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**What Could Stop Him?:  
Our Constitution includes multiple guardrails  
against Trump-like presidents. But those checks and balances  
only work when citizens resist.**

**By David Cole**

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Almost like the cycles of grief, Donald Trump's reelection has provoked shock, outrage, despondency, exhaustion, and despair. And for good reason. Trump's first term was a four-year disaster, culminating in his effort to foment a riot to overturn the results of a free and fair election. This time around, there are fears that he will, among other things, prosecute his enemies, conduct mass deportations, further restrict access to abortion, censor school curricula, remove civil service protections, impose high tariffs, and strip birthright citizenship from children of immigrants. He threatened as much repeatedly during the campaign, and his first term in office suggests that he does not make idle threats.

This time, moreover, he won not just the skewed electoral college but the popular vote (albeit by a very small margin). He will have Republican majorities in both houses of Congress and a 6–3 majority on the Supreme Court, including three of his own appointees. And his cabinet and staff nominees to date—including many people whose only qualification for office is their blind loyalty and extremist views—suggest that he considers himself for all practical purposes unchecked. No wonder many are dejected. But unlike in the stages of grief, acceptance cannot be the end goal here. Nor need it be. If citizens opt for resistance over resignation, we can check Trump's abuses. The framers of our Constitution, justly suspicious of overweening federal power, inserted multiple guardrails against Trump-like presidents.

Just as no one should underestimate the threats Trump poses, so we ought not discount the headwinds he is likely to face if people oppose his initiatives. Our worst enemy is not Trump himself, but fatalism about our ability to stop him. The Constitution's checks and balances are not self-enforcing; they work only where citizens and civil society institutions fight back. Trump's first term showed that when we do, we can limit the damage and turn the tide.

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Start with the separation of powers. Even with Republicans in control of both houses of Congress, enacting legislation is hard work. Unless the Senate eliminates the maneuver,

legislation requires sixty votes in the Senate to overcome a filibuster, which any single senator can invoke to prevent a bill from reaching the floor for a vote. The Republicans will have at most fifty-three seats, and the margin in the House will also be close. As a result, the majority in both houses will be constrained by its least conservative members—just as the Democrats were repeatedly frustrated by their least liberal member, West Virginia Senator Joe Manchin.

The Republican Party controlled both houses in 2017 and 2018, but Trump was unable to enact many laws he sought. He tried repeatedly to repeal Obamacare, for example, and failed every time. The only significant laws his administration enacted were a tax cut for the wealthy and, with bipartisan support, the First Step Act, which reduced overly harsh federal criminal sentences. By the 2018 midterms the country was fed up and Democrats gained forty-one seats in the House, taking control. Trump's threat to seek recess appointments for his many unqualified nominees will be an initial test of whether the legislature will stand up to the president, but it won't be the last.

Then there are the courts. It has become common on the left to claim that they will fail us. After all, Trump appointed almost 28 percent of the country's active federal judges by the time he left office, including, most significantly, three Supreme Court justices. The Supreme Court has since 2020 eliminated the right to abortion, ended affirmative action, rewritten the Second Amendment, and weakened the administrative state. These decisions have caused widespread harm and undermined the government's power to protect us from climate change, corporate greed, and gun violence.

Yet the courts, including the Supreme Court, also regularly rebuffed Trump in his first term—and they are likely to do so again. For one thing, almost two thirds of the country's active federal judges today are Obama and Biden appointees. Even if judges voted along party lines, Trump would face substantial opposition. And they don't, at least not always—Trump judges have often voted against Trump initiatives. For another, some of the Supreme Court's recent decisions, including eliminating deference to executive agencies on statutory interpretation and striking down major executive initiatives not clearly authorized by statute, will make it easier for advocacy groups and others to challenge Trump's executive actions. The effect of these decisions has been to reduce executive power—and that will be true for Republicans as well as Democrats. Any significant regulatory change, moreover, such as a new environmental rule, requires an extensive "notice and comment" process, which itself can take years. Courts then review such changes to ensure that they are grounded in fact and reason, not ideology. It was because of such a review that the Supreme Court blocked Trump's effort to place a citizenship question on the 2020 Census. A federal court in New York invoked the same authority to require Trump to include immigrants in the census count. Similar limits are likely to slow down—and could preclude—efforts to backtrack on the FDA's approval of vaccines, or mifepristone, the drug used for medication abortion.

Invoking administrative law principles and the Constitution, courts during Trump's first term invalidated countless other executive measures, including the first and second versions of the Muslim ban; his policy of separating migrant children from their parents; his denial of legal abortions to detained immigrant teens; and his attempt to terminate legal protections for DREAMERS, immigrants who came here without documents as minors. Courts also issued injunctions blocking him from restricting asylum, and from diverting funds to build the border wall. Trump's Supreme Court appointees rejected their own benefactor's argument that he was immune from subpoenas for his tax records.

The courts are, of course, no panacea, as the Supreme Court reminded us last June, when it granted the president unprecedented immunity from criminal prosecution for official acts—a ruling with all the more disturbing implications now that Trump has won reelection. (That ruling will block him, however, from prosecuting Biden.) During Trump's first term, the Court also upheld the third, significantly less expansive version of his Muslim ban. And it used its “shadow docket” to stay some of the lower court injunctions regarding his asylum and border policies, meaning that he was able to do substantial damage during the appeals process. Even where courts ultimately rule against the president, a lot of pain can be inflicted in the time it takes them to reach a final judicial decision. But we cannot rule out the courts: their core function is to hold the other branches accountable.

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Still another constitutional restraint on the president's power is federalism. States in the US have substantial authority over many of the policies and practices that affect our liberties. The federal government has relatively limited power, for instance, over the criminal justice system; only 13 percent of the country's incarcerated people are held in federal prisons for federal crimes. States and cities can and have declined to cooperate with the federal government on immigration enforcement. Public education is a matter of state and local control, limiting Trump's ability to impose an “anti-woke” agenda on the nation's schools. Attorney generals from blue states successfully sued to halt many of Trump's programs in his first term, and they are readying to do so again. Just as attorney generals in red states were thorns in Biden's side, those in blue states have substantial tools to oppose illegal federal initiatives.

Specific constitutional rights can also constrain the president. Consider Trump's promise to undertake mass deportations. The constitutional guarantee of due process requires fair hearings, appeals, and judicial review before an immigrant can be removed from the country. Those proceedings ensure that immigrants have an opportunity to defend themselves. Trump has threatened to invoke the Alien Enemies Act, but that eighteenth-century law is a dead letter, as it only authorizes the detention of nationals with whom

we are in a declared war—the last of which was World War II. He has also threatened to use the military, but the Posse Comitatus Act imposes significant constraints on doing so internally. Trump is likely to try to shortcut ordinary deportation hearings and detain immigrants to pressure them to give up their appeals—but those actions, too, can be challenged in court as violations of due process.

Trump will also face practical obstacles to his deportation initiative. As things stand, there are not enough immigration judges to preside over the deportation cases already pending. Nor are there empty beds in detention centers to enable mass detention. Trump would have to vastly expand the immigration judicial apparatus, a measure that he himself opposed during his first term. Even if he changes his mind, it would take time to put a larger system in place.

Other threats will be even harder for Trump to carry out. Birthright citizenship is guaranteed by the Constitution; the Supreme Court has held that it cannot be taken from anyone against his will—even for the most heinous crimes. It can't be eliminated without amending the Constitution, which requires a super-majority that is plainly out of reach. As for retaliatory prosecutions against “enemies,” Trump will have to override deep-rooted professional norms to get such cases filed in the first place. If he survives confirmation, Trump's nominee for attorney general, Matt Gaetz, might well try, but he'd face major opposition within the department. And the First Amendment prohibits prosecuting anyone in retaliation for protected speech, ensuring that anyone so targeted has a substantial defense.

Other threats are likely to be politically infeasible. Trump has already backed off from a nationwide abortion ban, presumably because he knows it would be political suicide for the Republican Party. Any effort to revoke civil service protections broadly will also prompt widespread, and likely bipartisan, resistance from the executive and legislative branches. Those rules protect hundreds of thousands of federal employees, Republican and Democrat alike. If Trump removed them, he would be rendering Republican civil servants vulnerable to Democratic administrations in the future. Similarly, if broad-scale tariffs lead to widespread inflation, as many economists predict, Trump will likely have to rescind them.

As substantial as these obstacles are, they are not enough to forestall all the damage Trump will almost certainly do. While any effort to change EPA rules will face the administrative law hurdles discussed above, for example, slow-walking enforcement or failing to act in the face of the accelerating climate crisis will be disastrous, and Trump can do precisely that without issuing new rules.

None of the many tools available to rein in President Trump work of their own accord. They depend on engaged, sustained, and strategic opposition by the citizenry and civil society institutions. Members of Congress, executive branch officials, state attorney generals, and judges are all affected by the milieus in which they operate. It is very difficult for people in government to stand up to a president when his actions are widely popular; it's much more feasible when those actions are broadly condemned.

That's why, when autocrats come to power in other countries, they nearly always target civil society. Trump may well try to take a page from their playbook; he openly admires Viktor Orbán and Vladimir Putin. But the United States has a uniquely robust civil society. It includes advocacy institutions like the ACLU, Common Cause, the Sierra Club, Indivisible, Black Lives Matter, the American Medical Association, and unions; newspapers, magazines, and broadcast media; universities and colleges; and religious communities. All of these entities are guided by ethics and norms independent of official power, and can serve as centers for opposition.

This civil society sector is where the ultimate check on governmental abuse lies. Thanks to countless fights over many years led by labor activists, civil rights movements, the press, civil libertarians, and dissidents, today's First Amendment doctrine ensures that we have the rights to criticize the government and report on its abuses, to petition for redress of grievances, to associate with like-minded others, and to assemble in protest of government policies. Activists can employ the tools outlined above by calling on our elected representatives, filing lawsuits, marching in the streets, speaking out in the media, and engaging in administrative law processes. At the same time, their engagement can make the legal checks more effective by reinforcing the fundamental values at stake. If—and only if—we do that, the checks and balances built into our Constitution will serve the function for which they were designed. It is up to us to demand that they do.

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