rule of law is the review by multiple federal courts of the Trump administration’s immigration policies. Federal courts have challenged the constitutionality of President Trump’s executive orders restricting immigration to the

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US from Muslim-majority countries and forced the administration to revise the ban. Within two days of Trump’s issuing his first “travel ban” executive order on January 27, 2017, federal judges in New York and Massachusetts temporarily blocked parts of the order. In February, a federal District Court in Washington state issued a nationwide preliminary injunction against the order. Trump issued a revised executive order in March 2017 that was again challenged in the federal courts; District Judges in Hawaii and Maryland issued temporary injunctions against the revised order, and the Ninth Circuit Court of Appeals ruled that “the President, in issuing the Executive Order, exceeded the scope of the authority delegated to him by Congress” to control immigration.¹⁰¹ In September, the Trump administration issued a presidential proclamation revising the travel ban further to target nine countries, including non-Muslim majority countries Venezuela and North Korea. The revised ban was challenged again by federal judges in Hawaii and Maryland. In November, the Supreme Court granted the administration’s request to lift the preliminary injunctions on the revised ban, allowing it to go into effect while legal challenges against the ban continued in appeals courts. In January 2018, a federal judge in California challenged the Trump administration’s immigration agenda again, imposing a nationwide injunction on Trump’s order to end the Deferred Action for Childhood Arrivals (DACA) program.¹⁰²

Both the repeated legal challenges to the travel ban in the federal courts and the Trump administration’s response to these challenges show a degree of resilience in the American judiciary. As a result of the judicial review process, the revised version of the ban that is now in effect has a more limited scope than the original executive order issued in February. For example, people with family connections in the US or formal relationships with US-based entities are exempt from the ban.¹⁰³ The administration’s decision to go through legal channels of appeal rather than simply ignore a Washington District Judge’s injunction against the ban in February was a moment in which the rule of law was upheld.¹⁰⁴ However, some commentators have argued that President Trump is politicizing the judiciary by causing judges to break norms of judicial restraint in their response to the immigration ban.¹⁰⁵ Legal scholars have also questioned the authority of

¹⁰⁵ Goldsmith, “Will Donald Trump Destroy the Presidency?”

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federal judges to issue nationwide injunctions based on a regional case, arguing it empowers judges to play a more political role.\textsuperscript{106}

Federal courts have pushed back against actions of the Trump administration that would violate civil rights in other instances as well. A DC District Court judge issued a preliminary injunction against Trump’s August 2017 presidential memorandum banning transgender people from serving in the military, arguing that it violated transgender service members’ Fifth Amendment rights to due process. In December, the DC federal appellate court upheld the injunction and a federal judge in Seattle also issued a ruling blocking the ban.\textsuperscript{107}

The federal judiciary has checked overreaches of executive power in cases where the Trump administration violated administrative law, in particular in several of its attempts to roll back environmental regulations. Federal courts have invoked the Administrative Procedure Act in cases challenging environmental deregulation. Federal courts found the Trump administration to have acted illegally by failing to follow the established procedures for deregulation in the following cases:

- The Department of the Interior attempted to postpone a rule that would reduce the flaring of methane from wells on federal land to improve air quality.\textsuperscript{108}
- The Environmental Protection Agency attempted to delay implementation of a rule that established stricter methane emissions standards for the oil and gas industry. The DC Court of Appeals ruling called the EPA’s attempt to delay the rule: “arbitrary, capricious, [and] in excess of statutory...authority.”\textsuperscript{109}
- The EPA attempted to delay the implementation of a rule that would set standards for the safe disposal of mercury and other toxic metals.\textsuperscript{110}

\textsuperscript{106} Benner, “A DACA Question: Should Judges Use Local Cases to Halt National Orders?”
\textsuperscript{108} “Trump-Era Environmental Rollbacks Hit A Roadblock: Successful Legal Challenges.”
\textsuperscript{110} “Trump-Era Environmental Rollbacks Hit A Roadblock: Successful Legal Challenges.”
A DC District Judge ruled that the Trump administration did not carry out required review before signing the permit to build the Dakota Access Pipeline; the ruling did not halt operation of the pipeline, but ordered a more rigorous review in light of fishing and hunting rights and environmental justice for Native American communities through whose land the oil pipeline would run.\textsuperscript{111}

Federal court actions over the last year have evidenced independence by judges appointed by Republican as well as Democratic presidents. For example, Federal Judge James Robart from Washington, who issued an injunction against the original travel ban executive order, was appointed by George W. Bush; the Hawaii and Maryland judges who issued temporary injunctions against the revised executive order were appointed by Barack Obama.

Finally, evidence of resilience in the judiciary can be seen in the fact that the courts remain open to public litigants seeking to enforce constitutional rights. Civil society organizations have used the judicial system to file numerous cases challenging actions by the Trump administration for potential violations of civil rights or administrative law, with some successes. Within two weeks of the administration’s issuing the first travel ban executive order on January 27, the ACLU and other civil rights groups filed over 20 lawsuits challenging the ban in federal courts around the country.\textsuperscript{112} Several lawsuits were also filed against Trump’s ban against transgender people serving in the military, including one by GLBTQ Legal Advocates and Defenders (GLAD) and the National Center for Lesbian Rights that was considered by the DC Federal District Court judge who issued the injunction on the ban. The National Resources Defense Council, an environmental NGO, sued the EPA over the agency’s rescission of a rule regulating safe disposal of mercury under the Clean Water Act, claiming the EPA violated the Administrative Procedure Act. In response, the EPA backed down and published the rule.\textsuperscript{113}


\textsuperscript{113} “Trump-Era Environmental Rollbacks Hit A Roadblock: Successful Legal Challenges.”
How does this compare to what is happening under illiberal regimes?

In Hungary, politicians from the ruling party Fidesz have made disparaging statements about judges and questioned judicial independence in a similar vein to Trump’s verbal attacks on the American judiciary. But anti-democratic governments in Hungary, Poland, and Turkey have taken more extreme measures through political capture of the courts. In Hungary, the Fidesz-dominated legislature amended the Constitution in 2010 and 2012 to lower the mandatory retirement age of judges sitting on the Constitutional Court and change the procedures for nominating judges such that the governing party can nominate and elect judges without any support from opposition party. In a similar move, the Law and Justice Party (PiS) government in Poland passed new legislation in December 2017 lowering the retirement age for Supreme Court judges – which will force out nearly half of those currently in office – and giving the PiS-controlled lower house of parliament more control in appointing new judges. Previously, the PiS government attempted to annul the pending appointment of five judges to the Constitutional Tribunal after it came to office at the end of 2015 and fill the seats with its own nominees, which sparked a protracted political crisis. At the end of 2016, PiS passed legislation limiting the ability of the Constitutional Tribunal to act as an effective check on executive power. Governments in Hungary and Turkey have exerted control over the judiciary through arbitrary transfers of judges. In Turkey, Erdogan’s government arrested over 700 judges and prosecutors without substantiated evidence after the 2016 coup attempt.

NORMS AND PRINCIPLES OF DEMOCRATIC GOVERNANCE

Liberal democracy in the United States is grounded in norms and principles that have guided the conduct of presidents and other constitutional actors in the process of democratic governance. These norms and principles of democratic governance are consistent with the Constitution and laws of the United States and implicit in the checks and balances of liberal democracy.

The President’s actions have violated principles of transparency and presidential ethics. Examples include:

- Refusing to release tax returns during the presidential campaign, breaking a norm followed by presidents of both parties since President Nixon.\(^{119}\)
- Refusing to divest personal and family business interests (the Trump Organization)\(^ {120}\) or to put the proceeds from his assets in a blind trust.\(^ {121}\)
- Failing to meet conflict of interest standards upheld by previous presidents.\(^ {122}\)
- “Monetizing the presidency”, charging fees for the use of Trump private facilities for official functions and encouraging Republican political committees and officials to do the same (e.g. using the Trump International Hotel in Washington, DC for a Republican National Committee fundraiser).\(^ {123}\)
- Appointing the President’s son-in-law Jared Kushner as a senior advisor in the White House, and allowing his daughter Ivanka Trump to join official

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meetings with high-profile international leaders.\(^{124}\) Ivanka Trump established a trust to address potential conflicts of interest for her personal brand, but retains influence over her brand which benefits from her high-profile political role.\(^ {125}\)

- Ending the practice of releasing White House visitor logs.

These transgressions of ethical norms and principles of transparency are not illegal since most conflict of interest laws for federal employees do not apply to the president. Nevertheless, presidential norm transgressions are damaging to democracy because they have “created a new set of arrangements that are a breeding ground of corruption, favoritism, and the further erosion of trust in the political system.”\(^ {126}\)

The President has used Twitter to insult people, including foreign leaders and countries.\(^ {127}\) For example:

- The President has criticized Senators who have support positions he disagrees with, including John McCain (calling him, “incapable of doing anything”, “very foul mouthed”, and a “dummy”), Jeff Flake (“toxic”, “sad”, and “a very weak and ineffective Senator”), Elizabeth Warren (“goofy”, “one of the least productive Senators” and “Pocahontas”, referring to her Native American heritage), and Dianne Feinstein (“Sneaky”, “a disgrace”).\(^ {128}\)

- President Trump has referred to North Korean leader Kim Jong-Un as “Little Rocket Man” and “short and fat”.\(^ {129}\)

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\(^{129}\) Adam Taylor, “North Korean insults to U.S. leaders are nothing new — but Trump’s deeply personal reactions are,” Washington Post, November 11,
The President criticized the response of London Mayor Sadiq Khan following a terrorist attack in London in June 2017 as “pathetic”.\textsuperscript{130}

During talks with members of Congress on immigration reform in January 2018, the President declared that the United States should not accept immigrants from “shithole countries” in Africa and parts of Latin America.\textsuperscript{131}

Donald Trump is not the first president to break norms. Woodrow Wilson changed the conventions of appropriate presidential behavior when he became the first president since George Washington to deliver the State of the Union report in person rather than in writing. What makes Trump’s norm violations different and particularly dangerous for liberal democracy is that unlike previous presidents he is not attempting to improve the operations of government by changing customs.\textsuperscript{132} Instead, his transgressions have had the effect of stirring up divisions within society, accelerating political polarization, and reducing public trust in democratic institutions.

Beyond the norms of presidential conduct, President Trump has accelerated the removal of what Harvard Scholars Stephen Levitsky and Daniel Zieblatt call the “normative guardrails” of liberal democracy – “mutual tolerance and institutional forbearance”\textsuperscript{133} -- by denigrating rather than challenging opponents and dismissing rather than engaging them. Commentators have pointed to how the President’s use of hyperbolic language—such as casting critical reporting as “fake news”, and accusing his political opponents of being “treasonous”— sets a confrontational and polarizing tone in the national political discourse.\textsuperscript{134} His use of the word “treason” in particular to describe acts of opposition or dissent reveals a lack of respect for or understanding of the importance of mutual tolerance and role of free speech in liberal democracy.

\textsuperscript{130} Via Trump, Donald (@realDonaldTrump). “Pathetic excuse by London Mayor Sadiq Khan who had to think fast on his “no reason to be alarmed” statement. MSM is working hard to sell it!” June 5, 2017, 9:49 AM. Tweet. https://twitter.com/realDonaldTrump/status/871725780535062528.


\textsuperscript{133} Levitsky and Zieblatt, op. cit. p. 211.


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What has been the public reaction?

There has been less pushback against damage to the norms and principles of democratic governance and presidential conduct than against the President’s attacks on democratic institutions. But public opinion indicates a rising level of concern. In a survey by Transparency International carried out in October and November 2017, a majority of respondents felt that corruption had increased in the year since President Trump was elected; 44 percent said that the President and White House officials were corrupt, an increase from 36% last year. A Pew poll conducted in August 2017 found that a majority (84%) of respondents had “mixed feelings about” or “don’t like” (25% and 58%, respectively) the way that Donald Trump conducted himself as president; only 34% of Republicans approved of Trump’s presidential conduct. Public officials from both parties have reacted negatively to President Trump’s ad hominem attacks on Twitter and discriminatory rhetorical statements, including his remarks about immigrants from “shithole countries”.

ELECTORAL PROCESS

Serious flaws in the US electoral process preexisted the Trump presidency. The Electoral College which propelled Donald Trump into office despite his loss of the popular vote is an archaic and controversial vestige of constitutional history that is difficult to reform. A decision by the Supreme Court in 2012 invalidating the regulation of political spending and enabling wealthy individuals and corporations to exercise untrammeled influence over the political process has skewed the electoral process. The imposition of new voting restrictions is another threat to the electoral process. Since the Republican electoral victories during the 2010 mid-term elections, 23 state legislatures have

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introduced new voting restrictions. Once in the White House President Trump leveled a spurious attack on “voter fraud” and created a national commission to investigate it.\footnote{See “State and Local Government”, pp. 41-42 infra.}

Campaign finance is a major area of electoral weakness and cause of disaffection with democracy in the United States. Many developed nations have public financing of elections, spending limits, restrictions on campaign advertising, and parliamentary rules of party discipline that provide disincentives for the use of private funding to influence individual politicians.\footnote{Paul Waldman, “How Our Campaign Finance System Compares to Other Countries,” The American Prospect, April 4, 2014, http://prospect.org/article/how-our-campaign-finance-system-compares-other-countries.} But in the United States, despite some limited legal attempts to curtail the influence of money in politics, politicians and their campaign staffs spend most of their time and energy raising money from donors.\footnote{Andy Sullivan, “In Washington, lawmakers’ routines shaped by fundraising,” Reuters, June 12, 2013, https://www.reuters.com/article/us-usa-congress-fundraising-insight/insight-in-washington-lawmakers-routines-shaped-by-fundraising-idUSBRE95B05520130612.} Many of these donors are representatives of industry and organized interest groups. As a result, these groups have come to dominate the way US policy and law is shaped at the expense of average citizens. In a landmark study, Martin Gilens and Benjamin Page found that “economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while mass-based interest groups and average citizens have little or no independent influence.”\footnote{Martin Maximino, “The influence of elites, interest groups and average voters on American politics,” Harvard Kennedy School, Shorenstein Center, November 14, 2014, https://journalistsresource.org/studies/politics/finance/lobbying/the-influence-of-elites-interest-groups-and-average-voters-on-american-politics.} So far, efforts at meaningful campaign finance reform in the United States have not been successful. In the 2010 in the Citizens United v. FEC case, the US Supreme Court found (in a 5-4 decision), that First Amendment rights of free expression apply to corporations donating money to political candidates, illustrating the extremely broad domain of speech considered to be protected by the First Amendment under Supreme Court jurisprudence.\footnote{Chris Cillizza, “How Citizens United changed politics, in 7 charts,” The Washington Post, January 22, 2014 https://www.washingtonpost.com/news/the-fix/wp/2014/01/21/how-citizens-united-changed-politics-in-6-charts/?utm_term=.734b6fa82a8c.}

The US system of nominating candidates via irregular political primaries is another serious electoral weakness undermining the functioning of democracy. Primaries in each state occur on a staggered schedule from February through June of the election year. Many occur on weekdays, and many voters may not be aware of the schedule in their state, which makes primary turnout much lower than general election turnout.\footnote{John Wihbey and Denise-Marie Ordway, “Voter participation in presidential primaries, caucuses,” Harvard Kennedy School, Shorenstein Center, April 18,2016, https://journalistsresource.org/studies/politics/primaries/voter-participation-in-presidential-primaries-and-caucuses.}
The irregular schedule also provides undue influence to states which are arbitrarily at the front end of the presidential primary schedule—voting in New Hampshire and Iowa has outsized influence on the race, while primaries in states at the end of the schedule have almost no influence on the result.\textsuperscript{144} The US primary process also contributes to polarization by providing a springboard for partisan extremists, since primary voters tend to represent the hard-core party faithful, and not the general electorate.\textsuperscript{145}

The imposition of new voting restrictions is another threat to the electoral process. Since the Republican electoral victories during the 2010 mid-term elections, 23 state legislatures have introduced new voting restrictions.\textsuperscript{146} The restrictions include new identification requirements and curtailments on early voting and voter registration drives.\textsuperscript{147} States where turnout among black, Hispanic, or poor voters surged in 2008 were much more likely to pass restrictive voting laws following the 2010 elections.\textsuperscript{148} Voting restrictions often specifically affect poor and minority voters. For example, some states ended early voting on Sundays, a time when African American churches had historically conducted “Souls to the Polls” drives.\textsuperscript{149} Many US elections take place on weekdays, and some states have eliminated weekend early voting entirely in an effort to decrease voter turnout among low-wage or single working parents who cannot leave work to vote during the week.\textsuperscript{150} Some states have eliminated day-of registration, a service disproportionately used by poor and minority voters.\textsuperscript{151} Minorities register to vote through voter registration drives at twice the rate of white voters. Many states have passed laws restricting or forbidding nonprofit organizations from running voter registration drives.\textsuperscript{152}

\textsuperscript{150} Ibid.
\textsuperscript{151} Ibid.
\textsuperscript{152} Ibid.
In a positive development at the state level, nine states and the district of Columbia have approved automatic voter registration (in which voters who interact with a government agency – for example, the Department of Motor Vehicles – are automatically registered to vote unless they opt out). However, the overall trend at the state level since 2010 has been one of increasing restrictions on the ability of marginalized groups to participate in the electoral process.

Chart: The American Prospect

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CIVIL SOCIETY

Civil society provides diverse channels for participation in politics outside of electoral cycles, promotes pluralism through representation of different views and interests, and fosters civic engagement among different groups and with the society at large.

President Trump’s attacks on civil society and the democratic norms of pluralism and tolerance that underpin it have been primarily rhetorical so far—for example, smearing his critics—but the attacks have resulted in increased political polarization and have emboldened anti-pluralist groups. The Trump administration has undermined pluralism by attacking basic principles of anti-discrimination.

The administration has adopted policies and positions that are overtly anti-pluralist. These include:

- Immigration policies, such as the “travel ban” executive order which initially targeted only citizens from Muslim-majority nations.
- White House position statement on immigration reform calling for elimination of the “diversity visa” program designed to promote immigration from countries with historically low rates of immigration to the US.\(^{154}\)
- Presidential Memorandum banning transgender service members in the military.
- Proposed repeal of legislation preventing religious organizations and charities from using their tax-exempt status to endorse or oppose political candidates, raising constitutional questions about the separation of church and state, and increasing the politicization of religion.\(^ {155}\)
- Presidential statements attacking minorities, including comments about the ethnic background of a judge whose ruling the President disagreed with, and


posting anti-Muslim videos originating from the far-right Britain First group on his Twitter account.156

A study by the Southern Poverty Law Center (SPLC), a civic organization that has maintained an annual census of domestic hate groups since the 1980s, found that the Trump campaign “electrified the radical right”, and that the President-Elect’s choice of political advisors and appointees with anti-Muslim and white nationalist sympathies sent out a dangerous anti-pluralist message.157 SPLC documented a wave of hate crimes and bias incidents following the election, many of which directly referenced Donald Trump or his slogans, including a 197% increase in anti-Muslim hate groups and a 23% increase in neo-Confederate groups in 2016. In particular, The President’s comments after the violence against counter demonstrators during a white nationalist rally in Charlottesville, VA in August were a watershed moment for white nationalists.158 White nationalists considered Trump’s comment, “We condemn hatred, bigotry, and violence on many sides,” to legitimize their cause.159

The Trump administration has attacked democratic principles fundamental to the functioning of civil society. President Trump has threatened civic participation in voting by appointing civil rights officials who participated in efforts to favor Republicans through partisan gerrymandering. For example, he selected for a top civil rights job in the Justice Department a senior lawyer who worked to defend Republican-led states against challenges to their redistricting plans after the 2010 Census.160

President Trump has denigrated civil society by mischaracterizing peaceful protest and civic action as political partisanship. He characterized the large crowds of constituents that turned up at town hall meetings to express their opposition to the Republican healthcare reform bill as “not the Republican people that our representatives are


representing...actually, in numbers of cases, planned out by liberal activists”, while White House Press Secretary Sean Spicer alleged the crowds included paid protestors.\textsuperscript{161} The President also described protesters who demonstrated in opposition to a white nationalist event in Boston in August 2017 as “anti-police agitators.”\textsuperscript{162} In September, he criticized NFL athletes for protesting racial injustice by kneeling during the National Anthem.\textsuperscript{163}

**How has civil society responded to attacks on democratic values?**

Despite the administration’s assault on pluralism, citizens have mobilized to defend civic values and exercised their rights to political participation. New associations have emerged that connect national organizing with local action, including Indivisible, Women’s March, and Resistance School. More people are engaging with existing civil rights groups like the American Civil Liberties Union, which has seen a “dramatic” increase in membership since Trump’s election: from 450,000 to 1.5 million members nationally, and from 14,500 members to 80,000 in its Massachusetts branch.\textsuperscript{164} The number of volunteers with the Massachusetts ACLU has increased from an average of 50 a year to 3,500 currently. People are communicating with their elected representatives: there was widespread participation in town hall meetings on proposed healthcare legislation, and anecdotal evidence suggests more people have been calling their Congressional representatives since the election.\textsuperscript{165} Members of the business community have protested. In response to the “travel ban” executive order, the CEOs of over 120 businesses spoke out against the order, Alphabet and Twitter donated millions of dollars to the ACLU and other organizations supporting immigrants, and Starbucks pledged to hire 10,000 refugees over the next five years.\textsuperscript{166} In August, a number of corporate CEOs resigned from economic advisory councils to the president – the

\begin{footnotes}


\textsuperscript{164} Conversation with Carol Rose, Executive Director, ACLU Massachusetts, on October 20, 2017.


\end{footnotes}
Strategic and Policy Forum and the Manufacturing Jobs Initiative – in response to the President’s equivocation about the violence carried out by white nationalists in Charlottesville.\textsuperscript{167}

There has been an increase in the number of people interested in running for political office, measured by participation in political training programs, and more diverse candidates have run and been elected to state and local offices. Attendance in Rutgers University’s “Ready to Run” national nonpartisan political training program for women who want to run for office was 300% higher in 2017 compared with historical averages.\textsuperscript{168} Emily’s list, a national organization that seeks to get more pro-choice Democratic women elected to office, reported being contacted by over 16,000 women (half under the age of 45 and many who would be first-time candidates) who were interested in running for local and state office since the 2016 election.\textsuperscript{169} In elections in November 2017, voters in Virginia elected their state’s first transgender delegate, first female Latin American delegate, and first female Asian-American delegate to the state legislature. Among other historical elections of diverse candidates, four cities elected their first African-American mayors.\textsuperscript{170} Voter turnout in state and local elections has also been higher since the election of Donald Trump compared with historical trends:

- Turnout for the April 18 Georgia 6th District special election was 43.58%, and 58.16% for the runoff in June 2017, compared with 11.56% in the first round and 8.89% in the runoff for the last House special election in 2010.\textsuperscript{171}

\begin{itemize}
  \item \textsuperscript{171} Georgia Secretary of State, “April 18, 2017 Special Election: Official Results,” updated April 28, 2017 http://results.enr.clarityelections.com/GA/67317/Web02-state/#/.
  \item Georgia Secretary of State, “June 20, 2017 Special Election: Official Results,” updated June 26, 2017 http://results.enr.clarityelections.com/GA/70059/Web02-state/#/.
\end{itemize}

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• Turnout in the 2017 Virginia general election was the highest in 20 years for a gubernatorial race in the state.\textsuperscript{172}

• Turnout in the Alabama Senate special election in December was estimated to be 40.46%, higher than expected, and significantly higher than the 18% turnout for the August primaries for the special election;\textsuperscript{173} turnout of Democratic voters was particularly high, 30% higher than in the 2014 midterm elections\textsuperscript{174}.

Public opinion polls confirm that more Americans have become politically engaged following the 2016 presidential election. A Pew Research Center poll conducted in June – July 2017 found that more Americans are paying greater attention to politics since Donald Trump’s election; 15\% of respondents said they had attended a political event, rally, or organized protest and of those 67\% attended in opposition to President Trump or his policies, 11\% in support of the President or his policies.\textsuperscript{175}

Student activism is also high, continuing a trend over the past several years. Harvard’s Spring 2017 IOP Public Opinion Project survey of undergraduate students 18-24 years old found an increase in students’ attitudes that politics were important to their life (47\%, compared with 40\% in 2012), and the degree to which working in public service was appealing to them (35\%, compared with 29\% in 2012).\textsuperscript{176} UCLA’s 2015 annual Freshman Survey reported the highest level of interest in political and civic engagement of incoming freshmen college students in the 50 years the study has been conducted, measured by students’ expectations that they will participate in student protests and demonstrations, likelihood of voting in a local, state or federal election, and desire to become community leaders.\textsuperscript{177} The 2016 survey reported the highest percentage of


\textsuperscript{177} Higher Education Research Institute, “College Students’ Commitment to Activism, Political and Civic Engagement Reach All-Time Highs,” UCLA Newsroom, February 10, 2016, http://newsroom.ucla.edu/releases/college-students-commitment-to-activism-political-and-civic-engagement-reach-all-time-highs.
students who saw influencing the political structure as a “very important” or “essential” life goal since the survey began.\textsuperscript{178}

A number of prominent Republicans and conservative intellectuals have openly opposed the illiberal aspects of the Trump administration, writing books, columns, op-eds, and making media appearances and speeches to disseminate these views. Bill Kristol, founder of \textit{The Weekly Standard} who served as an advisor to the Romney and McCain campaigns, was so opposed to Trump’s comments following Charlottesville that he supported the Democratic candidate for the Virginia governor’s race.\textsuperscript{179} Conservative commentator George Will calls Trump “the worst president ever.”\textsuperscript{180} George W. Bush speechwriter and columnist David Frum has become “obsessed...with Donald Trump’s assault on American norms and institutions, and the threat he represents to American democracy.”\textsuperscript{181} Other prominent conservatives who have opposed illiberal aspects of the Trump administration include writers Max Boot, Ross Douthat and David French, blogger and radio host Erick Erickson, and TV personalities Glenn Beck and Joe Scarborough.\textsuperscript{182} The editors and columnists of major conservative publications like \textit{The Weekly Standard}, \textit{The Wall Street Journal} and \textit{National Review} have vocally opposed the administration’s actions.\textsuperscript{183}

\textbf{How does this compare to what is happening to civil society in illiberal regimes in Eastern Europe?}

Anti-democratic governments in Hungary, Poland and Turkey have carried out aggressive campaigns against independent civil society. They have used a variety of legal and extralegal means to restrict civil society, including passing legislation regulating foreign funding and restricting registration of independent civil society organizations, using police investigations to intimidate and/or arrest activists and groups that are


\textsuperscript{183} Ibid.
critical of the government, and in some cases physically harassing and even killing dissidents. Russia’s notorious 2012 “Foreign Agents Law”, which introduced legal restrictions on foreign-funded NGOs, has been a model for illiberal regimes. Hungary’s government has adopted a similar law and vilified civil society groups receiving funds from George Soros’s Open Society Foundation in particular. Turkey has forced independent civil society organizations to cease their operations and has arrested political dissidents ranging from opposition party members to academics. The Turkish government forced the closure of hundreds of civil society organizations and arrested 37,000 people suspected of opposing the government after the October 2016 coup attempt, alleging the organizations had links to terrorist organizations.\textsuperscript{184} The Turkish government’s crackdown on dissent has also targeted academics; nearly 700 Turkish academics have applied to the international organization Scholars at Risk for assistance with moving abroad.\textsuperscript{185}

The Trump administration has not restricted civil society in similar ways, but the President’s rhetorical attacks on democratic pluralism have increased the polarization of American civil society. As a side effect, these attacks have encouraged illiberal governments like those in Eastern Europe to pursue their authoritarian agendas without the risk of incurring condemnation by the US.\textsuperscript{186}

**STATE AND LOCAL GOVERNMENT**

The Tenth Amendment to the US Constitution reserves for state governments “the powers not delegated to the United States (i.e., the federal government) by the Constitution, nor prohibited by it to the states.” Under the federal system in the United States, states share government responsibility with the federal government. State and local government is fundamental to the multi-layered governance of U.S. federalism,


providing distributed sovereignty in the federal system and serving to check and balance the power of the federal government. Some state governments have historically played a negative role in contravening or restraining federal government actions to advance civil rights.

How have state and local governments responded to the Trump Administration?

Some state and local governments have resisted anti-pluralist initiatives by the Trump administration, including the executive order banning Muslim immigration; a voter fraud panel based on false allegations that millions of illegal immigrant voters caused Trump to lose the popular vote; and deportation initiatives, including the attempt to rescind the Deferred Action for Childhood Arrivals program (DACA). In addition, state and local governments have resisted efforts by the Trump administration to undercut the statutory and treaty responsibility of the federal government to protect the environment, opposing US withdrawal from the Paris climate accords.

In May 2017, President Trump created a commission to investigate his unsubstantiated claims that there had been widespread voter fraud during the 2016 election. On June 28, 2017, the commission sent a letter\(^{187}\) to the secretaries of state (who serve as the senior election officials) in each US state requesting voter information. The commission requested the names, addresses, party affiliations, birth dates, felony conviction records, voting histories since 2006, last four digits of social security numbers, and other information on voters in every state, implicating issues of privacy and raising questions about possible efforts to disenfranchise voters. 30 states refused to send the information or never responded to the request. 20 states complied fully or in part. Some states, such as New York, initially refused to send the data, but later partially complied.\(^{188}\) Six states demanded payment of a fee in exchange for the data, which the commission never paid.\(^{189}\)

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Some state officials went on record to justify their opposition. For example, California’s Secretary of State stated: “California’s participation would only serve to legitimize the false and already debunked claims of massive voter fraud made by the President.”[^190] Virginia Governor Terry McAuliffe said the commission was “set up as a pretext to validate Donald Trump’s alternative election facts” and could be a “tool to commit large scale voter suppression.”[^191] However, some secretaries of state publicly supported the request. Missouri Secretary of State Jay Ashcroft, a Republican, called the commission’s requests fair and said that his office looks “forward to working with Secretary Kobach and the commission on its findings and offer our support in the collective effort to enhance the American people’s confidence in the integrity of the elections process.”[^192]

President Trump responded to the refusal of many states to provide the data with the following tweet: “Numerous states are refusing to give information to the very distinguished VOTER FRAUD PANEL. What are they trying to hide?”[^193] The President also claimed that resistance to the commission’s request was partisan: “Many mostly Democrat States refused to hand over data from the 2016 Election to the Commission On Voter Fraud. They fought hard that the Commission not see their records or methods because they know that many people are voting illegally.”[^194]

In January 2018, the Washington Post conducted a fact-check investigation of this claim. It found that 64% of the states headed by a Republican governor did not provide data, compared to 53% of states with Democratic governors. 68% of the states with a Democrat secretary of state did not provide data, compared to 52% of states with a Republican secretary of state. While having a Democrat as secretary of state made a state more likely not to submit the data, the pushback was bipartisan. 15 states with a Republican governor and secretary of state refused to submit the data, though many of

these states, such as Tennessee\textsuperscript{195} and South Carolina,\textsuperscript{196} claimed that state laws forbade them from complying with the request. Overall, the state-level pushback against the commission’s request was bipartisan, but Democrats objected publicly and on principle, whereas Republican state officials who refused to comply often expressed sympathy with the commission’s goals but made refusals in terms of compliance with state law.

The tables below shows how every state responded to the request:

<table>
<thead>
<tr>
<th>Alabama</th>
<th>Gov</th>
<th>Sec State</th>
<th>Comply</th>
<th>Date Sent/Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>R</td>
<td>R</td>
<td>N</td>
<td>pending fee</td>
<td></td>
</tr>
<tr>
<td>Alaska</td>
<td>I</td>
<td>D</td>
<td>Y</td>
<td>28-Sep-17</td>
</tr>
<tr>
<td>Arizona</td>
<td>R</td>
<td>R</td>
<td>N</td>
<td>pending fee</td>
</tr>
<tr>
<td>Arkansas</td>
<td>R</td>
<td>D</td>
<td>Y</td>
<td>27-Jul</td>
</tr>
<tr>
<td>California</td>
<td>D</td>
<td>D</td>
<td>N</td>
<td>refusal</td>
</tr>
<tr>
<td>Colorado</td>
<td>D</td>
<td>D</td>
<td>Y</td>
<td>3-Aug-17</td>
</tr>
<tr>
<td>Connecticut</td>
<td>D</td>
<td>D</td>
<td>N</td>
<td>refusal</td>
</tr>
<tr>
<td>DC</td>
<td>D</td>
<td>D</td>
<td>N</td>
<td>refusal</td>
</tr>
<tr>
<td>Delaware</td>
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<td>N</td>
<td>refusal</td>
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<tr>
<td>Florida</td>
<td>R</td>
<td>R</td>
<td>Y</td>
<td>28-Jul-17</td>
</tr>
<tr>
<td>Georgia</td>
<td>R</td>
<td>R</td>
<td>N</td>
<td>pending fee</td>
</tr>
<tr>
<td>Hawaii</td>
<td>D</td>
<td>D</td>
<td>Y</td>
<td>28-Sep-17</td>
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<tr>
<td>Idaho</td>
<td>R</td>
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<td>Y</td>
<td>28-Sep-17</td>
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<tr>
<td>Illinois</td>
<td>R</td>
<td>R</td>
<td>N</td>
<td>refusal</td>
</tr>
<tr>
<td>Indiana</td>
<td>R</td>
<td>R</td>
<td>N</td>
<td>litigation</td>
</tr>
<tr>
<td>Iowa</td>
<td>R</td>
<td>R</td>
<td>Y</td>
<td>19-Sep-17</td>
</tr>
<tr>
<td>Kansas</td>
<td>R</td>
<td>D</td>
<td>Y</td>
<td>14-Aug-17</td>
</tr>
<tr>
<td>Kentucky</td>
<td>R</td>
<td>D</td>
<td>N</td>
<td>pending fee</td>
</tr>
<tr>
<td>Louisiana</td>
<td>D</td>
<td>R</td>
<td>N</td>
<td>pending fee</td>
</tr>
<tr>
<td>Maine</td>
<td>R</td>
<td>D</td>
<td>N</td>
<td>refusal</td>
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<tr>
<td>Maryland</td>
<td>R</td>
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<td>refusal</td>
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<tr>
<td>Massachusetts</td>
<td>R</td>
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<td>N</td>
<td>refusal</td>
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<tr>
<td>Michigan</td>
<td>R</td>
<td>R</td>
<td>N</td>
<td>refusal</td>
</tr>
<tr>
<td>Minnesota</td>
<td>D</td>
<td>D</td>
<td>N</td>
<td>refusal</td>
</tr>
</tbody>
</table>

| Mississippi | R   | R  | N       | refusal         |
| Missouri   | R   | R  | Y       | 20-Sep-17       |
| Montana    | D   | R  | Y       | 28-Sep-17       |
| Nebraska   | R   | R  | N       | refusal         |
| Nevada     | R   | R  | Y       | 26-Sep-17       |
| New Hampshire | D | D  | Y       | not rec'd       |
| New Jersey | R   | D  | Y       | 18-Aug-17       |
| New Mexico | R   | D  | N       | refusal         |
| New York   | D   | D  | Y       | 28-Sep-17       |
| North Carolina | D | D  | Y       | 21-Sep-7       |
| North Dakota | R | D  | Y       | 20-Sep-17       |
| Ohio       | R   | R  | Y       | 28-Jul-17       |
| Oklahoma   | R   | R  | Y       | 18-Sep-17       |
| Oregon     | D   | R  | Y       | 11-Oct-17       |
| Pennsylvania | D | D  | Y       | 25-Sep-17       |
| Rhode Island | D | D  | N       | refusal         |
| South Carolina | D | D  | N       | refusal         |
| South Dakota | R | D  | Y       | not rec'd       |
| Tennessee  | R   | R  | N       | litigation      |
| Texas      | R   | R  | Y       | 20-Sep-17       |
| Vermont    | D   | N  | Y       | refusal         |
| Virginia   | D   | N  | Y       | refusal         |
| Washington | D   | R  | Y       | 22-Sep-17       |
| W. Virginia | R | D  | Y       | 11-Oct-17       |
| Wisconsin  | R   | D  | N       | pending fee     |
| Wyoming    | R   | D  | N       | refusal         |

President Trump disbanded the commission on January 3, 2018 stating: “Rather than engage in endless legal battles at taxpayer expense, today I signed an executive order to dissolve the commission, and have asked the Department of Homeland Security to review these issues and determine next courses of action.”\textsuperscript{197}

The original executive order banning immigration from seven Muslim-majority nations (EO 13769) took immediate effect after it was signed on Friday, January 27, 2017, causing chaos at airports and border crossings as agencies scrambled to comply. On


Sunday, January 29, 16 state attorneys general, all Democrats, signed a statement condemning the order.\textsuperscript{198} Seven states with Democrat attorneys general did not sign: Minnesota, Kentucky, Mississippi, North Carolina, New Hampshire, Rhode Island, and Delaware. Several state AGs released individual statements of protest, explaining how EO 13769 violated American norms and legal traditions. For example, Oregon Attorney General Ellen Rosenblum issued a statement that the executive order “reinstates national origin discrimination, something that President Lyndon B. Johnson long ago rejected as ‘harsh injustice.’ We will not go back to those days of our American history. Let me be clear — Discrimination based on national origin is illegal.”\textsuperscript{199}

State attorneys general filed multiple lawsuits against the President over EO 13769. Between January 27 and January 31, over 40 suits were filed in federal courts.\textsuperscript{200} Suits were filed on both statutory and constitutional grounds. Sixteen state attorneys general from California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia and Washington joined the suits.

Cities, counties and states have established “sanctuary jurisdictions” limiting cooperation with federal government efforts to enforce immigration laws. These jurisdictions have implemented “sanctuary policies”, such as training police and state and local authorities not to question people about their immigration status and denying requests by federal authorities to hold arrested people past their release dates.\textsuperscript{201} Four states (California, Vermont, Connecticut, and Rhode Island), 39 cities, and 364 counties have declared themselves sanctuary jurisdictions. In response, President Trump has issued an executive order (EO 13768) that sanctuary jurisdictions refusing to comply with immigration enforcement measures would not be “eligible to receive Federal grants, except as deemed necessary for law enforcement purposes” by the U.S. Attorney General or Secretary of Homeland Security.

The city of San Francisco, the state of California, and a number of other jurisdictions have brought suit on constitutional grounds against EO 13768. In April 2017, a federal


\textsuperscript{200} Civil Rights Litigation Clearinghouse, University of Michigan Law School, \url{https://www.clearinghouse.net/results.php?searchSpecialCollection=44}; see spreadsheet.

\textsuperscript{201} Van Le, “Immigration 101: What is a Sanctuary City?” \textit{America’s Voice}, April 25, 2017, \url{https://americasvoice.org/blog/what-is-a-sanctuary-city/}.
court issued a nationwide preliminary injunction halting enforcement of the executive order.\textsuperscript{202} In November, the executive order was declared unconstitutional by a district court judge, who issued a nationwide permanent injunction against it.\textsuperscript{203}

In July 2017, US Attorney General Jeff Sessions threatened to withhold federal funding from four sanctuary cities: Baltimore, Albuquerque, Stockton, and San Bernardino, and announced new, more restrictive rules for applying for federal grants that have historically aided with policing.\textsuperscript{204} Several state and local officials stated that they will file suit against the Trump administration if it withholds funds. Mayor Rahm Emanuel of Chicago said: “Chicago will not be blackmailed into changing our values, and we are and will remain a welcoming city.”\textsuperscript{205} However, at the state level, 33 state legislatures are considering legislation that would ban sanctuary policies, while only 15 states and the District of Columbia have introduced legislation supporting it.\textsuperscript{206} Texas passed a law in May forbidding local governments from withholding immigration information with federal officials.\textsuperscript{207} The Florida\textsuperscript{208} and Wisconsin\textsuperscript{209} legislatures debated similar bills earlier this year. This state action may leave sanctuary cities in a difficult position. Under the US Constitution, states are sovereign entities, possessing constitutionally protected authorities not subject to federal approval. However, city and county governments in the US do not enjoy federal sovereignty, and have authority only to the degree that it is granted by state governments.

Some state and local governments have resisted efforts by the Trump administration to undercut the statutory and treaty responsibility of the federal government to protect the


\textsuperscript{203} Ibid.


environment, opposing US withdrawal from the Paris climate accords. On June 1, 2017, President Trump withdrew the United States from the Paris Climate Accords. That evening, the governors of Washington, New York, and California announced that they were founding the US Climate Alliance, a group of states committed to upholding the Paris Agreement. Eventually fifteen states and Puerto Rico joined the coalition. 389 cities and eleven states eventually pledged to uphold the Paris accords.

Map: cities and states that have pledged to uphold the Paris accords. Source: https://www.citylab.com/equity/2017/12/the-year-in-city-resistance/549290/

In September, at the urging of Attorney General Sessions, President Trump announced the end of the Deferred Action for Childhood Arrivals (DACA) program, which allowed undocumented immigrants who had been brought to the US as young children to remain in the country. Fifteen states and the District of Columbia have since brought

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suit against the administration, claiming the action was motivated by racial bias. A US district court in January 2018 found that "These allegations raise a plausible inference that racial animus towards Mexicans and Latinos was a motivating factor in the decision to end DACA." The court overturned the administration’s curtailment of DACA for existing beneficiaries, but did not overturn the ban on new DACA applicants.

In context, state and local pushback has been significant, but limited in its extent. Republicans currently control 67 of 98 state legislative chambers. 33 out of 50 governors are Republicans. Most Republican state and city governments have not substantively joined efforts to challenge the anti-pluralist actions of the Trump administration.

By exercising the sovereignty inherent in federalism, state governments have supported democratic pluralism in the US. But states have also undermined pluralism by allowing the practice of legislative gerrymandering. Gerrymandering involves the majority party in a legislature redrawing the boundaries of electoral districts in such a way that makes it more difficult for the opposition party to win seats in those districts in the next election. Gerrymandering is a root cause of the polarization in American politics today, compromising democracy at both the state and national levels.

The United States is alone among developed democracies in allowing partisan elected officials to determine the redistricting process, which is done every ten years following a national census. In 36 of the 50 US states, redistricting is controlled by the state legislature. Both Republican and Democratic-controlled state legislatures have engaged in partisan gerrymandering. Recent gerrymandering has been largely

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Republican-led due to the “Obama backlash” wave of Republican electoral victories in state legislatures in the 2010 mid-term elections, in a key census year,\(^\text{220}\) when Republican control of state legislative chambers increased from 36 chambers to 57, out of a total of 98 (Nebraska has a unicameral, bipartisan chamber).\(^\text{221}\) These Republican state legislatures went on to gerrymander their states based on 2010 census data, which contributed to outsized GOP representation in the US House in the 2012 elections.

Despite the prevalence of gerrymandering, four western states (California, Idaho, Arizona, and Washington) have set up independent, non-partisan commissions to take charge of redistricting. In California, where the independent commission was created thought a ballot initiative, there is contention over the fairness\(^\text{222}\) and effectiveness\(^\text{223}\) of the commission’s redistricting efforts, but California’s districts are much more efficiently drawn than in states such as North Carolina, where gerrymandering has helped produce multiple extra House seats for one party.

Constitutional challenges to gerrymandering are now pending in federal and state courts, and a ruling by the Supreme Court is expected in 2018. On Jan 9th, 2018, a panel of federal judges found that district maps in North Carolina violated citizens’ constitutional rights because the Republican-controlled legislature had drawn the maps for political advantage.\(^\text{224}\) Other challenges have been adjudicated in Wisconsin, Maryland and Pennsylvania. The Supreme Court is considering two cases involving constitutional challenges to gerrymandering. In one case, the challenge argues that the electoral boundaries in Wisconsin violate the constitutional right to vote by establishing legislative districts heavily biased in favor of Republicans. In the second case, the challenge contends that Democratic lawmakers in Maryland revised the boundaries of a legislative district with the intent of undermining Republicans’ electoral chances in that district.\(^\text{225}\)


Liberal democracies rely on elected officials and their political appointees to carry out the will of the people. However, many areas of government require technical expertise that can only be provided by long-serving career professionals, who supply expert advice and counsel to elected and appointed officials. In Max Weber’s ideal, the “official in the
modern state is not considered the personal servant of a ruler.” Rather, civil servants provide professionalism, autonomy, and stability in the face of changing elected governments. An autonomous and professionalized bureaucracy is essential to good governance.

President Trump has undermined the efficient functioning of the federal civil service by the appointment of officials who have intentionally crippled the agencies they manage, by the failure to fill senior agency positions, by publicly casting aspersions on federal agencies (especially the FBI, CIA and EPA), and by systematically ignoring the advice and expertise of career civil servants. In his January 2018 State of the Union Address, the President called on Congress “to empower every cabinet secretary with the authority to remove federal employees who undermine the public trust or fail the American people.”

At the State Department, Secretary of State Rex Tillerson has implemented a hiring freeze, and has forced the resignation of many high-level career diplomats. In response, Democrats and Republicans in Congress sent letters to President Trump protesting that Tillerson’s purge at State was undermining US diplomacy. However, by the end of 2017, 60 percent of senior positions at the department remained vacant, along with dozens of important diplomatic posts abroad, including ambassadorships to key US allies like South Korea, Australia, Saudi Arabia, and Jordan. Secretary Tillerson has filled the department’s Policy Planning Staff with appointees who have no previous State Department experience, and has come to rely principally on that staff, rather than its career civil servants.

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228 State of the Union Address, January 29, 2018.
To head the Environmental Protection Agency, President Trump appointed Scott Pruitt, a climate change skeptic, and longtime critic of the agency. Pruitt previously served as State Attorney General for Oklahoma, in which role he brought 14 lawsuits challenging the EPA’s authority to regulate mercury, smog, carbon emissions, and other forms of pollution in the state.\(^{233}\) Since taking office, Pruitt has presided over the largest rollback of EPA regulatory activity in the agency’s 47-year history, rescinding, curtailing, or postponing over 30 environmental regulations governing matters like greenhouse gas emissions, chemical spills, and pesticides.\(^{234}\) Pruitt will lead the effort to map the United States’ legal actions constituting its withdrawal from the Paris Climate Accords, a task that would typically fall to a State Department legal team.\(^{235}\) According to interviews with current and former senior staff at the EPA, Pruitt is making these changes without consulting the agency’s career civil servants, scientists, and lawyers, but rather with the advice and input of industry representatives and members of the Republican Attorneys General Association (which he formerly chaired).\(^{236}\) Pruitt’s calendar (obtained via FOIA request) shows that between February and December 2017, he has had limited contact with EPA’s regular staff (52 meetings), but met much more frequently with industry representatives and lobbyists (218 meetings).\(^{237}\) As of December, 2017, Pruitt had visited 30 states, but had not visited a single EPA regional office.\(^{238}\)

Civil servants within the EPA who have voiced opposition to Pruitt’s policies have had their email monitored.\(^{239}\) The agency has hired a company to provide “media monitoring” services, adding to what EPA employees have called an attempt to stifle critical voices within the agency.\(^{240}\) The company, Definers Public Affairs, stated that the EPA had hired it to investigate agency staff who were critical of the Trump administration, including by filing Freedom of Information Act (FOIA) requests for the


\(^{235}\) Ibid.

\(^{236}\) Ibid.

\(^{237}\) Ibid.


\(^{240}\) Ibid.
emails of EPA staff. The EPA has curtailed freedom of information by suppressing scientific reporting as well as restricting access to government research and scientific data on climate change. The EPA Office of Public Affairs banned three EPA scientists from speaking at an October 2017 conference on their research about climate change. The agency removed documents from its website related to climate change, including resources tailored for students, and for state, local, and tribal governments, hampering the ability of citizens to provide public comment on the Trump administration’s proposal to repeal the Clean Power Plan, which established state-by-state targets for carbon emissions reductions in the electricity sector.

The President has publicly attacked the credibility of the Justice Department, the FBI, and the CIA. During the Russia investigation, he publicly attacked DOJ officials, tweeting: “Why isn’t Attorney General Jeff Sessions “looking into Crooked Hillary’s crimes & Russia relations?” In May of 2017, he fired his FBI director, James Comey, whom he had accused of “grandstanding and politicizing” the investigation, which he called a “witch hunt.” The President asked the Attorney General why he didn’t “replace Acting FBI Director Andrew McCabe, a Comey friend who was in charge of Clinton investigation?” McCabe was subsequently forced to retire early. The President publicly rejected CIA assessments that Russia meddled in the 2016 election. Trump administration officials have promoted the idea that the federal civil service constitutes a “deep state,” a supposed cabal bent on undermining American democracy.

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How have federal civil servants responded?

Civil servants have pushed back against the administration in four ways. First, they have done so by disclosing information. Second, some government employees have publicly opposed Trump’s policies by posting their opposition on social media. Third, some high-level government officials have openly opposed some of the Trump administration’s policies. Fourth, some high-level officials have resigned in protest.

Transitions between parties in office historically create some tension and turnover in the federal civil service, but the Trump transition has been unusual. Chris Lu, Deputy Secretary of Labor under Obama, stated: “I don’t recall any kind of dissent like this happening either in a Democratic or Republican administration — this is clearly unusual.”

Federal civil servants have disclosed information in an effort to draw attention to abuses of power or attacks on civil service professionalism by the Trump administration.

A memo disclosed to Bloomberg on December 8, 2016 revealed that the Trump transition team had sent a series of questions to the Department of Energy, including requesting the names and professional organization memberships of employees who had worked on the Obama-era “Social Cost of Carbon” initiative. The Energy Department ultimately refused to provide the data requested.

On January 24, 2017, officials inside the administration leaked to the New York Times a draft executive order entitled “Detention and Interrogation of Enemy Combatants” that had been circulated for review on the National Security Council. It proposed reopening CIA “black sites,” locations in Eastern Europe, Africa, and Asia that had been

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set up following the 9/11 attacks and used for torture. The draft EO would formally revoke Executive Order 13491 (“Ensuring Lawful Interrogations”) which Obama had issued in 2009 to end the torture program. After the draft executive order was leaked, members of the public and Democrats and Republicans in Congress expressed outrage.\textsuperscript{253} The following day, White House Press Secretary Spicer claimed that the draft EO was “not a White House document” and that he had “no idea where it came from.” However, three White House officials anonymously told reporters that Spicer’s claim was false; the document had been circulated among the White House staff along with many other draft EOs during the first month of the Trump administration.\textsuperscript{254} Secretary of Defense Mattis and CIA Director Pompeo disavowed knowledge of the draft EO. At a press conference on January 27th, Trump stated that, while he “absolutely” believes torture and waterboarding are effective,\textsuperscript{255} Secretary Mattis, who opposes these techniques, “will override because I’m giving him that power.”\textsuperscript{256}

On February 9, 2017, disclosures to the Washington Post revealed that National Security Advisor Michael Flynn had lied about discussing sanctions with the Russian ambassador just after Trump’s election. Flynn subsequently resigned. The significance of the disclosure was noted by the Columbia Journalism Review: “The acting attorney general told the White House weeks ago that transcripts showed Flynn likely misled administration officials. It wasn’t until the public found out he lied—based on a torrent of leaks from inside the administration in the past week—that Flynn was forced out.”\textsuperscript{257}

On May 18, 2017, former FBI director James Comey disclosed his own detailed memos recording the contents of phone calls and private meetings with President Trump.\textsuperscript{258} The memos recorded that Trump had asked Comey to tell the press that the FBI was not investigating the president and detailed a meeting in which Trump pushed Comey to drop the investigation into Michael Flynn. This disclosure led to the FBI appointment of Special Counsel Robert Mueller.


\textsuperscript{255} Ibid.


Government employees at executive branch agencies have publicly opposed some of the Trump administration’s policies using social media. In January 2017, government scientists used Twitter to protest the Trump administration’s attempts to muzzle climate change research. After the official Twitter account of Badlands National Park in South Dakota deleted climate-related tweets by a former employee, government employees set up a series of “rogue” and “alt” Twitter accounts such as @alt_CDC, @RogueNOAA, @AltNatParkSer and @ungaggedEPA. These accounts rapidly gained hundreds of thousands of followers.259

Groups of government and independent scientists and programmers such as DataRefuge and the Environmental Data and Governance Initiative (EDGI)260 initiated a “data rescue” effort, downloading government climate data to private backup servers in order to preserve it.261

Some high-level federal civil servants have publicly opposed Trump Administration policy. In January 2017, after the release of the travel ban, Acting Attorney General Sally Yates ordered Justice Department lawyers not to make legal arguments defending the order.262 Yates was fired. 900 State Department diplomats also signed a memo protesting the executive order.263 White House press secretary Spicer said of the diplomats who signed the memo that they “either get with the program or they can go.”264

Some high-level federal civil servants have resigned, many in protest. Following are examples:

- EPA’s director of science and technology, Elizabeth Southerland, stated publicly in resigning that EPA Director Scott Pruitt and Trump were

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“abandoning the polluter pays principle that underlies all environmental statutes and regulations.”

- Mustafa Ali, an official at the EPA’s Environmental Justice office, which is responsible for protecting minority and poor populations from pollution such as that threatening Flint, Michigan, resigned over the stripping of nearly all funding for his office.

- Several members of a White House cybersecurity council resigned over Trump’s response to the incidents in Charlottesville, Virginia and the withdrawal from the Paris accords.

- Nearly the entire senior level of management at the State Department resigned in January 2017, including Patrick Kennedy, Undersecretary of State for Management, Joyce Barr, Assistant Secretary of State for Administration, Michele Bond, Assistant Secretary of State for Consular Affairs, and Gentry Smith, Directory of the Office of Foreign Missions. All were career Foreign Service officers who served under both Republicans and Democrats. David Wade, State Department Chief of Staff during the Obama Administration, stated: “It’s the single biggest simultaneous departure of institutional memory that anyone can remember.”

- Rumana Ahmed, a Muslim member of the National Security Council, resigned over the travel ban, stating: “the diverse White House I had worked in became a monochromatic and male bastion...I knew I could no longer stay and work for an administration that saw me and people like me not as fellow citizens, but as a threat.”

- The Acting Head of the Drug Enforcement Agency, Chuck Rosenberg, resigned after issuing a memo stating that Trump’s comments about the treatment of suspects “condoned police misconduct.” (Trump said: “When you see these thugs being thrown into the back of a paddy wagon -- you just see them thrown in, rough...I said, ‘Please don't be too nice.’”)
Despite these protests and resignations, Trump administration cabinet members and agency heads have remained silent in the face of presidential assaults on the integrity of their departments. Former George W. Bush Justice Department official Jack Goldsmith writes, “not a single cabinet official or agency head has stood up to the president’s attacks on the integrity of his or her department, or of federal employees more generally.”

CONGRESS

Congress has a central constitutional role to play as the first branch of the federal government with powers coequal and in some areas superior to the presidency (e.g. appropriations).

Two related trends have undermined the Congress’s effectiveness in fulfilling its constitutional role: increased political polarization and the erosion of norms and principles of bipartisanship in Congress. These trends have been exacerbated during the first year of the Trump presidency by one-party control of both houses of Congress and by the President’s contribution to increased polarization.

The Congressional majority party is using anti-pluralist strategies that avoid the need for bipartisan compromise to advance legislation and approve executive appointments. When Democrats attempted to block President Trump’s Supreme Court Justice nominee Neil Gorsuch in April 2017, Senate Republicans used their majority to change the rules for approving Supreme Court nominations, lowering the threshold from 60 votes to a simple majority. When the Democrats were in the majority in 2013, they made a similar rule change for approving lower court judges and other executive office appointments. These majority-party practices weakened the ability of Congress to act as an effective check on executive power. Following the example of the Democrats in enacting the Affordable Care Act in 2010 without Republican support, Republicans in Congress used legislative procedures to push through a tax bill in 2017 without

272 A study by Brookings scholar Sarah Binder found legislative gridlock had increased between 1947-2012; in 2014, 75% of the salient issues on the legislative agenda were subject to gridlock. Sarah A. Binder, “Polarized We Govern?,” Brookings (blog), May 27, 2014, https://www.brookings.edu/research/polarized-we-govern/.
bipartisan support. The House and Senate passed versions of their tax bills within short timelines, approximately two weeks, in a non-transparent process. Democratic Senators complained that they only received copies of the bill and amendments within hours of voting on them, and from lobbyists rather than the legislative sponsors.274

Political polarization has prevented Congress from acting as a check on potential abuses of presidential power. Congress is conducting its own investigations into Russian meddling into the 2016 election, in the House and Senate Intelligence Committees and the Senate Judiciary Committee. By the end of 2017, however, two of the three investigations were largely stymied. The Senate Judiciary Committee investigation has been stalled by a debate over the scope of its inquiry, and the House Intelligence Committee investigation has been hampered by partisan fighting between Republican and Democratic members.275

Congress has become more polarized, more partisan, and less effective. Brookings Institution political scientist Sarah Binder notes that “as the parties have polarized, the incentives to make overtures to the other side and to build broad coalitions of the sort normally needed to pass major legislation have waned.”276 Binder finds that 75% of salient political issues currently face gridlock in Congress, up from 30% during the post-WWII period. Even broadly popular policy proposals have statistically limited chances of being enacted into law: a policy which enjoys 80% popularity has a less than 50% chance of being adopted.277 President Trump has exacerbated Congressional polarization by making statements disparaging Democratic Members of Congress, accusing them of being “un-American” and “treasonous” for not applauding during his State of the Union address in February 2018.278

Congressional gridlock has opened the way for the President to expand the practice of ruling by executive order. This is not a new trend. President Obama also used executive orders to push forward his agenda when blocked by Republican opposition in Congress. The Republican Congress has used the Congressional Review Act to overturn a number of environmental regulations. The act establishes expedited procedures by which Congress can overturn new regulations with a joint resolution of disapproval passed by a simple majority within the first 60 legislative days after the regulations are issued. During the first year of the Trump administration Congress used the CRA to nullify 14 rules, the most the act has ever been used.

To what extent has Congress pushed back against violations of democratic practices or principles?

In some limited but significant areas, Congress or individual members have upheld norms of bipartisanship and have demonstrated institutional independence. For example:

- There is bipartisan opposition in the Senate to ending the practice of filibustering, a legislative tool that has a role in supporting pluralism and preventing majoritarian rule, despite Trump’s calls for the Senate to do so.
- The Congressional Budget Office (CBO) demonstrated its independence with reports on healthcare and tax bills that contradicted the claims of the Trump administration (a CBO report on the proposed repeal of the Affordable Care Act in July found that the bill would increase the number of uninsured Americans by 15 million in the next year).

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• The Senate Foreign Relations Committee held a hearing in November 2017 on the president’s authority to order the use of nuclear weapons, the first hearing on this issue since 1976. Senators cited their concern about a president’s exclusive power to authorize the use of nuclear weapons in light of heightened tensions with North Korea, concerns about President Trump’s handling of the North Korea relationship, and the President’s volatility and “quixotic” decision-making process.\textsuperscript{283}

• In late July 2017, Congress passed legislation imposing sanctions on Russia with a veto-proof, bipartisan supermajority, despite opposition from the Trump administration. However, Congress has yet to do anything in response after the Trump administration missed October 1, 2017 and January 29, 2018 deadlines to implement the sanctions.\textsuperscript{284}

• Members of Congress from both parties have expressed support for the Department of Justice Special Counsel’s investigation. Senators Thom Tillis (R-NC) and Christopher A. Coons (D-DE) proposed legislation intended to “bolster the independence of the Justice Department” by requiring judicial review of any attempt by the president to fire Muller.\textsuperscript{285} Republican senators supported Attorney General Jeff Sessions after Trump publicly criticized him for recusing himself from the Russia probe, and have also been supportive of Mueller.\textsuperscript{286}

In addition, Individual Republican legislators have publicly criticized President Trump for his lack of presidential decorum and violation of norms. Senator Bob Corker (R-TN) in October called Trump reckless, saying he treats his office like “a reality show” and

\begin{footnotesize}
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  \item Goldsmith, “Will Donald Trump Destroy the Presidency?”
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that the White House had become an "adult day care center". Senator John McCain (R-AZ) alluded to the danger of Trump’s undermining American ideals and global leadership in a speech in October 2017, “We will not thrive in a world where our leadership and ideals are absent.” Senator Jeff Flake (R-AZ) announced in October that he would not seek reelection in 2018, saying that he would not be “complicit or silent” in the face of “regular and casual undermining of our democratic norms and ideals”, that the “present coarseness of our national dialogue” is a “tone set at the top.”

Some Republican senators publicly objected to the initial version of the executive order banning immigration travel from Muslim countries (EO 13769). Senators John McCain and Lindsey Graham released the following statement: “This executive order sends a signal, intended or not, that America does not want Muslims coming into our country. That is why we fear this executive order may do more to help terrorist recruitment than improve our security.” Other Republicans who criticized the executive order included Bob Corker, Cory Gardner, Lamar Alexander, Rob Portman, Susan Collins, Orrin Hatch, and Ben Sasse, although some Republican criticism centered on the implementation rather than the content of the executive order.

Despite some significant instances of institutional integrity in Congress and principled opposition by individual legislators to President Trump’s violation of presidential norms, Congress has largely failed to act as a strong source of resistance against attacks on democratic institutions and norms. Increasing polarization and the breakdown of norms of bipartisanism have prevented Congress from effectively carrying out its constitutional role to legislate and to act as a check on potential overreaches of executive power. As a result of these trends, public attitudes reflect increasing lack of trust and support for Congress. Congress ranks lowest in recent public opinion polls on the level of public trust in government institutions. A 2017 Pew Survey found that the level of public trust in government institutions was low overall and part of a declining trend.

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However, Americans had a higher level of trust in the judicial branch than the executive or legislative branch – respondent’s trust in the Supreme Court (49%) was the highest level in the past 5 years – and only 13% of Americans approved of Congress.\textsuperscript{292} Harvard University’s Spring 2017 survey of undergraduates’ attitudes towards politics and public service also found low trust in political institutions, particularly Congress.\textsuperscript{293}

\begin{figure}
\centering
\includegraphics[width=\textwidth]{trust_graph.png}
\caption{How often do you trust each to do the right thing? (% who indicate “all” or “most of the time”)}
\end{figure}

Source: Harvard Kennedy School Institute of Politics


CONCLUSION

What lessons can be drawn from the first year of the Trump administration about the potential for resilience of institutions and elements of liberal democracy in the US?

Long before the election of Donald Trump, liberal democratic institutions were in trouble and vulnerable to attack. For more than a decade there has been growing democratic discontent and a steady deterioration of public support for the US system of democratic governance.

Political polarization and differing partisan perceptions of government performance are the main contributors to this trend. The electoral process has been weakened by the influence of unregulated campaign spending and an increase in state-level voting restrictions and legislative gerrymandering. The Congress has been in a prolonged period of polarization and gridlock. The institutions and elements of liberal democracy have come under attack from anti-establishment populist politics. The result has been a weakening of public belief in the ability of the courts, the Congress and the Constitution to be effective in checking and resisting abuses of power by the executive, and a “drop in the percentage of people who agree that the US fully or mostly lives up to democratic standards.”

President Trump has exacerbated and accelerated the degradation of liberal democratic institutions. By repeatedly lying and manipulating factual reality, he has promoted the view that there is no objective truth. By attacking, denigrating and insulting opponents, he has degraded public discussion of issues and politicized the public perception of institutions that have normally been perceived as nonpartisan guardrails of democracy. The federal courts, the media, law enforcement agencies and the federal civil service have all been attacked by the President as partisan when they have resisted his agenda.

The President’s attack on the FBI in connection with its ongoing Russia investigation into potential collusion and obstruction of justice is a case study of how Trump has sought to benefit from politicizing nonpartisan institutions and thereby undermining democratic norms and the rule of law. An academic commentator observes that “polarization by party identity is so powerful at the moment that most voters see the

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world through thick red and blue lenses.”\textsuperscript{297} In the case of the FBI, the President’s attacks have been aimed at altering the public’s perception of an agency previously held in high regard as professional and nonpartisan.\textsuperscript{298}

Notwithstanding these presidential attacks, some of the institutions studied in this report have demonstrated varying degrees of potential for resilience. Those that have been most resistant, like civil society, are strong and innately capable of defense, while others, such as the electoral process, have been weakened by partisan manipulation and are unlikely to prove resilient unless reformed. The greatest resilience has been demonstrated by the strongest institutions, civil society and state and local government, and the greatest vulnerability by the weakest, the electoral process and norms of presidential conduct. Several institutions vulnerable to presidential attack, such as the media, have shown significant levels of resistance, while others with inherent institutional strengths, such as the Congress, have exhibited little to none.

What makes some liberal democratic institutions strong and others weak? The history of American political culture has shaped a strong and diverse civil society with a tradition of political activism often in opposition to government. Alexis de Tocqueville pointed out two centuries ago that Americans make up for their skepticism about government with their commitment to civic engagement. Political culture in the US has created a system of state and local government which, under constitutional federalism, shares governing responsibility with the federal government and serves to check and balance federal power, sometimes constructively, as over the past year, and sometimes destructively, as during the post-reconstruction period and the civil rights revolution.

By the same token, American political culture has created a weak electoral process, plagued by historical anomalies such as the Electoral College, multiple state and local jurisdictions, unregulated campaign funding, legislative gerrymandering and state restrictions on voting. Presidential norms are weak because they are not written into law and are no match for a president who overrides them. The Congress has been badly weakened by political polarization, despite its express constitutional powers.

\textsuperscript{297} Alex Theodoris, University of California, quoted in Edsall, supra n 297.
\textsuperscript{298} See 1949 Gallup Poll, reflecting 94 per cent approval of FBI, and January 2018 NBC/Wall Street Journal poll reflecting drop in Republican confidence in FBI from 46 to 31 per cent and rise in Democratic confidence from 34 to 53 per cent over previous three-year period.
The most surprising resistance to presidential attack during the first year of the Trump presidency has come from four institutions with significant political vulnerabilities that make them ready targets for an anti-democratic president – the media, the federal judiciary, law enforcement and the federal civil service.

The mainstream media in the US have the protection of the First Amendment, but little else to defend them in a digital world in which facts and truth are manipulated and undermined, propaganda is everywhere and public support for accurate reporting is difficult to sustain. Nevertheless, the media have stood up to the President’s “fake news” attacks, expanding investigative reporting, boosting subscriptions and even reflecting a slight increase in public trust.

The federal judiciary is vulnerable because the President is reshaping the courts by exercising his power to appoint new judges, some of whom are unqualified or ideologically extreme and could become rubber stamps for anti-pluralist policies. Despite this political vulnerability, parts of the federal judiciary have been resistant over the past year to the administration’s anti-pluralist agenda on immigration, minority rights and partisan gerrymandering. Similar resistance to the President’s attack on the rule of law in seeking to end or control the Special Counsel’s investigation has come from within the Justice Department and the FBI, despite their political vulnerability as a department of the executive branch and an agency whose head can be fired at will by the President, respectively. And the federal civil service—whose staff are vulnerable to politically-motivated firings—has generally maintained its professionalism and resisted the administration’s effort to denigrate its work.

It is too early to tell whether resistance to President Trump’s style and substance of governing will continue to be demonstrated by the institutions of liberal democracy. Flaws in these institutions predating the Trump presidency have been exacerbated by Trump’s attacks, limiting their capacity for resilience. Nevertheless, US public opinion reflects antipathy toward concentrations of authority in the presidency, and this could provide a basis for continuing resistance. An opening exists for the mobilization of public support in defense of constitutional norms and the rule of law in the 2018 congressional elections.

The bottom line is that several institutions and elements of liberal democracy in the US have demonstrated a potential for resilience during Trump’s first year. When compared


How Resilient is Liberal Democracy in the US?
to illiberal democracies where neo-authoritarian leaders – such as Orban in Hungary, Kaczyński in Poland, and Erdoğan in Turkey – have recently undermined the independence and functioning of pluralist institutions, the situation in the US is better. Whether this situation will continue depends in the short term on the Trump administration’s future direction and the outcome of the 2018 elections. The deepening polarization of American society is both the cause and the effect of democratic discontent, and Donald Trump has both stimulated and benefited from increased polarization during the first year of his presidency. Whether liberal democracy in the US will prove resilient in the long run will depend on finding ways to bridge differences and build coalitions; the emergence of new leadership to defend democratic institutions; and reform of the Congress, the electoral process and the many other weak elements of American democracy.