

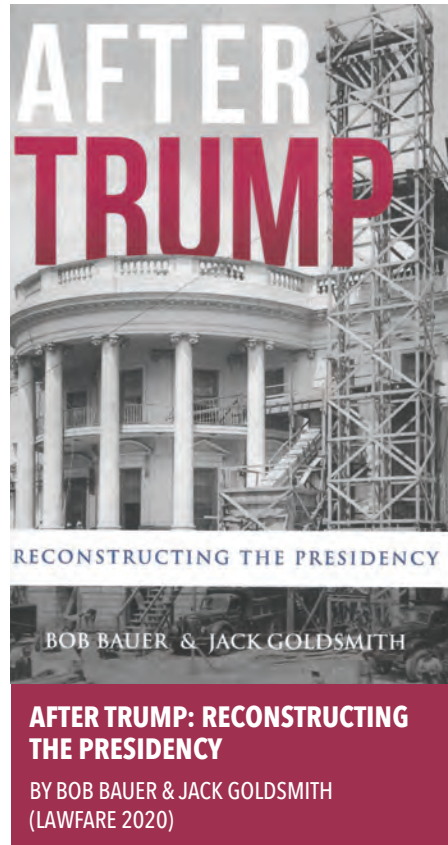
Reforming the Presidency: How Far is Far Enough?

Donald Trump will soon leave the White House. And when he does, Bob Bauer and Jack Goldsmith tell us, reform is in order.

Trump's attacks on institutions and political opponents, his violation of democratic norms, his disregard for the law — in sum, his authoritarian proclivities — have done extraordinary damage to our democracy. In the process, his excesses have revealed deficiencies in the laws, rules, and practices that govern presidents and the executive branch. Lest another demagogue pick up where Trump has left off, the presidency needs to be reformed. *After Trump: Reconstructing the Presidency* (Lawfare 2020) is Bauer and Goldsmith's guide to action.

The compendium they have written is vast and meticulous. It suggests reforms on topics ranging from foreign state influence to tax disclosures to executive-branch vacancies to nuclear weapons. In each instance, Bauer (who served as White House Counsel in Barack Obama's administration and is now a professor at New York University School of Law) and Goldsmith (who served as assistant attorney general in George W. Bush's administration and is now a professor at Harvard Law School) explain how a law or rule needs to change or what augmentations are called for.

The Federal Election Campaign Act should be amended, for example, to explicitly outlaw foreign contributions to presidential campaigns. Inspector general vacancies should only be filled by either a Senate-confirmed inspector general from another agency or an official within the same agency at a rank of GS-15 or higher who has at least three years of experience. The 2002 Authorization to Use Military Force should be repealed outright, whereas



the 2001 version should be amended. And on and on. Their proposals are so numerous that an entire appendix is devoted to summarizing them.

Bauer and Goldsmith do more than propose reforms. They provide informative mini-histories that illuminate the pathologies and failures of the contemporary executive branch. Those involving the president's relationship with the Justice Department and the FBI are among the most interesting. In these chapters, we see Trump (especially) and some of his predecessors steer the nation's law enforcement agencies toward purely political or even criminal objectives. The tangled relationships between the attorney general, the White House counsel, periodic special counsels, and various inspectors general are drawn in stark relief. For Bauer and Goldsmith, these

mini-histories serve as a backdrop for the particular reforms they go on to propose.

There is much to admire in this book, and the authors bring considerable experience, knowledge, and political insight to bear in crafting their proposals. Yet we had hoped for more from these distinguished authors.

Perhaps this is because we approach the book as political scientists rather than lawyers or legal scholars. From our perspective, part of the problem is that their tentative, piecemeal approach to reforming the presidency ignores the bigger picture. The challenge is not only to protect American democracy from an authoritarian. The challenge is also to assure that our democracy actually *works* to address the problems and concerns of its citizens, and thus that it is effective. The reason is not just that good government is desirable. The reason is that the chronic ineffectiveness of American government is precisely what gave rise to the populist, anti-system rage that fueled Donald Trump's rise to power in the first place. To protect democracy, then, reforms of the presidency ultimately need to have two sides: one concerned with constraining the dangerous aspects of presidential power, the other concerned with using and possibly expanding presidential power — in selective, nondangerous ways — to promote a more effective government. Both are critical.

For Bauer and Goldsmith, the ineffectiveness of government is not presented as a concern. They are supporters of a strong executive, arguing that “a powerful, vigorous presidency is vital to the proper functioning of American democracy” — but they seem to think that the presidency, as it now exists, *already* has the tools it needs to provide the lead- ▶

ership our system requires for “proper functioning.” Which is simply not the case. As reformers, then, they put all the focus on the *fear* that presidential power is a danger to democracy (which it is), and they don’t pursue the *promise* that presidential power can offer democracy by promoting a more effective government. This is one-sided, and an opportunity lost.

The point of their project, as they’ve designed it, is to protect against the excesses of an authoritarian-inclined president. Here too, we think the authors don’t go far enough. Even if every one of their proposals were adopted, they wouldn’t stop an autocratic president from undermining our democracy and possibly taking it down.

The problem is that the authors do not offer bold, potent ideas for constraining such a president. They see serious downsides to having executive officials and agencies that are securely insulated from presidential control — worrying that they will go rogue (as, for example, many think independent counsel Kenneth Starr did) — and they put great stock in the political accountability allegedly gained when presidents and their appointees have almost total control over the executive branch, its officials, and its operations. The danger is strikingly obvious: An authoritarian president will use that control for anti-democratic ends. This is precisely what the authors are supposed to be protecting against, but their views on insulation and accountability don’t allow them to do that.

The authors’ reticence to consider robust checks on presidential power also derives from their perspective on the law. Like many lawyers trained in the shadow of the Constitution, they assume a priori that the document — and its attendant jurisprudence — must or ought to remain intact. They “accept

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the basic constitutional contours of the presidency that currently prevail,” and they operate within that framework: which is not only quite limiting, but also weighted in favor of presidential authority. This being so, the authors’ analysis is very much an inside-the-box exercise that is deferential to presidents. Potential reforms that would actually constrain an authoritarian president are dismissed as probably incompatible with the Constitution, or are simply not considered. This is a book about incremental adjustments.

If reformers are to prevent a future strongman from undermining our democracy, they cannot embrace what appears to be the jurisprudential status quo and allow themselves to be trapped by it. They must think outside the box. The Constitution, after all, is exceedingly vague. It does not tell us what “the executive power” is. It does not say what the appointment power implies, much less the removal power. It does not say anything about executive privilege. It does not say — notwithstanding

the theory of the unitary executive (which is extreme and dangerous) — that presidents have the right to totally control everything and everybody in the executive branch. These and other matters occupy a vast gray area that the legal status quo speaks to but does not resolve. There is much room for difference and debate — and no need whatever to accept prevailing interpretations if there are good arguments against them.

The proper question is not, “What does the Constitution as currently interpreted allow us to do, however weak the reforms it permits might be?” The proper question is: “What does this country *need* from its Constitution if it is to have a well-functioning democracy protected from abuses of presidential power?” A serious attempt to answer this question would lead inevitably to an intellectual inquiry that does *not* take the legal status quo as given, identifies and grapples with fundamental issues in the law, and seeks out and embraces innovative solutions that seem best for the nation — arguing, when necessary, for new or different interpretations of the Constitution as well as for changes in the Constitution itself. If the current Supreme Court might disagree, so be it. The ideas need to be out there for public consideration and debate.

Because the authors stay inside the box, they cannot really confront the danger of an authoritarian-inclined president. In their view, prevailing jurisprudence won’t let them go there (even if they wanted to, given their views on insulation and accountability). Their incremental adjustments might make our system somewhat safer. But they leave glaring threats to democracy fully intact and dangerous. Consider two examples.

First, the authors devote some 40 percent of their book to the Department of Justice, which is the most powerful agency in American government — and profoundly dangerous in the hands of an authoritarian president, who could use it to favor his friends, terrorize his opponents, control the media, amass personal power, and protect his own criminal activities. The authors recognize the dangers, and they argue that the DOJ's prosecutions, investigations, and related activities, including those of the FBI and special prosecutors, need to be shielded from overt politicization and conducted according to proper ethics and norms. Virtually all of their proposed reforms, however, take the form of adjustments to internal DOJ rules, with ultimate authority *still* vested in the president and his attorney general. This amounts to relying on the president to regulate himself. An authoritarian president would not adopt any of these reformist constraints. And were he to find such rules in place upon assuming office, he and his attorney general — presumably an extreme loyalist — could use their authority to simply change the rules to suit their purposes and harness the department's extraordinary power for anti-democratic ends. Only "good" presidents would conform to the authors' rules. But they are not the ones we need protection against.

The second example has to do with Congress's ability to check an autocratic president. Throughout Trump's first term, Congress was put to the acid test — and failed miserably. It failed, in part, because congressional Republicans had no intention of checking Trump's many abuses of power, and indeed, circled the wagons to protect him. But it also failed for legal-institutional reasons. Once the Democrats gained control of the House, they launched numerous investigations of Trump's behavior — on Russia,

his finances, emoluments, Ukraine — and later, began impeachment proceedings. Throughout, Trump simply defied them. He refused to let executive branch officials testify or provide documents to House committees, forcing the latter to go to court and guaranteeing long delays that to this day are not resolved. The committees never got the testimony and documents they needed for their investigations. Yes, Trump was impeached. But he was then acquitted by the Republican Senate and liberated to continue doing what he wanted. He immediately went on a vengeful tear, unleashing punishments on career bureaucrats whose only sin was to speak the truth. After nearly four years of Trump's abuse of power, the lesson is clear: Congress cannot be counted on to check an autocratic president or hold him to account.

What could be more fundamental? This is a dangerous problem that lies right at the heart of our separation of powers system. Yet the authors give it short shrift. They bury it in a rump chapter labeled "Other Reforms" and simply make recommendations for how Congress's subpoenas can be better enforced through civil litigation. There are no flashing red lights. No sense that Congress's abject weakness is a serious defect that threatens to bring our whole system down. No sense that major reforms are needed to bolster Congress's power to check an authoritarian president.

The crisis facing American democracy is very real, and it needs to be dealt with forcefully. Even with Donald Trump gone, the socioeconomic forces that gave rise to his angry populist base — globalization, technological change, immigration, a more diverse and cosmopolitan culture — will not go away. The politics of populist rage will remain a dire threat, and its yearning

for strongman rule may propel future autocrats to the presidency. The nation needs a constitutional system that is prepared to meet the challenge, and it's up to reformers to make that happen — by embracing bold reforms, arguing for a jurisprudence more conducive to constraints on presidential power, and, not least, recognizing how the presidency can be reformed to promote a more effective government. Our democracy depends on it.

This is our take as political scientists. Yet we don't want to end on a dour note. Bauer and Goldsmith are exceedingly well-versed in the laws and practices of the presidency and the executive branch, and they have laid out an intricately well-developed road map of practical, doable reforms that would move the country in the right direction. A wide audience will benefit from reading this book, including lawyers, legal scholars, and reformers intent on taking positive steps toward a safer government. We only wish the authors, who are uniquely positioned to offer a reformist re-thinking of the presidency, had ventured a good bit farther than they did.



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