

The strongman presidency and the two logics of presidential power

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Abstract

The strongman presidency presents an acute threat to democracy. Two logics underpin its emergence, both of which implicate the administrative state. Under the first, presidents have sought to deploy the vast resources of the administrative state in pursuit of power and legacy. This logic is symmetric, shaping the behavior of Republican and Democratic presidents alike. The second logic, however, sets them apart. Because most of the administrative state is the embodiment of progressive values, Democratic presidents have approached presidential power in ways that are largely compatible with its well-being, whereas Republican presidents have laid claim to increasingly extreme powers in order to retrench and sabotage it. Layered on the first, this asymmetric logic is the main driver of the strongman presidency—and, ultimately, a major threat to American democracy.

KEYWORDS

administrative state, democracy, presidential power

INTRODUCTION

Donald Trump exposed the fragility of American democracy. He did it by simply exercising his powers as president and pushing them to the hilt—obstructing justice during the Russia probe, weaponizing the Department of Justice (DOJ), violating the Constitution's emoluments clauses, refusing congressional requests for documents and testimony, declaring sham national emergencies, refusing to accept his 2020 election loss, inciting an insurrection, and in countless other ways engaging in autocratic behavior untethered to the rule of law.

He was not held accountable for any of this. He was impeached twice but then acquitted twice by Republicans in the Senate. He lost his reelection bid, but just barely—74 million people voted for him despite his authoritarian behavior. Had it not been for his abject failure of leadership during the coronavirus pandemic, which killed over 500,000 people on his watch and tanked the economy, he

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might have won the election and ratcheted up his assault on democracy in a second term. And he may still do exactly that, as he marshals his forces for yet another run in 2024.

It's easy to think that Trump's behavior in office was an aberration and that, after he rides off into the sunset, whenever that might be, the nation will be spared the authoritarian threat. But this just isn't so, for two reasons. The first is that the populist rage propelling Trump to the White House will remain a major force in American politics, as will the disruptive socioeconomic forces that undergird it—white nationalism, globalization, technological change, and immigration. Their continuing impacts will induce other presidential candidates to embrace authoritarian aims in much the way Trump did (Howell & Moe, 2020).

The second reason is related but distinct: the sheer power of the presidency has grown so great over the last two hundred years, particularly during the modern era, that presidents now have expansive opportunities to make policy and shape the nation's fate via unchecked unilateral action, whether or not their behavior is consistent with existing law, procedures, or norms.

It might seem that this development isn't an existential problem if presidents themselves are wedded to democracy, respect its guardrails, and embrace what Levitsky and Ziblatt (2018) call the democratic norm of forbearance. But even for presidents with clear democratic commitments, there are strong incentives to push the bounds. The power is there, just waiting to be used. And by using it, they can achieve policy, political, and personal objectives that would otherwise go unmet. This alone can degrade democracy.

Beyond that, though, there is the ominous prospect—indeed, the ominous likelihood—that the office will again be occupied by someone with authoritarian inclinations: someone like Trump who aims to be an American strongman and will use the vast powers of the presidency to wreck democracy. Trump nearly did it. Others—more competent, more experienced—could well succeed.

The nation's framers, James Madison foremost among them, were deeply concerned that a demagogue might gain office and dominate the polity, and they saw to it that their new constitution created a presidency that was highly constrained and weakly powered. How, then, has presidential power expanded to the point that, as legal scholar Peter Shane (2009) starkly frames it, “Madison's nightmare” has become the reality of our times? How could this have happened to the oldest democracy in the world?

TOO MUCH POWER—OR TOO LITTLE?

Scholarship on the presidency is immense, arising from the interdisciplinary contributions of historians, legal scholars, and political scientists and reflecting various approaches and methods. Inevitably, much of this work deals in one way or another with power and how presidents have tried to exercise and expand it—sometimes successfully, usually not—in their efforts to lead the nation, achieve their policy objectives, and make their marks on history.

There is much to be learned here, and the interdisciplinary nature of the work is a big reason for that, shedding light on presidential power from different angles. But there is a downside as well, because scholars often fail to look beyond their own academic siloes to learn from what outsiders are saying and finding. The upshot is the emergence of disjoint themes about presidential power that have never been reconciled but continue to evolve independently—and cause confusion.

The presidency is too powerful

Legal scholars widely agree—based on developments in constitutional and statutory law and how presidents have used, manipulated, and abused the law to their own advantage—that presidential power has vastly increased throughout history, particularly in modern times. This perspective is so well accepted that it is largely taken for granted. Richard Pildes (2012, p. 1381), writing in the *Harvard Law Review*, put it this way: “It is widely recognized that the expansion of presidential power from the start of the twentieth century onward has been among the central features of American political development.”

Legal scholars also frequently agree that this growth of presidential power has exceeded constitutional limits and become dangerous to democracy. Such criticisms are common throughout the legal literature, and increasingly so during recent decades. Three contributions, however, warrant special mention. In 1996, following presidency-boosting developments during the Reagan and Bush 41 years, Martin Flaherty published a much-cited piece in the *Yale Law Journal* asserting that the presidency had become “The Most Dangerous Branch” (the title of the article), and he launched an assault on legal arguments that supported expanded presidential power (Flaherty, 1996). More than a decade later, two important books appeared: Peter Shane’s *Madison’s Nightmare* in 2009 and Bruce Ackerman’s *The Decline and Fall of the American Republic* in 2012. Both pointed to excessive presidential power as the prime threat to American democracy and argued for major reforms.

These books were published well before Donald Trump roiled the nation’s waters and showcased how much damage an autocratic president can do to the public’s trust in government, the norms that underpin our democracy, and commitments to the rule of law. It’s fair to say that, prior to the Trump shock treatment, most Americans—and most academics—were blissfully unaware and untroubled that such things could actually happen in this country. But Shane and Ackerman had the insight and analytics, early in the game, to see the authoritarian threat that lay ahead. And among legal scholars writing on the presidency, they weren’t alone.

What about historians? The Constitution, statutory law, and jurisprudence serve to concentrate the focus of legal scholars, but they are just a small part of the historian’s purview. When assessing a topic like the presidency and its power, historians range much more broadly and embrace greater diversity. Nonetheless, as Zelizer (2012) observes in his perceptive overview of political history as a field, there has for decades been much coherence in how historians view and approach the presidency.

During the first decades after the War, liberal historians—who dominated the field of political history (and still do)—embraced the presidency as the key institution for advancing liberal values and the legacy of the New Deal; they generated a scholarly literature that situated presidents as the central actors in the making of American political history; and they saw presidential power as a force for good that justifiably was growing over time. But by the early 1970s, historians began to question these assessments. The United States was deeply enmeshed in the Vietnam War, which had proven a presidentially contrived disaster filled with abuses of power, and Richard Nixon harnessed the presidency for criminal purposes in seeking to defeat his Democratic and media opponents in the Watergate affair. In light of such developments, historians came to see the dangerous side of presidential power, and they wrote about it.

This altered assessment was articulated most forcefully by Schlesinger (1973), whose book *The Imperial Presidency* became an instant classic. His argument was that, although presidents need to be powerful in order to steer an unwieldy government to meet the needs of its citizens, presidents had gained way too much power in certain realms, especially in crucial matters of war and national security, and reforms were desperately needed to rein them in and restore Congress’s rightful place in the constitutional order.

Congress did enact a spate of reforms. Thereafter, Presidents Gerald Ford and Jimmy Carter were mindful of staying in their lanes. But this brief period of congressional resurgence and presidential restraint didn’t last. With the election of Ronald Reagan in 1980, the expansion of presidential power continued its upward trajectory. As Schlesinger (1986, p. 293) himself put it, “Whatever else may be said about Ronald Reagan, he quickly showed that the reports of the death of the presidency were greatly exaggerated.”

In the decades since, the bloom has stayed off the rose as far as political historians are concerned. But as in the past, they continue to provide, in Zelizer’s words, a “presidential-centered history with an emphasis on the expanding power of the office”—while recognizing its dangers (Zelizer, 2012, p. 19).

The presidency is underpowered

Political scientists are well aware that presidential power has increased dramatically since the early days of the Republic, particularly during modern times. It is easy to find examples of work that strikes exactly

this theme. The New Deal was barely established, for example, before Corwin (1957) was arguing that “the history of the presidency is the history of aggrandizement.” Much more recently, James (2005) nicely captured the upward trajectory of presidential power throughout American history, and noted the tension between the promise (of leadership and effective government) and the fear (of autocracy) that accompanied its rise. In a trenchant update to Schlesinger's classic work, Rudalevige's (2008) *The New Imperial Presidency* documents the growth and excesses of presidential power, paying special (but hardly exclusive) attention to George W. Bush's war on terror and its unilateral flouting of the law.

This line of thinking, however, is not characteristic of the discipline's presidential research. Political scientists have typically sought to place presidents within the American separation of powers system, particularly its cumbersome legislative process, and to inventory the many obstacles that system puts in presidents' way as they attempt to solve national problems and meet the lofty expectations thrust upon the office. Yes, presidential power has expanded. But having recognized this point, political scientists—and here we include ourselves—have then set to work on documenting its many limits and frustrations.

By far the most influential book ever written on the presidency is Richard Neustadt's *Presidential Power*, first published in 1960. His central theme was that because presidents were forced to operate within a separation of powers system filled with myriad checks and balances, they had nowhere near enough formal power to meet public expectations and exercise true leadership. Presidents were underpowered. The only way for them to get enough power to succeed, Neustadt argued, was to nurture and deploy their personal resources—their knowledge, experience, charm, charisma, and energy—to bargain with members of Congress and the bureaucracy and persuade them to go along with presidential objectives.

Neustadt's personalization of the presidency rather quickly fell out of step with the times (Moe et al., 1993). As the administrative state ballooned in size, scope, and complexity, and as the institutional presidency took shape in response, the formal powers of the office assumed center stage among political scientists—a move further promoted by the emergence of the discipline's “new institutionalism” during the 1980s and the increasing use of formal theory in studies of executive politics thereafter. In this context, explanations of the presidency via personalization receded into the background. What did not recede was Neustadt's insistence that the presidency was underpowered—and that this was the key to understanding presidential behavior and (lack of) success. At the very beginning of his 1990 update to *Presidential Power*, Neustadt reiterated his core theoretical point: when studying the presidency, he insisted, “weak remains the word with which to start” (Neustadt, 1990, p. xix).

By then, political scientists who study American politics were already on board with the theme of presidential weakness. They had been for some time. And they still are. The main reason is that their central focus has been on how public policies get made within our separation of powers system, and on the roles played and influence wielded by various actors—presidents, members of Congress, bureaucrats, judges, interest groups, voters, donors—in determining which policies do and do not get adopted. Given the nature of the system and the crowded terrain of the policy process, it is quite clear that presidents confront enormous obstacles in enacting their favored policies—and that, except under special circumstances, they do not have nearly enough power to get what they want (see, e.g., Jones, 1994).

In the broader literature on American politics, the study of political institutions has been preoccupied *not* with the presidency, but with Congress. Over the last half century, the number of political scientists specializing in research on the second branch of government is dwarfed by the number specializing in the first. Given the president's preeminent role as the leader of the nation, and given Congress's manifest failures to fulfill the most basic functions of government, this allocation of resources might seem ill-advised. But it has an explanation. Part of it is that political science is a field that puts enormous emphasis on quantitative data, methods, and analysis; Congress—with 535 voting members, two chambers, dozens of committees, and many thousands of decisions—gives researchers a lot to count, code, and analyze. But the explanation also has an important substantive component: Congress sits at the center of American policymaking—it makes the laws—and the discipline's concern for policy, and for identifying the abundance of players who participate in its production, is what attracts so many scholars.

The body of research on Congress is enormous and richly diverse. From classic works by Fenno (1978) and Mayhew (1974) to more recent studies by Krehbiel (1998), Cox and McCubbins (1993), and Lee (2009), we learn a great deal about how party leaders, committee chairs, interest groups, and voters propel the policymaking process and shape its outcomes. Notably, though, these works devote very little attention to presidential power; and when it is explored in any depth, it appears unexceptional, episodic, and nearly always on the losing end of things. When presidents have actually been the focus of analysis, the results have generally shown just that. This broader theme can be found in the very title of Edwards' (1989) influential book, *At the Margins: Presidential Leadership of Congress*, wherein presidents rarely if ever exercise legislative clout in any big or comprehensive way. Subsequent research on congressional investigations (Kriner & Schickler, 2016) and legislators' public appeals (Christensen & Kriner, 2020; Howell & Pevehouse, 2007) further illuminates the various means at Congress's disposal to check and constrain the exercise of presidential power.

Students of American politics have also produced a large body of research on the executive branch: the president's own bailiwick, where his influence should presumably flourish. But that is not the dominant theme of this research. Early studies of American bureaucracy by such scholars as Lowi (1969), McConnell (1966), and Bernstein (1955) argued that interest groups had captured the regulatory agencies and colonized whole realms of the bureaucracy, thus insulating agencies from democratic control, including control by presidents. As the "new institutionalism" took root, control of the bureaucracy and its policymaking became a prime target of research in its own right—but the analytic focus was on Congress, not presidents. This line of work showed how Congress uses its authority to create and structure government agencies in such a way as to ensure, so far as possible, that agencies pursue Congress's stated policy preferences in future years—and that they not be swayed by the preferences of presidents or opposition interest groups (Epstein & O'Halloran, 1999; Huber & Shipan, 2003; Miller & Whitford, 2016; Moe, 1989). The bureaucracy is often designed, in other words, to make it difficult for presidents to control. More generically, and putting Congress aside, principal-agent models of the bureaucracy further underscore the impediments to presidential control over the executive branch (for a review, see Gailmard & Patty, 2013).

Even when political scientists have focused their research on matters where presidential power is clearly at it greatest—cases of unilateral action, particularly in realms of war and national security—there has still been work that highlights how they are sometimes checked by other powerful actors, notably by Congress and the courts. The thrust of this literature is that, although presidents may exercise power through unilateral action, they cannot do everything they want and are often constrained—affecting how they use their unilateral powers, and indeed, whether they use them at all (Chiou & Rothenberg, 2017; Howell & Pevehouse, 2007; Kriner, 2010; Rudalevige, 2021; Staudt, 2011).

There is a good bit more to the American politics literature than we are able to discuss here. But the general point should be clear enough. Given the historical trajectory of presidential power, it would be entirely appropriate for political scientists to wave red flags exactly as Peter Shane, Bruce Ackerman, and Arthur Schlesinger have, warning that excessive presidential power is a danger to American democracy. But that sort of thing rarely happens. The bulk of political science scholarship promotes a theme of presidential weakness. With a few exceptions (e.g., Howell & Moe, 2020; Irons, 2005; Pfiffner, 2009; Rudalevige, 2008), there are no danger signs, no flashing lights, no red flags.

Squaring the circle

Different academic fields, then, have generated very different perspectives on presidential power. Zelizer (2012) takes historians to task for not paying serious attention to the political science research on presidents being underpowered, arguing that there is much to learn from this work, and that it would rightly qualify the historians' traditional emphasis on the centrality of presidents and the dramatic rise in presidential power. We agree. And we'd say the same in applying Zelizer's logic to legal scholars—or

political scientists, for that matter—in their tendency to overlook the work taking place in these other fields.

But there is another lesson to be learned here as well, and it's an important one: both of these perspectives on presidential power are true at the same time. It is true that presidents have gained such expansive power that it threatens American democracy. And it is also true that presidents do not have nearly enough power to achieve their policy objectives and meet the expectations of the American people.

Different standards of evaluation help to explain why both these perspectives can be true, and why there is no conflict between them. Historians and legal scholars are interested in assessing the broad arc of presidential power, in gauging its developments over time, and in assessing whether its magnitude, exercise, and potential are compatible with democracy. By these criteria, the expansion of presidential power quite naturally becomes a genuine concern and the dominant narrative. But when presidents' policy ambitions, or those of their party or the larger public, are used as the relevant measuring stick, presidential powers clearly come up short. What presidents and their supporters want vastly exceeds what the office will permit. And so, for Richard Neustadt and the litany of political scientists who followed, weakness understandably becomes the underlying theme of the American presidency.

Notice, too, that legal scholars, historians, and political scientists focus on different objects of study, which also explains why they justifiably render such different assessments. Claims that presidential power has grown excessive and dangerous usually focus on the president's capacity to make policy unilaterally, *outside* the normal policy process. Claims that presidents are underpowered focus on the president's capacity to make policy *within* the usual policy process, which almost always involves a great many obstacles, constraints, actors, and special interests. Both claims are grounded in extensive research. Both claims are correct.

Confusion arises because these perspectives appear to be—but are not—in conflict, and because they are separately embraced by different disciplines that have not made a concerted effort to integrate them. Confusion also arises for another reason: even within disciplines, power is a multifaceted concept. It includes starkly different formulations under the same general rubric, and academics of all stripes (as well as nonacademics) are usually content to use it in its generic form. So when claims are made that presidents are too powerful, or that they are underpowered, it is rare for anyone to say, “What aspects of power are you talking about?” or “Are you talking about power in the legislative process or power in unilateral action?” Instead, generic statements about power are supposed to speak for themselves—which, of course, they don't. The result is the appearance of conflicting claims when in fact there is no conflict at all.¹

If the presidency is to be well understood, then, the solution is partly to recognize and integrate the contributions of scholars across disciplines. But it is also to distinguish between different aspects of presidential power—and to be clear about it.

STUDYING THE STRONGMAN PRESIDENCY

We began this essay by highlighting the presidency of Donald Trump. That presidency was frustrated by all kinds of legislative and judicial obstacles, just as the political science literature would predict. But it also revealed, quite vividly, how a rogue White House could become command central for democracy's undoing. In ways small and large, Trump's aggressive use of unilateral power and flagrant disregard for democratic norms put the admonitions of historians and legal scholars in stark relief.

Recall, though, that these concerns long preceded Trump's rise to power. Earlier expansions of the office's power raised the dangerous possibility that the presidency, should it fall into the wrong hands,

¹One example of this confusion strikes close to home. The sub-sub-title of our 2016 book *Relic*, some will recall, was a broadly misinterpreted zinger: “and why we need a more powerful presidency.” In that book as well as our subsequent writing, we endorsed an expansion of the president's agenda-setting power in the legislative process, where presidents are weak and giving them greater agenda power would help the policy process work better. We did *not* argue that presidents should be granted more *unilateral* power, and in fact cautioned against it. Lamentably, though, our language in the subtitle suggested that we supported any possible expansion of presidential power, when we plainly did not. So we are guilty of the very confusion we are encouraging others to avoid.

would bring our democracy down. Trump is not single-handedly responsible for today's precarity. He is better seen as one part of a longer historical trajectory of presidential power—a trajectory that has become very dangerous, is not due to any one person, and is driven by larger political and social forces.

Our purpose here is to help explain why an office that was created by the framers to be so limited has seen its powers grow so expansively. What accounts for the rise of the strongman presidency?

This is a big topic. And in this one articles, we cannot cover all the relevant details. Our aim, instead, is to establish a basic logic for thinking about the problem, and to identify some of the more important substantive components that any good answer would surely include. In future work, we hope that we and others can expand upon what we do here—or debate, revise, and improve it—to move toward the more comprehensive account that is ultimately needed.

PRESIDENTIAL MOTIVATION

It is useful to start with the president's powers of unilateral action because these are the powers that have grown so much over time and that now threaten democracy. Their exercise propels the strongman presidency. That said, the long-standing weakness of presidents in the normal policy process also plays an important part in the larger story. We need to appreciate presidential weakness and its structural causes in order to understand why the strongman presidency emerged as it did.

Both weakness and strength undergird a crucial motivational commonality that unites all presidents and needs to be at the heart of any attempt to understand presidential power. The commonality is that all presidents care, at their core, about establishing a legacy as great leaders—and in order to establish such a legacy, they need to wield sufficient power to gain notable victories and enduring accomplishments. Concerns about their legacies lead presidents to wield and seek power, and to repudiate and compensate for the political obstacles that invariably stand in their way. Weakness is unacceptable. Their time is short, their aspirations large, the public's expectations of them boundless, and so presidents must move aggressively to expand their power and embrace unilateral options that circumvent the normal policy process and enable them to act on their own (Howell, 2015; Moe, 1985).

This motivational commonality is the beginning of an explanation. But only the beginning. Although presidents uniformly want to be powerful, and although their “will to power” lends a predictable dynamic to their behavior, there is no guarantee that they can have what they want. For the rest of the explanation, we need to recognize key aspects of American politics and society that, in conjunction with the motivational commonality, have abetted the rise of presidential power over time and ultimately pushed it to dangerous heights.

Two aspects stand out. The first is the rise and expansion of the administrative state. The second is the partisanship of presidents, along with the ideologies and agendas of the parties they lead. These core components combine with the motivational commonality in distinctive ways to produce what we will call “the two logics of presidential power.” One logic is symmetric, applying to all presidents in roughly the same way regardless of party. The other is asymmetric, applying very differently to Republicans and Democrats. Both are centered on the administrative state. And both operate simultaneously to define the trajectories of presidential power.

THE ADMINISTRATIVE STATE

The emergence of a robust, independent, and enduring administrative state is the most important development in the history of American government. Over the course of roughly half a century, spanning the Progressive Era to the Great Society, a vast bureaucracy took hold at the federal level. It employed millions of civil servants in hundreds of newly established departments, bureaus, and agencies charged with sweeping new responsibilities in the writing and implementation of public policy (DiIulio, 2012; Fukuyama, 2014; Wilson, 1975).

Some simple figures illustrate the point. Whereas approximately 390,000 nonmilitary employees worked full-time within the federal bureaucracy in 1910 when the administrative state was just emerging, over 2.1 million did so in 1980 when it had reached maturity. During the same period, hundreds of new agencies came online—so many, in fact, that close observers cannot even agree on the precise number (for more on this, see Selin & Lewis, 2018, p. 12). Between 1940 and 1980, inflation-adjusted, per capita spending by the federal bureaucracy (excluding the military and servicing of the debt) increased by a factor of six; total spending increased by a factor of ten; and as a percentage of GDP, it more than tripled (Garrett & Rhine, 2006).

The transformation of government was extraordinary. With expansive and diverse new policy missions delegated by legislative statutes, and with newly developed organizational capacity to write and implement an astounding number of new rules and regulations (Kerwin & Furlong, 2018), the federal bureaucracy intruded into previously unfettered markets and other domains of private exchange, strained constitutional conventions, expanded individual rights, redistributed income, collected income and payroll taxes on individuals and corporations, waged literal wars abroad and metaphorical ones at home, and profoundly affected the lives of every American.

In a larger context, however, there is nothing unusual about these developments. All modern, industrialized nations throughout the world have administrative states. This is so for a very good reason: they couldn't do without them. The administrative state is essentially just the executive component of government, consisting of all the various government agencies whose job it is—on the basis of expertise, professionalism, merit, specialization, and organization—to translate the written words of public policy into concrete reality for the rest of society. They perform this essential task through rulemaking, adjudication, enforcement, guidance, information gathering, data analysis, reports, and assorted other means. Bureaucracy is famously arcane, slow, and frustrating. But no government could hope to address its nation's problems or meet the needs and concerns of its citizens without one (Fukuyama, 2014).

THE SYMMETRIC LOGIC OF PRESIDENTIAL POWER

With the explosive growth of the administrative state, presidents found the normal policy process—running through Congress—just as daunting as before. In this realm, *they were still weak*, shackled by a system filled with obstacles and protective of the status quo. There was a way, however, that presidents could compensate for this weakness: they could advance their policy objectives through unilateral action, an avenue that was increasingly available to them.

In part, this was because, in the post-Progressive political world, the American people were far more supportive of presidential activism. But it was also because Congress and the courts, while potential (and sometimes real) sources of opposition, proved willing to go along. Congress increasingly looked to presidents for national leadership, as well as to ensure that legislation would be adapted to changing circumstances and carried out effectively; and it willingly delegated them (and bureaucratic agencies) substantial discretion. Meanwhile, the courts—arguably because presidents appoint their members, and because judicial decisions only matter if presidents decide to enforce them—were deferential to unilateral action and often refused to get involved.

In this welcoming environment, and with presidents all too willing to seek and exercise power, an expanding administrative state simply gave them a lot more to work with than in the past. During the eighteenth and nineteenth centuries, presidents sat atop the executive branch but had limited opportunities to put it to use—because there was almost nothing *in* the executive branch to empower them.² Not so for modern presidents. For them, the administrative state offered a cornucopia of specialized agencies, discretion-filled policies, trained personnel, and positions for loyalists—affording

²Though the nineteenth-century federal bureaucracy was unmistakably small by modern standards, evidence of support for a more robust administrative state can be traced all the way back to the nation's founding. See, for example, Edling (2008).

them countless opportunities for taking unilateral action to shape the nation's policies and advance their own legacies without going through Congress. The administrative state was their path to real power.

Unilateral action and the administrative state

In the political science literature on unilateral action, most attention is focused on the issuance of executive orders—which, of course, are an important means by which presidents set policy on their own. Scholars also recognize that executive orders can be overturned by subsequent presidents, and thus cannot be counted upon to make enduring changes to policy. They further emphasize that Congress controls the purse strings, so presidents cannot change policy in ways that call for big, ongoing expenditures. All of this is quite true. But it fails to fully appreciate either the increasingly expansive scope of unilateral action available to presidents or the connection between unilateral powers and the administrative state.

Consider each of these points in turn. Whereas the existing scholarly literature on unilateral powers exhaustively investigates the production of executive orders, far less attention is paid to the many other kinds of unilateral directives available to presidents, including executive agreements, memoranda, national security directives, and proclamations. As others have pointed out (e.g., Kaufman & Rogowski, 2022), executive orders constitute a small and unrepresentative sample of unilateral directives. Through various channels, both formal and informal, presidents unilaterally decide whether to comply with congressional requests for information and witness testimony, pardon individuals for criminal activities, classify and declassify state secrets, escalate and deescalate military actions across the globe, and a good deal more.

However presidents choose to take unilateral action, almost all directives of consequence are not self-executing. Instead, they must be carried out by means of government agencies, personnel, expertise, and resources. The exercise of unilateral power, therefore, runs through the administrative state. Moreover, presidents don't necessarily need to issue directives in order to act unilaterally. Rather, they can do it by using the discretion embedded in legal statutes and their control over agency leaders (most of whom are their own appointees) to get agencies to make the kinds of policy changes they want; and these changes, often accomplished through rulemaking, are much more difficult for future presidents to undo and are likely to secure funding through the appropriations processes for the agencies in question. In the literature, presidential policymaking through the bureaucracy is typically not counted as unilateral action at all. But that's what it is, and it happens constantly and routinely across all presidencies, Republican and Democratic alike (Lowande, 2018; Lowande & Rogowski, 2021).

Building instruments of control

When attempting to govern administratively, presidents face a basic challenge: the bureaucracy is difficult to control, and thus difficult to harness and deploy. Part of the problem is that the bureaucracy's size, complexity, and reach make it nearly impossible to achieve coherence and coordination. But more fundamental still, bureaucrats have their own interests, rooted in their careers, professions, reputations, ideologies, agency missions, and the interest groups and congressional committees with which they are allied. As a result, bureaucrats may purposely stray from a president's preferences or stonewall or resist. Due to their expertise and experience, they have ample means of going their own ways (Rudalevige, 2021; Skowronek et al., 2021).

Presidents need organizational mechanisms of their own that allow them to overcome these obstacles (so far as possible), gain control of the administrative state, and use its various components to enhance their own power. Modern presidents have been well aware of that. When the New Deal led to a dramatic increase in the size and messiness of the bureaucracy, FDR sought to reorganize the executive branch along sharper, more hierarchical lines in order to facilitate presidential leadership over the whole of it. To

that end, he set up his famed Brownlow Committee, whose report led to the creation, consolidation, and transfer of many federal agencies, but also to the creation of the Executive Office of the President (EOP). Included within the EOP were the Bureau of the Budget (transferred from the Treasury), as well as a new White House Office containing an augmented staff of close presidential aides (Arnold, 1986).

This was the origin of the modern institutional presidency. At the time, it bestowed upon FDR purely presidential agencies, trusted advisers, and support personnel. But its greater significance lay in its potential expansion. This nascent institutional presidency offered *all* subsequent presidents the opportunity to build—for themselves, largely on their own authority—an organizational capacity for controlling the administrative state and using it to advance and exercise their own power.

All presidents, regardless of party, were motivated to do exactly that (Moe, 1985). Given the nature of American politics, it wasn't easy or straightforward, and the full-blown institutional presidency that we know today—with some 2000 employees and 14 separate organizational units in the EOP, including roughly 500 employees and 19 offices tucked within the White House Office alone—didn't happen overnight. Presidents didn't control the purse strings. They faced a suspicious Congress concerned about guarding its own control over the bureaucracy, as well as parties, interest groups, and bureaucrats that benefited from a tradition of fragmentation and decentralization. They had no blueprint for how to proceed, no history of presidential organization to learn from or mimic. And throughout, they faced a complex, changing political environment—and a 4-year term—that demanded immediate action and discouraged future planning.

As successive presidents sought to improve their prospects for control, FDR's initial investment in an institutional presidency gave way to a much larger and more differentiated apparatus (Burke, 1992; Hart, 1995). This happened through a process that unfolded incrementally over many decades and presidencies. Each president inherited the institution of his predecessor, embraced what worked and seemed compatible with his own style of operation, made revisions, additions, and subtractions, and passed the updated institution on to his successor—who did the same. And so it went, again and again, until—by the late 1980s—the institutional presidency assumed a fairly stable organization that represented an equilibrium of sorts. There are still changes here and there, to be sure, because presidents are different people with different decision styles and agendas. But the changes that new presidents make today are marginal compared to those made many decades ago—because the institution now does a good job of meeting the needs and demands that are *common to all of them*. The mature administrative state is now governed by a mature institutional presidency.

As presidents incrementally pieced together an institution that would work for them, they relied on two interrelated approaches: they centralized and they politicized (Moe, 1985). Centralization involved creating decision arenas and expertise within the EOP that would give presidents the capacity to initiate, develop, and coordinate their own policies—with selective participation by the departments and agencies on the presidents' terms. It also involved the creation of specialized units, such as the Office of Legislative Liaison, to support the president's needs in dealing with Congress, outside interests, appointments, and certain policy realms (Hult & Wolcott, 1995, 2004). Politicization involved the appointment of increasing numbers of presidential loyalists—within the EOP, of course, but also throughout the bureaucracy—to occupy positions of importance to policymaking. The traditional practice of allowing parties, department heads, legislators, and interest groups to control most appointments gave way over time to well-organized means within the EOP of filling key positions with people chosen to serve the president's interests (Lewis, 2008; Weko, 1995).

In its maturity, the institutional presidency has assumed a well-defined structure. Its major components include:

- The Office of Management and Budget, which allows presidents to control agency spending, legislative proposals, and testimony to Congress, and provides detailed knowledge of what agencies are doing and how (Pasachoff, 2016).
- The National Security Council, the Domestic Council (under various names), and the National Economic Council, which advise the president on pressing national issues, inject expertise, debate

and evaluate policy options, coordinate across agencies, and otherwise give presidents a centralized capacity—not captive to the bureaucracy or Congress—to formulate foreign and domestic policy and advance the presidential agenda (Hult & Wolcott, 1995, 2004).

- The Office of Information and Regulatory Affairs (OIRA, located within the OMB), which carries out regulatory review and enables presidents to assess, delay, stop, or modify important rules proposed by regulatory agencies throughout government (Shane, 2009).
- The White House Counsel's Office, staffed with appointed attorneys, which provides presidents with legal advice on such things as executive orders and legislation; and most notably, which advises presidents on whether their ideas for policy or unilateral action are lawful and, if not, what can be done to make them so. All too often, its job is to come up with a legal rationale that simply justifies whatever presidents want to do (Ackerman, 2012).
- The Office of Legal Counsel (OLC), which is in the Justice Department and thus technically outside the institutional presidency, but is tightly connected to it. Since 1933 it has been the authoritative interpreter of the Constitution and statutory law for the entire executive branch, and it has provided presidents with expert legal advice on policy ideas, legislation, executive orders, and proclamations. It too has strong incentives to tell presidents what they want to hear about the legality of their ideas, and thus to justify what presidents want to do (Ackerman, 2012; Berman, 2021; Renan, 2017).
- The Presidential Personnel Office (PPO), which gives presidents a professionalized capacity to find, recruit, and evaluate the appointees—many of them loyalists—who will fill out the most influential positions in the bureaucracy and the EOP and ensure that the president's agenda is vigorously pursued (Patterson & Pfiffner, 2001; Weko, 1995).
- The Office of Personnel Management (OPM), which replaced the independent Civil Service Commission pursuant to Jimmy Carter's Civil Service Reform Act of 1978 and is not independent at all. The OPM is a thoroughly politicized presidential agency that oversees and makes policy for the civil service system, and is an integral part of presidential strategies to put the right people in influential bureaucratic positions and get the wrong people out (Lane, 1992).

By building out their own institution, presidents of both parties jointly developed new means by which to manage an expanding administrative state. Regulatory review, for example, first emerged in nascent form under Richard Nixon and was pursued and expanded by Gerald Ford and Jimmy Carter. Under these presidents, legal scholar Peter Shane (2009, p. 149) notes, “the formal commands to agency heads did not go further, in essence, than ‘consult,’ ‘analyze,’ and ‘consider.’” But under the Reagan administration, “things changed dramatically.” Reagan required agencies to submit proposed rules to OIRA for review, accompanied by rigorous cost-benefit analyses of alternative approaches; allowed agencies to issue rules only when the benefits exceeded the costs; prohibited them from publishing a final rule until OIRA gave its consent; and asserted the right to delay proposed rules indefinitely pending review. Despite howls of protests from environmentalists and liberal members of Congress, this model of regulatory review was subsequently embraced with minor modifications by all future presidents, Republican and Democratic, who used it as an important tool for controlling the administrative state and advancing their own agendas.

Similar stories could be told about the other mechanisms of oversight and control within institutional presidency. In each case, initial experimentation and early developments by successive presidents ultimately led to bipartisan support for robust functions that enhance presidential power. All but one of the major components of the institutional presidency listed above have been in place for at least 40 years.³ These are not partisan agencies. They are *presidential* agencies, sought and valued by all presidents as the foundation of their expanding power.

³The exception is the National Economic Council, which has been in place for about 30 years.

The fundamentals of the symmetric logic

The fundamentals of presidential power are institutional in nature. They are not spectacular or shocking events that temporarily upend an institutional order and permit executive aggrandizement. Rather, they are typically banal, slowly evolving organizational developments that take shape over many decades—driven by the common motivations of successive presidents to grapple with the opportunities and challenges of the administrative state, and serving their common interest in building historical legacies worthy of admiration and praise.

The simple fact is that big government generates presidential power. It does so because presidents seek power and because big government supplies them with opportunities to expand and deploy it. There is nothing partisan about this. It is symmetric across the parties: Republicans and Democrats alike are caught up in the same overarching logic, and thus the same characteristic types of behavior. They all want to establish legacies as great leaders, and they all use their positions of executive leadership to take advantage of everything the administrative state has to offer them.

THE ASYMMETRIC LOGIC OF PRESIDENTIAL POWER

The symmetric logic reveals an essential commonality in how presidents of both parties connect to the administrative state. But commonality is not the whole story, for in key respects Republicans and Democrats are also very different. There is a second logic at work here, an asymmetric logic, that operates in conjunction with the symmetric logic but with radically different and very dangerous consequences.

The asymmetric logic comes about because, with some exceptions—most notably, the various national security agencies—the administrative state is almost wholly an embodiment of progressive values, enacted through the leadership of the Democratic Party to help people in need, regulate business, expand minority rights, tax and spend, and address a broad range of national problems. The administrative state has a decidedly liberal tilt, designed to put the government to work in solving public problems. It is no accident that spending on the administrative state has grown the most in those agencies that serve distinctly liberal missions, particularly in health and human services (Garrett & Rhine, 2006); that a preponderance of federal agencies lean to the ideological left (Clinton et al., 2012); or that Democrats are more likely to work and be promoted within the career civil service than Republicans (Lewis & Richardson, 2017; Spenkuch et al., 2021). Quite by design, ours is a decidedly liberal administrative state.

Asymmetric politics begin to take shape

Since FDR pursued his New Deal, Democrats have been the party of government (Milkis, 1993). They have viewed the administrative state as theirs, and they have sought to fill it with policy allies and vital government programs. Writ large, Democrats have been in the business of vesting agencies with liberal missions that promote the public well-being (as they see it), and then getting the agencies to pursue the missions spelled out for them in legislation and law.

This Democratic embrace of government has only grown over time. For decades, the party was split between liberal northern Democrats, who recognized the need for an expanding federal bureaucracy to solve public problems, and conservative southern Democrats, who resented the federal government's "overreach" in imposing progressive laws—regarding desegregation, civil rights, secularism, and the like—on their region. But the southern Democrats began gravitating to the Republican Party after the Democrats' passage of the 1964 Civil Rights Act and the 1965 Voting Rights Act. And with this realignment, the Democratic Party grew more homogeneously liberal—and more homogeneously the party of government.

During the New Deal and into the 1970s, the Republicans had their share of conservatives—prominent among them Robert Taft, Barry Goldwater, William F. Buckley, and many business leaders—who stridently opposed the administrative state and regularly blasted it as socialist, unconstitutional, and a dire threat to freedom. Buckley famously declared it “the enemy of the people.” In addition, there were far-right conservatives at the fringe of the party, such as the John Birch Society, Joe McCarthy, and other conspiracy theorists, who despised the administrative state even more (and were often racist, anti-Semitic, anti-immigrant, and xenophobic). They were regarded as “kooks” by many conservative leaders, but the Republican Party was their political home nonetheless (Corn, 2022; Lichtman, 2008).

Despite all the firebrand rhetoric coming from its right flank, the Republican Party as a whole remained reasonably centrist and ideologically diverse. The moderates included such leaders as Thomas Dewey, Nelson Rockefeller, Dwight Eisenhower, and Richard Nixon; and although the conservatives were constantly plotting to gain control of the party, the moderates held the upper hand. Between 1948 and 1976, moderate candidates landed the Republican presidential nomination in every presidential year except 1964, when conservative activists won the nomination for Goldwater, who championed their deep-seated opposition to government (Kabaservice, 2012). As Goldwater (1960, p. 15) put it in his widely read *Conscience of a Conservative*, “I have little interest in streamlining government or in making it more efficient, for I mean to reduce its size. I do not undertake to promote welfare, for I propose to extend freedom. My aim is not to pass laws, but to repeal them.”

When Goldwater lost the general election in a landslide, conservative hopes of controlling the party were temporarily dashed. Republicans would go on to nominate Richard Nixon in 1968 and 1972 and Gerald Ford in 1976, both moderates. Indeed, Nixon extended the reach of federal regulation—signing off, for example, on the creation of the Environmental Protection Agency, the Occupational Safety and Health Administration, the Consumer Product Safety Commission, and their progressive expansions of government.

In the latter years of his presidency, however, Nixon shifted course. Frustrated by the ineffectiveness of his early commitment to cabinet government (a moderate approach if there ever was one), by a Democratic Congress that blocked much of his policy and reorganization agenda, and by his failure to reorient the social programs created under the Great Society, he turned to a new strategy of governance, which Richard Nathan (1975) famously labeled the “administrative presidency.”

Henceforth, Nixon pursued his policy ends by circumventing Congress and acting unilaterally through the administrative state—filling influential agency positions with loyalists, preventing career civil servants from performing their jobs in agencies and programs he opposed, and impounding the latter's funds to cripple their performance. His administrative presidency was cut short by Watergate. It was, as Nathan (1975) put it, “the plot that failed.” But in the grander scheme of things, it didn't really fail. It established a model that future presidents would build upon and deploy.

For much of the post–New Deal era, conservatives associated presidential power with liberal activism, and they were horrified by it. They staunchly opposed a strong presidency. They vilified FDR, the quintessential liberal president and father of the administrative state, as a dictator who brought the nation to the brink of socialism and even totalitarianism. They insisted that Congress, not the president or the federal bureaucracy, rightly retained the power to make law; and that a liberal administrative state that issued orders and wrote rules was a gross distortion of the constitutional order (Healy, 2007).

By the mid-1970s, however, long-held views of the presidency underwent a radical change on both ends of the ideological continuum. With Vietnam, Watergate, and the 1973 publication of Arthur Schlesinger's *The Imperial Presidency*, liberals began to reexamine their embrace of presidential power. Conservatives began to reconsider their priors too. John Hart, a senior editor of *National Review*, broke from the pack in a 1974 feature article, arguing that conservatives needed to revise their thinking and recognize the need for a strong presidency to dismantle the administrative state.

One long-term change in the equation of political power involves the steady growth of the federal bureaucracy, which, though nominally part of the “executive branch,” actually operates with considerable autonomy. ... At the present juncture, as a matter of fact, the

only way these agencies can be diverted, cut back, or eliminated is through the action of a powerful President who is willing virtually to go to war within his own executive branch in order to carry out his mandate.

Hart's early argument was prescient. During the 1970s, the political times were changing. The economy was in decline, Watergate and the Vietnam War had undermined public trust in government, people objected to bureaucracy, taxes, and government inefficiency—and conservatives were on the political upswing. They could see that they had a real shot at capturing control of the Republican Party and winning elections. The presidency was no longer the special province of liberals and moderates. And if a true antigovernment conservative were to win the presidency, vast power would be needed if the administrative state was to be retrenched. It wouldn't happen through legislation because Congress would never go along. The courts wouldn't either, because they were guided by liberal jurisprudence. Presidents must do it themselves, unilaterally.

It didn't take long for conservatives to come around. As Gene Healy (2007) of the Cato Institute observed, "By the Reagan era, prominent right-wingers were calling for a repeal of the 22nd Amendment [which limited presidents to two terms], and conservative conventional wisdom held that the real threat to separation of powers lay not in an Imperial Presidency, but in an Imperial *Congress*." Presidential power needed to be used, they thought, but also vastly *expanded*—so that Republican presidents could finally lay waste to the dominant progressive components of the administrative state.

The inflection point

It was at this point in America's political history that the asymmetric logic emerged as a force of considerable consequence. Prior to Reagan's watershed election, all presidents sought to promote their legacies through foreign and domestic policy achievements; they all sought power; and they all participated in the construction of an institutional presidency that met their common needs. A disruptive new ingredient was introduced with the rise of conservatism and its growing influence within the Republican Party, which increasingly became an antigovernment party—a party whose opposition to the administrative state served as a central preoccupation and organizing principle. Reagan minced no words, announcing in his inaugural address: "Government is not the solution to our problem. Government *is* the problem."

Far more than at any time in the past, Democrats and Republicans now stood in starkly different orientations to the administrative state. Whereas Democrats supported its agencies and programs, Republicans viewed most of them as unacceptable progressive overreach. Whereas Democrats saw potential partners all across the federal bureaucracy, Republicans saw enemies almost everywhere. And whereas Democrats sought to deploy the administrative state for solving the nation's most pressing problems, Republicans lamented its very existence, deriding it as a freedom-threatening incursion on the private sector that needed to be radically controlled to redirect its policies and radically retrenched to reduce its size, reach, and cost (see, e.g., Sekulow, 2015).

To carry out this conservative onslaught, Republicans pressed for extraordinary power. The rise of conservatism had dramatically changed the party's goals; in order to achieve them, Republicans became the champions of a superpowered presidency that could effectively take on the administrative state. For Democrats, there was no need for such extraordinary power. Yes, their presidents wanted enough power to promote their agendas, be strong leaders, and enhance their legacies. But there was nothing extraordinary about that. It's what all presidents had always wanted. Moreover, Democratic presidents sat atop a government whose agencies and programs they supported; they looked out at bureaucrats who were largely allies; and they weren't in the business of transforming the administrative state. Conservative presidents *did* want to transform the administrative state—by reducing and redirecting some of its operations and by marginalizing, delegitimizing, and sabotaging many others (Noll, 2022). To do all of that, they needed extraordinary power.

From Reagan on, the Republicans' asymmetric quest for extraordinary power only intensified. With the southern realignment that played out after the 1960s, and with the success of Jerry Falwell and other religious leaders in herding white evangelicals into the Republican fold, the socially conservative wing of the party—which despised the federal government for its perceived threat to their traditional culture—grew in size, unity, and influence. As time went on, then, conservative Republican presidents increasingly had two compelling reasons to attack the administrative state. One was conservatism's long-standing opposition to regulation and taxes, led by libertarians and business. The second, which was relatively new to the party, was the insistent, well-organized demand of social conservatives for the defense of their traditional culture (Corn, 2022; Fitzgerald, 2017; Lichtman, 2008).

Along both dimensions, conservatives became more ideologically extreme. This trend has proceeded steadily, but its ascent has been especially sharp in the years since 2010: a period that witnessed the rise of the Tea Party and the subsequent emergence of Donald Trump, his right-wing populist base, and its enthusiastic support for strongman leadership. The Republican Party of today is far more conservative than the party of Reagan, and it is even more virulently antigovernment (e.g., Desilver, 2022). Republicans routinely deride the federal bureaucracy as the “deep state” and the “swamp,” and Trump and his followers are dedicated to tearing its progressive components apart limb from limb (Lewis, 2018).

For all these reasons, Republican presidents from Reagan onward have been much more aggressive in their pursuit of power than their Democratic counterparts, and their aggression has only accelerated over time—with considerable success. During this era, the president's unilateral powers have expanded to the point that they are no longer compatible with a well-functioning democracy. Republican presidents and their conservative allies are largely responsible for that. Their innovations, claims, and behavior, far more than Democrats', have pushed presidential power beyond acceptable bounds.

The Unitary Executive Theory

The lynchpin of Republican efforts to expand the powers of the presidency has been the Unitary Executive Theory (UET), a legal perspective first pieced together in early form by conservative attorneys in Reagan's DOJ, encouraged and overseen by Attorney General Edwin Meese. Over the next few decades, the theory was further developed—and strengthened—by conservative legal scholars, judges, and Republican administrations.

Legal scholars recognize that there are “weak” and “strong” versions of the theory. The weak version is associated with the theory first developed during the Reagan years and, in particular, with the work of Steven Calabresi and Christopher Yoo (2008), who have continued to write on the subject. The strong version, reflected in the writings of Berkeley law professor John Yoo (e.g., 2009; no relation to Christopher Yoo) and others, emerged in full force during the George W. Bush administration and was later magnified during the Trump administration.

The UET is not a single thing, then, and its competing provisions cannot be definitively reconciled. That being so, we'll focus here on its stronger characterizations, as they do a good job of conveying the constitutional logic at work, especially in recent years.

The theory contends that, following an originalist interpretation of the Constitution (itself a creation of modern conservatives, notably Robert Bork and Antonin Scalia), the powers of the three branches of government are strictly separate and exclusive. The president reigns supreme within the executive branch and is endowed with exclusive authority to control everyone and everything within it: its personnel, its agencies, its programs. Congress has no right to interfere—by, say, creating independent agencies, lodging policy discretion in agency heads rather than the president, placing restrictions on the president's removal power, imposing minimum qualifications for executive positions, creating a civil service system insulated from political control, requiring documents and reports from executive agencies, demanding testimony from executive officials, and so on.

In practice, Congress has routinely done all these things (and much more) throughout American history, performing roles that the vast majority of legal scholars have long viewed as entirely legitimate in recognition of Congress's lawmaking and investigatory powers under the Constitution, including the robust "necessary and proper" clause. But the UET rejects the validity of these traditionally accepted practices. It insists that any constraints imposed on the chief executive by legislative statute are unconstitutional infringements on the president's exclusive authority within his own branch, and that presidents are free to ignore them—meaning, they are free to violate the laws that Congress has enacted and presidents have actually signed. The realm of legally justified unilateral action is therefore vast, and far more expansive than "the law" appears to suggest. (For overviews, see Ackerman, 2012; Crouch et al., 2022; Hollis-Brusky, 2011; Shane, 2009; Waterman, 2009.)

In addition, strong versions of the UET claim that the courts, as a separate branch of government, have no right to tell presidents what is constitutional and what is not. Presidents have the right to interpret the constitutionality of statutes—and thus, whether they need to follow them—based on their own judgment and no one else's.⁴ When Congress passes statutes and presidents sign them into law, presidents can attach "signing statements" saying that they consider certain provisions to be unconstitutional encroachments on the president's rightful prerogatives. In so doing, they are indirectly telling administrative agencies *not* to carry out those provisions—and thus, once again, to ignore or defy important parts of laws that are on the books.

The UET, of course, is not a complete fabrication. The precise meanings of Article II powers generally, and the vesting clause in particular, are exceedingly ambiguous and hence might plausibly be used in attempts to legitimate a range of actions (Howell, 2023, pp. 43–46). A long history of jurisprudence and practice, moreover, establishes that presidents can justifiably lay claim to various powers of removal and oversight (Alvis et al., 2013). And quite independently, there are good reasons to support targeted enhancements of presidential power, particularly in the legislative arena (Howell & Moe, 2016).

As currently constituted, however, the UET is extreme and exceedingly dangerous to our democratic system of government. It makes a mockery of separation of powers, removes essential checks on presidents, and gives them virtually dictatorial powers over the administrative state. That this theory has been created by conservatives is no accident. They are the ones who seek extraordinary presidential power. And once they captured the presidency with Reagan's inauguration, they wasted little time in devising a legal rationale for giving presidents vast power over an administrative state that they staunchly oppose.

As of today, the UET is not firmly accepted as law (see, e.g., Crouch et al., 2022). Still, the theory is remarkably influential, and it has made significant strides toward acceptance thanks to the energy and persistence of the conservative legal movement—centered in the Federalist Society and the recent appointment of hundreds of conservative judges (often members of the Federalist Society) by Republican presidents (Teles, 2010). Supporters of the UET also populate Republican presidential administrations, particularly the White House Counsel's Office and the Justice Department's OLC, where decisions of great consequence are made about the legality of presidential behaviors and proposals.

These UET-based decisions, moreover, are largely (but not entirely) unchecked by the courts. The fact is, most matters of presidential behavior, and indeed almost all matters of presidential control of administration, never make it into the court system. And when they do, the courts usually defer to presidents or label the issues as "political questions" that are not subject to judicial scrutiny. Thus, even though the UET is not established law, it guides administrative behavior in Republican presidencies, almost always justifying whatever they want to do (Ackerman, 2012).

While UET judges have been perfectly willing to fix their stamp of approval on a vastly more empowered presidency, the judiciary as a whole has equivocated. It hasn't assembled a clear body of law that clarifies what presidents can legally do, what institutional constraints they must abide, and what the

⁴For more on this point, see Shane, 2009; Sloane, 2008; Waterman, 2009.

rule of law requires on matters of presidential control of the administrative state. Though the courts have been in a position to specify hard and fast boundaries of executive authority, they haven't done so—at least not yet.⁵ On fundamental constitutional issues of separation of powers, presidential action, and agency behavior, the relevant law has often been left vague and uncertain.

For presidents of both parties, this has been an opportunity. In taking unilateral actions that are bold, consequential, or controversial, they have often not needed to “follow the law” in any straightforward sense because the relevant constitutional law itself is not well specified. To be sure, they have needed to be objectively well informed about the outer bounds of the law's gray zones. But as long as they stayed plausibly within them, presidents could claim that what they were doing was legally justified and proceed with a measure of confidence that the courts would not interfere. Over time, as practices, precedents, and supportive legal rationales have accumulated, presidents have thus been able to fill in and develop a *de facto* body of pro-presidency “law” applying to the executive branch and separation of powers issues. They have been able, in other words, to expand their own power by actively shaping the body of (apparent) law most relevant to their own behavior (Berman, 2021; Renan, 2017).

Partisanship, the UET, and the asymmetric logic

Republican and Democratic presidents have not approached these opportunities in the same way. The asymmetric logic has been at work. Republican presidents have made increasingly aggressive use of the UET in pushing for and exercising powers so expansive that they threaten democracy and the rule of law. While conservatives—and many legal scholars and political scientists—frequently argue that Democratic presidents are guilty of exactly the same thing, these claims are off base. It is true, of course, that Democrats seek power to achieve their objectives. And in the wake of the UET, Democrats have sometimes engaged quite assertively—and questionably—in unilateral action that seems to reflect its principles. But it is a mistake to see the two parties as the same in their approach to presidential power.

The UET is a Republican creation, and all Republican administrations since Reagan's have embraced it—and sequentially strengthened it—as both a guide and a justification for presidential behavior.

George H. W. Bush is commonly depicted as a moderate, restrained, and reasonable president. Nonetheless, early in his presidency William Barr—the head of Bush's OLC and later his Attorney General—produced a 10-page legal memo embracing the UET's rationale for exclusive presidential control and repudiating Congress's traditional roles in structuring, constraining, and overseeing the executive. He did so, moreover, with full knowledge of the Supreme Court's monumental decision in *Morrison v. Olson* (1988), which explicitly *rejected* the UET's extreme interpretation of the Constitution. The decision in that famous case was 7-1. The lone dissenter was Antonin Scalia, whose UET argument was joined by no one else on the Court. Undeterred, William Barr went on to proclaim the UET as the legal theory that the Bush administration would follow (Kinkopf, 2005).

Bill Clinton did not go along. His head of the OLC, Walter Dellinger, made a point of crafting a much longer memo that rejected Barr's embrace of the UET and set out a more moderate (but still pro-president) set of legal principles bearing on the executive and separation of powers (Kinkopf, 2005). To take just one telling example of Clinton's pullback from the UET: he greatly expanded public access to executive branch information under the Freedom of Information Act (FOIA), countering major restrictions that had been imposed under Reagan and Bush.

Clinton did enhance presidential power in pursuit of specific objectives. He carried out a bombing campaign in Kosovo, for example, that violated the War Powers Act's requirement that hostilities continuing beyond 60 days be authorized by Congress. Even more notably, Clinton and his people argued that presidents have the right to issue directives to agencies telling them what to do, including what rules to adopt, unless Congress has placed authority and discretion in agency hands

⁵See Epstein and Brown's contribution to this volume.

(Ackerman, 2012). Kagan (2001), a Clinton White House adviser (and later dean of Harvard Law School and Supreme Court Justice), subsequently produced an influential article, “Presidential Administration,” making the legal case for this brand of control. Nonetheless, as Ackerman (2012, p. 197) observes, “Kagan is a moderate compared to partisans of the Unitary Executive. ... Kagan believes that Congress can limit or repudiate presidential administration by passing explicit statutes that restrict presidential power.” The UET insists that Congress can do nothing of the sort.

This was exactly the line of thinking that George W. Bush embraced—with conviction. Bush 43 championed a stronger, more fully developed version of the UET than Ronald Reagan or Bush 41 had, and he put it to use. Declaring a “war on terror” during the post-9/11 years, and advised by hardcore UET advocates—notably Vice President Dick Cheney, his aide David Addington, and (in the OLC) John Yoo—Bush endorsed the torture of prisoners of war and the surveillance of American citizens despite legislative statutes explicitly outlawing such practices. Through signing statements, he issued more than 1000 constitutional objections to specific legal provisions in legislative statutes—many more than the total issued by all of his predecessors combined. He sealed off the federal bureaucracy from external oversight or intrusion by putting severe new restrictions on agency responses to FOIA requests (reversing Clinton’s openness), by limiting the provision of executive documents and testimony to congressional investigations, by restricting access to presidential documents, by authorizing executive officials to use private email accounts in order to skirt laws requiring the preservation of government documents, and more.

In addition, Bush used his allegedly exclusive top-down control of federal agencies to undermine their attempts to carry out their legally defined missions—for example, by directing scientists in various agencies to omit any reference to climate change or global warming in government documents and reports, and by injecting newly created political operatives within federal agencies to authorize (or not) regulatory rules before they could be transmitted to OIRA. We could go on.⁶

Well before Bush left office, prominent legal scholars and journalists—as well as, of course, leading Democrats—saw Bush’s adherence to the UET as dangerous to democracy. The growth of presidential power had been a serious concern since Nixon; but through his norm-busting exercises of unilateral power and disregard of existing laws, George W. Bush became the poster child of an antidemocratic president (Ackerman, 2012; Savage, 2007; Shane, 2009).

As a senator, Barack Obama was critical of presidential power and unilateral action. But once he was elected president, his perspective changed. No surprise there. Like all his modern predecessors, Obama sought power, and unilateral action became an integral part of his strategy of governance. For the most part, however, he didn’t use it in the ways that Bush did. Indeed, he often used it to undo or moderate Bush’s UET-justified excesses. This is the case, for example, in every one of the unilateral actions noted below by Andrew Rudalevige (2010).

Early on, Obama issued a series of executive orders lessening the presumption of government secrecy; pledging the closure of (though not closing) the Guantanamo Bay detention facility; reviewing detention policy options generally; and ensuring legal interrogations. In the last order, most notably, Obama rejected the array of administration legal opinions underpinning the broadest reaches of the theory of the unitary executive. ... In the first two weeks of his term alone, President Obama issued ten formal orders and another ten memoranda to the executive agencies, on topics ranging from automobile emissions to Gazan refugees [reversing Bush’s unilateral policies].

We should also mention Obama’s response to the Republican-led Benghazi investigations. These investigations were the epitome of congressional farce—having little to do with substance, dragging on (purposely) for years, and simply serving as a hyper-partisan vehicle for heaping public criticism on

⁶And others do. See, for example, Lichtman (2008), Pfiffner (2009), and Savage (2007).

Obama and Secretary of State Hillary Clinton to damage their reputations. When the House committee demanded that Clinton testify, Obama could easily have refused under the logic of the UET. But he didn't do that. He authorized Clinton to testify before the committee, where she was grilled by Republicans for 11 hours. It was predictably ugly, but Obama allowed it to happen because he wasn't a UET president.

During his first 2 years, when Democrats controlled Congress, Obama took an active role in the legislative process and achieved major legacy-defining victories: the economic stimulus, Obamacare, and Dodd-Frank. But during his last 6 years, Republicans controlled one or both chambers of Congress. And with the legislative route all but closed, Obama relied even more heavily on unilateral action. Among other things, he provided states with waivers from the requirements of No Child Left Behind (NCLB) and promoted education reforms of his own; he enacted the DACA program to protect young immigrants; and he bombed Libya without congressional authorization.

War actions aside, Obama enacted important policies unilaterally in order to respond to serious domestic problems that a deadlocked Congress was incapable of addressing. He authorized waivers to NCLB because it was flawed and broken, and Congress wouldn't act to fix it. He adopted DACA because young immigrants brought here as children faced dire situations not of their own making, and Congress was unable to respond. In both cases, Obama believed that existing congressional statutes gave him the legal discretion to act. He also believed that the courts rightly had the authority to overturn his actions if they decided his interpretations of the law were wrong (Rudalevige, 2016a, 2016b). These are not the actions of a UET president who is threatening democracy. They are the normal actions of a normal president who wants to exercise power, yet also recognizes the legitimate roles of the other branches in constraining the executive.

These beliefs also informed Obama's use of signing statements. He used them on occasion when he thought Congress had overstepped its bounds. But he was hardly an aggressor in pressing the president's unilateral prerogatives. As journalist Charlie Savage observed, "The Obama administration rarely claimed that the president's executive powers could override statutes, and [it] acted on such claims even less often, especially compared to the Bush-Cheney administration." The use of signing statements, in other words, was quite asymmetric.

That asymmetry, across all domains of unilateral action, was about to be magnified many times over. Obama was succeeded by Donald Trump, a Republican with authoritarian inclinations who would push the UET even further than George W. Bush had, exercise his unilateral powers with abandon, and nearly destroy our democracy.

Trump rode a wave of populist anger to electoral victory in 2016 and made it abundantly clear that *he* was the strongman his populist base was hungering for. "I alone can fix it," he proclaimed. He vented their fears and frustrations: demonizing immigrants and people of color, disparaging science and professionals, and attacking America's political institutions as corrupt and illegitimate.

Populism is an antisystem movement. It sees itself as mobilizing the nation's real "people" (in this instance, white Christian conservatives) against the established "system" (our *democratic* system), and it seeks a strongman leader who can get things done on his own, democracy be damned. Trump aimed to be that strongman (Howell & Moe, 2020; Norris & Inglehart, 2019; Sides et al., 2019).

During his 4 years in office, he behaved like a UET president on steroids. He attacked the administrative state—and democracy—in ways too numerous to catalogue exhaustively. Here are but a few. He obstructed justice many times during the Mueller investigation; and according to more than a thousand former federal prosecutors,⁷ he could have been charged with multiple felonies. In a blanket denial of congressional authority and an unprecedented expansion of executive privilege, he refused to allow officials in the executive branch to provide documents to congressional committees or to testify before them. He gutted the State Department of hundreds of experienced officials charged with conducting the nation's foreign policy, and he sabotaged other key agencies as well, from the

⁷The statement and list of signatories can be found here: <https://medium.com/@dojalumni/statement-by-former-federal-prosecutors-8ab7691c2aa1>.

Environmental Protection Agency to the Consumer Financial Protection Bureau. He pushed many hundreds of scientists out of government. He weaponized the Justice Department to punish his enemies and favor his allies, ignore noncompliance with congressional subpoenas, block the sending of watchdog reports to Congress, and otherwise do his bidding. He turned Rudy Giuliani loose in Ukraine to press officials to turn up damaging information on Joe Biden, his political opponent. By withholding much-needed military aid from Ukraine, he tried to bribe its president to go along. And in the final months of his presidency, he attempted to destroy the civil service system by making employees with policy roles subject to politically based dismissal, thus creating, in effect, a modern spoils system under presidential control (Baker & Glasser, 2022; Howell & Moe, 2020).

These repeated assaults on the administrative state consumed the Trump presidency. They also laid bare the danger that a strongman presidency presents to American democracy. Given the chance, a demagogue with authoritarian aspirations can use the excessive unilateral powers now vested in presidency to subvert the most basic features of democratic governance. Indeed, that's exactly what happened when, in the coup de grace of his autocratic presidency, Trump refused to admit he lost the 2020 election, convinced millions of Americans that the election was stolen, deployed the unilateral powers of the presidency to promote his cause, and ultimately incited a violent insurrection at the Capitol to prevent the peaceful transfer of power. In those waning days of the Trump presidency, he nearly succeeded in taking our democracy down (Leonnig & Rucker, 2021).

Joe Biden's election in 2020 offered a temporary return to normalcy and a welcome pullback from UET-inspired excesses. But the threat remains. In seeking the Republican nomination in 2024, Trump has promised to pick up right where he left off. And the Republican Party has been taken over by its populist base—which is not only antigovernment, but ultimately authoritarian, pushing for a strongman presidency that can throw off democratic constraints and take action on behalf of “the people.”

Whether or not Trump himself remains at center stage, these antidemocratic forces are not going away anytime soon, and other Republican politicians will take advantage of them to cultivate their own power. Indeed, they are already doing so. In the years to come, then, there is good reason to worry that a Republican who aspires to be president will also aspire to be a strongman—and once elected, will use the president's vast unilateral power to act like one.

CONCLUSION

There are no guarantees that American democracy will survive. As research in comparative politics well demonstrates, most democracies that go down are not the victims of military coups or social revolutions. They die because an important faction of elites—one of the two major parties in the American case—stops abiding by the guardrails of democracy and pursues its own power by flouting democratic norms, practices, and rules (Levitsky & Ziblatt, 2018). That is what is happening here, with the rise of the strongman presidency and the antisystem political forces that sustain it. The United States is not special, and our democracy can die for the same reasons that other democracies die. Our guardrails have been breached. And the strongman presidency leads the charge.

Two logics have delivered this strongman presidency, both buttressed by the administrative state. Under the first, the symmetric logic, presidents have sought to deploy the vast resources of the administrative state—authority, expertise, manpower, and more—to advance their preferred policies; and they have built instruments of control through politicization and centralization to direct agencies and bureaucrats toward their chosen ends. This symmetric logic is familiar to presidency scholars, who have long recognized how presidents—all presidents—attempt to expand their power over and through the federal bureaucracy.

The second logic is less familiar but ultimately more consequential for the fate of democracy. Under its dynamics, an asymmetry takes hold as Democratic and Republican presidents part company. Because most of the administrative state is the embodiment of progressive values, presidents from the two parties respond to it very differently. Democratic presidents support it, so they tend to approach presidential

power in ways compatible with the administrative state's well-being, the laws that authorize and define it, and the continued pursuit of its many governmental missions. Republican presidents staunchly oppose it, looking upon it not just with skepticism but with outright contempt. And as their party has grown more conservative, they have laid claim to increasingly extreme powers intended not only to control but also to retrench and sabotage significant portions of the federal bureaucracy.

These two logics explain the rise of the strongman presidency. But as the second logic makes clear, the immediate threat to democracy comes from just one party: the Republican Party. If America's long-standing system of self-government someday collapses into autocracy, a strongman Republican presidency will play the lead role.

This isn't the sort of thing that presidency scholars are accustomed to saying. Given the justifiable pride we scholars take in separating our own politics from the objects we study, we are predisposed to assign blame equally and make the case that Democratic and Republican presidents are somehow equal offenders. But in this instance, they are not.

To understand the rise of the strongman presidency, we must confront the ways in which power and partisanship have become entangled. More specifically, we must come to terms with the basic fact that Republicans, not Democrats, have pushed to amass extraordinary unilateral power for the express purpose, as Hart (1974) precisely put it, of waging "war" on the administrative state.

This war poses an acute threat to American democracy. Every healthy democracy depends upon a robust and independent administrative state for the simple reason that it must deliver services and solve problems in ways that satisfy its citizens. Such is the work of the administrative state, which translates vague constitutional and statutory pronouncements into tangible, meaningful action. Democracies that routinely fail to attend to the wishes and wants of their publics are not long for this world. To survive, democracies need well-functioning bureaucracies.

The American administrative state consists of agencies and programs created by legal means, typically through statutes enacted by Congress and signed by presidents. As such, it is founded, defined, and legitimated by the rule of law. Should a political constituency object to an agency created by law, of course, it can follow legal procedures to formally revise its mandate or eliminate it altogether. And presidents and agency heads are often granted a measure of discretion to redirect administrative operations, as long as they stay within certain bounds. But UET presidents see themselves as liberated from most of the cumbersome legal procedures and constraints that are the essence of democratic government. And their unilateral campaigns to lay waste to the administrative state—now at the heart of Republican presidencies—need to be recognized for what they are: assaults on the rule of law and on democracy itself.

The nation's current situation is dangerous and unstable. Trump lost the 2020 election. But sooner or later, it is eminently possible, even likely, that another autocrat will ascend to the White House, take hold of the vast unilateral powers vested within it, and resume Trump's larger attack on democracy. Americans and their more moderate leaders need to understand the existential threat of the strongman presidency, and they need to take action to bring the presidency back within well-constrained bounds. If they don't, we may well lose the democracy that, for more than two centuries, has defined who we are as a people and as a nation.

DATA AVAILABILITY STATEMENT

For reasonable requests about the research findings that support this study, please contact the corresponding author, William G. Howell.

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