

Chapter 2: A Breakdown of Norms and Other Political Liabilities

The enemy of modern American democracy is not a foreign adversary. It is a slow-moving derailment of liberal democratic values from within by a handful of elected leaders who use extremism within the structure of democracy to break itself. Some foreign adversaries have contributed to this exploitation for their own objectives, but the most sinister actions come from within. Thoughtful and strategic, these lines of effort have escalated over time and joined, creating a threat with incalculable momentum. Since the end of the Cold War, most democratic breakdowns have been caused not by generals and soldiers but by elected governments themselves.³⁵ Like Hugo Chávez in Venezuela, elected leaders have subverted democratic institutions.³⁶ Norms refer to informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external non-legal sanctions, or both.³⁷ In the past few decades, norm-busting by some establishment politicians and political parties has functioned as an accelerant of autocracy, as a means to an end aimed at the retention of power.

Replacing the polished language of legacy politicians, the rise of bombastic messaging and untruthful rhetoric erodes the public's confidence in the press, elections, and the government itself. It has increased political violence and the standard of behavior that should be expected from our leaders and their supporters. The loss of mooring in the founding beliefs of our nation collided with a movement that has sought to weaponize the

³⁵ Steven Levitsky and Daniel Ziblatt, *How Democracies Die*, (New York: Broadway Books, 2019), 5.

³⁶ Ibid.

³⁷ Richard H. McAdams, "The Origin, Development, and Regulation of Norms," 96 Michigan Law Review 340 (1997).

structures of our government to hold power, supplant the aspirational goals of America, and further entrench the inequality that has plagued our republic since our European ancestors set foot on North American soil. Constitutional hardball punctuates interactions in the legislative branch. Traditionally, political institutions have stood defiantly against autocratic behaviors, but the trend of undercutting norms of American politics has undermined these institutions, leaving them ineffective.

The filibuster conceptually should increase bipartisan work as it provides a voice to the minority but has become a stumbling block to nearly all legislative efforts in a highly charged partisan environment. Senators representing a majority of the population cannot pass bills because they are held hostage by the “nays” of the minority. Increasingly, this occurs notwithstanding actual support for the legislation but to thwart the success of the opposing party.

There is increasing divergence in the representation of Electoral college votes due to the growth of the most populous states compared to the smaller states. Congressionally gerrymandered maps prevent even the House of Representatives, the house of Congress most reflective of popular will, from passing laws that have strong bipartisan public support. A counter-majoritarian difficulty has arisen outside of the judicial arena, within the legislative branch, where the representative minority can countermand laws that reflect the majority's will. This division does not exist in a vacuum; social, cultural, and economic changes in the U.S. have amplified it.

The founders' concern for this exercise of power within the structure of government is demonstrated in the Federalist papers. James Madison wrote in Federalist 51 that the Constitution provides checks and balances to underpin “the great security

against a gradual concentration of the several powers in the same department,” requiring each branch to be independent and minimize encroachment of the other branches. The founders were concerned about the power of faction, the tyranny of the majority, and the ability of government “to control itself.” In Federalist 10, Madison wrote:

The latent causes of faction are thus sown in the nature of man . . . A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power . . . have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good.

The restraints he saw on faction’s effective formation have been obliterated by the speed of travel, communication, and fundraising – in essence, technology. Americans have witnessed the vexation, oppression, and consolidation of power through a norm-shattering alliance between the legislative, judiciary, and executive branches.

At no time in our nation's history has a political party within two branches more clearly abdicated their independence and consolidated power to avoid accountability or institute an agenda than during the Trump presidency. Not only did the Republican lawmakers fail to oppose his unethical actions for abuse of power and obstruction of Congress, as they had when Richard Nixon abused power, but they also rewarded Trump for it. The overwhelming norm breaking by President Trump arguing a judge could not be fair because of his Mexican ancestry, criticizing a Gold Star family, calling for violence against protesters, threatening to kill his opponent, declining to release his tax returns, hiring his daughter and son-in-law to work in the White House, refusing to divest himself from his DC hotel and their other businesses, conducting official business from

his private golf club, chastising his own attorney general for allowing investigations into him, repeatedly calling the reporters the “enemy of the people,” attacking the FBI and the judiciary, is unprecedented.³⁸ The “no holds barred” approach resulted in instability, distrust, and normalized aberrant behavior, but it achieved remarkably for their agenda. The continual and unapologetic support that Trump enjoyed with every remarkable departure from norms only empowered him to push the boundaries further.

Some scholars have argued that it would be more worrisome if norms are subtly revised than when they are openly flouted, noting that President Trump's flagrant defiance of norms may not be as significant a threat to our constitutional democracy as the more complex deterioration of norms underway in other institutions.³⁹ Josh Chafetz and David Pozen argue that constitutional norms are perpetually in flux. Instead, they see that the principal source of instability is that constitutional norms can be decomposed, dynamically interpreted, and applied.⁴⁰ They use as an example President Franklin D. Roosevelt's disregard of traditional term limits observed by George Washington. This norm destruction resulted in the 22nd Amendment, which had universal support. It's hard to imagine a new Constitutional Amendment that would address the myriad of norm-busting actions that have taken place, even in the last six years. But they highlight a more significant positive outcome from Trump's penchant for norm demolition. Chafetz and Pozen note that not only do Americans overwhelmingly view Trump as untrustworthy, but the pushback against his norm-breaking has resulted in many net positives, including

³⁸ Ryan Teague Beckwith, “Donald Trump won by breaking norms. Democrats are starting to do it too,” *Time Magazine*, September 7, 2018, <https://time.com/5390143/donald-trump-Democrats-norms/>.

³⁹ Chafetz, Josh and Pozen, David E., How Constitutional Norms Break Down. *UCLA Law Review*, Vol. 65, pp. 1430-1459, 2018, Available at SSRN: <https://ssrn.com/abstract=3168106>

⁴⁰ *Ibid.*

the increased public interest in journalism, increased subscriptions and donations to media outlets reporting on his misrepresentations, and increased contributions to organizations like The American Civil Liberties Union, Southern Poverty Law Center, Planned Parenthood, and the Environmental Defense Fund. States also got in on the action, leading suits against the administration and passing legislation requiring presidential candidates to disclose their tax returns to be eligible for inclusion on the ballot. Their points are well-taken and reveal functional political institutions in the face of authoritarian tendencies and norm erosion. But the glass half-full has not made its way to the public perception. Barbara Perry, presidential studies director at the Miller Center at the University of Virginia, said that Democrats seem ready to start fighting fire with fire, “It seems to me that Democrats have now realized that you can’t fight with a set of rules when your opponent is not following them,” she said. “And at the moment, there’s not an opportunity for a referee to step in and say, ‘Stop. You need to follow these rules.’”⁴¹

Other scholars disagree, suggesting that fighting like Republicans plays directly into the hands of authoritarians. Extreme tactics can diminish opposition support from moderates. Moreover, they opine that without strong bipartisan support, an impeachment would hasten partisan antipathy, resulting in a third of the country viewing Trump’s impeachment as a vast left-wing conspiracy.⁴² Advocating for the reliance on institutional channels as a backstop to democracy, Levitsky, and Ziblatt encourage dependency on Congress and the Courts. While the book was written in 2019, the authors captured

⁴¹ Ryan Teague Beckwith, “Donald Trump won by breaking norms. Democrats are starting to do it too,” *Time Magazine*, September 7, 2018, <https://time.com/5390143/donald-trump-Democrats-norms/>.

⁴² Steven Levitsky and Daniel Ziblatt, *How Democracies Die*, (New York: Broadway Books, 2019), 217.

precisely what would happen after the 2020 election. Their beliefs were partially confirmed; the courts stood up to the assault on democracy, which assumed the form of lawsuits alleging voter fraud. But Congress did not fare as well. Determined to operationalize their base, 154 Republican lawmakers objected to the election certification, which kicked off a violent attack at the Capitol. After the attack, 147 Republican lawmakers still objected to the election certification. Post-second impeachment and well into the second year of Joe Biden's presidency, a third of the country still believes in the disproven left-wing election-stealing conspiracy.

There appears to be insufficient collective and symmetric will to administer governance following the norms and traditions that long enabled bipartisan governance. In his 1838 address, Lincoln said, "By such examples, by instances of the perpetrators of such acts going unpunished, the lawless in spirit, are encouraged to become lawless in practice; and having been used to no restraint, but dread of punishment, they thus become, absolutely unrestrained."⁴³ Norm-busting may have been a distraction and provided the latest fodder for the media and manufactured outrage for horrified Democrats. It may have served as vain attempts to preserve a mythic image of a strongman who never backs down and never gives in. It certainly has had a malevolent impact on the tone and tenor that should be expected of our leaders and has inflamed public sentiment.

⁴³ Abraham Lincoln, Lyceum Address, January 27, 1838. Accessed October 3, 2022. <http://www.abrahamlincolnonline.org/lincoln/speeches/lyceum.htm>.