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Washington faces Donald Trump's shock and awe tactics



Donald Trump, with wife Melania at Washington's Lincoln Memorial, is paying little heed to due process of law.

HENRY ERGAS THE AUSTRALIAN 12:00AM February 11, 2017

With the US Court of Appeals for the Ninth Circuit decisively rejecting the Trump administration's application for its executive order on immigration to be reinstated, the question of whether the checks and balances America's system of government imposes on the new administration will remain effective has moved to the centre of the political debate.

That the President has substantial powers is clear. Faced with a hostile congress, Barack Obama took government by presidential decree to new heights; with both the congress and the presidency now under Republican control, Donald Trump should be able to draw on those powers and more in his efforts to purge the Babylon-by-the-Potomac his supporters revile.

But it would be wrong to simply dismiss the limits on Trump's scope for action. Indeed, a crucial uncertainty, in gauging the outlook for Trump's first term, is assessing how the White House's impetuous occupant will react as those restrictions bite.

The constraints on the president's authority are as old as the American republic itself. Intimately familiar with ancient Rome's descent into dictatorship, the architects of the American constitution put the lessons they had drawn from the classics about the dangers of an unbridled executive at the centre of The Federalist Papers.

And when Alexander Hamilton, who favoured an activist government, suggested expanding the president's discretion, James Madison retorted that a presidency not tightly controlled by congress would be "in theory, an absurdity — in practice, a tyranny".

The constitution's allocation of rights and responsibilities to the president was therefore based on the conviction that, as John Adams wrote, "every man in power becomes a ravenous beast of prey", with the veto giving the president some ability to frustrate congress, but no ability to direct or dissolve it.

However, the design hardly proved as resilient as the founders hoped in curbing presidential ambition. While it took a century and a half for the office to evolve into what Arthur Schlesinger Jr denounced as "the imperial presidency", the trend to an ever stronger executive was apparent well before then.

Woodrow Wilson, writing as an academic in 1906, welcomed that trend, arguing that only a powerful executive, acting not unconstitutionally but "extra-constitutionally", could provide the leadership the US's growing role in the world demanded. From then on, the need to manage a constantly expanding range of responsibilities at home and abroad has served as the basis for concentrating power in the presidency and its sprawling federal bureaucracy.

But it is not merely because of the managerial functions it undertakes that the presidency dominates the political scene. Rather, it is because the president has always been the supreme unifying element in the American system of government.

The Supreme Court dispenses the justice under law the constitution promises. Congress, in a large and diverse country, provides voice and sinew for the incessantly changing elements that make up the national mix.

But if anyone speaks and acts for the nation as a whole, it is the president, who alone requires a national constituency and alone can address that constituency with a single voice. It is that role that has allowed the presidency to be — in the words of Stephen Skowronek, one of its most eminent students — the “singularly persistent force driving the transformation of American politics”.

Set in the context of a system otherwise designed to disperse power, the unanticipated consequence of the framers' design has been to implant in the body politic “a governing institution inherently hostile to inherited governing arrangements” and which has often proven as “order-shattering” as it is “order-preserving”.

But the presidency never has an absolutely free hand, not merely institutionally but also politically. Truly transformative presidents — who dismantle the politics of the past and orchestrate the formation of a durable new coalition — are extraordinarily rare: out of 44 completed presidencies, the list would not stretch beyond Thomas Jefferson, Andrew Jackson, Abraham Lincoln, Franklin Roosevelt and, to some extent, Ronald Reagan (whose effects on the American polity, the political scientist Alan Ware has shown, fell far short of Margaret Thatcher's impact on Britain).

That is not because other presidents had more limited ambitions; rather, Skowronek argues, it is because presidents of reconstruction, as he calls them, have only ever succeeded when the coalition they displaced had already torn itself apart, ensuring they came to office in the wake of their predecessor's unambiguous failure.

Reconstructions, he concludes, only occur after the completion of a cycle that starts with an earlier reconstruction and ends with that reconstruction's “disjunction” — the previous coalition's descent into paralysis.

Even then, shattering the old regime and inaugurating the new has always required political skills of the highest order, not just to assemble a governing coalition but also to overcome the obstacles the particularist and localist forces in congress create to any program of sweeping change.

And handling the Supreme Court requires political skills of the highest order too, especially when much of its bench is inherited from the previous regime.

At times, faced with overwhelming political tides, the court has beat a prudent retreat, as it did under onslaughts by Jefferson and Roosevelt. However, those retreats haven't stopped it from protecting and expanding its remit.

When chief justice John Marshall conceded in 1803 to Jefferson's assault on the newly appointed federal judiciary, the court asserted for itself a previously unknown right to review legislation that would define its role for centuries to come.

Equally, when, in the run-up to World War II, the court reluctantly accepted Roosevelt's social security and labour legislation, it slipped into an otherwise minor case about skimmed milk a footnote conferring on itself an obligation to protect “discrete and insular minorities” that served as the linchpin for the postwar “rights revolution”.

In short, even the greatest presidents may get what they need, but they never get what they want.

Viewed as a whole, those factors highlight the difficulties Trump could face. For all his rhetoric about up-ending the American political system, the circumstances are profoundly different from those in which transformational presidents won the White House.

Despite the large losses they suffered under Obama, the Democrats are not in free fall as they were after Jimmy Carter's one-term presidency. As for Trump, he not only lost the popular vote but has come into office with the lowest approval ratings on record for a newly inaugurated president: at this stage in his first term, Reagan had a net favourability rating of plus 40; Trump's is minus 14.

And his relations with the Republicans' congressional leadership remain characterised by suspicion at best, intense dislike at worst.

The difficulties inherent in tackling issues such as tax reform, the repeal and replacement of the Affordable Care Act and international trade are likely to strain those relations further, as will the tensions associated with a widening current account deficit and a possible slowing in economic growth.

However, Trump could still have far-reaching effects, all the more so if the constraints that get in his way prompt an escalation of the shock-and-awe tactics that are his hallmark. And there is a respectable argument that the barriers against presidential overreach are more fragile today than they have ever been.

Bruce Ackerman, one of the nation's leading scholars of the constitution, expressed those fears early in the Obama years. The central trends in American politics, he argued in his 2010 Tanner lectures on *The Decline and Fall of the American Republic*, made it increasingly likely that a charismatic figure would emerge to compete with incumbent politicians, and once that “candidate breaks out of the pack”, the candidacy would “generate enormous momentum”, allowing the demagogue “to claim a popular mandate for extreme positions”.

Given that momentum, the bulwarks Ackerman's own historical work had emphasised would no longer suffice to keep that candidate, once elected president, in check.

There is much to be said for that argument. Congress is so polarised, and the threat its members face of being displaced in the primaries so potent, that voting on party lines has become a norm from which only the most powerful members can afford to defect; that undermines its effectiveness as a constraint on a president from the majority party.

The Supreme Court is also exceptionally polarised. In the Burger court of the mid-1970s, there were five members who were swing voters on politically charged issues; currently, Anthony Kennedy, now 80, is the only member of the Roberts court who does not consistently vote with the liberal or conservative camp. Should he retire, or another vacancy arise, Trump could create and entrench the first ideologically homogeneous majority voting bloc since the Warren court of the 1960s, reducing the checks the court would impose on a president who shared its predispositions.

And last but not least, there is Trump's personal and political character. He is not the first president in modern times to attack the media, belittle his opponents and ignore due process; but he is the first to do so from the outset of his presidency. And he is certainly the first president to repeatedly insult the judiciary, question the integrity of the intelligence services and assert a moral equivalence between the US and a semi-authoritarian regime run by a thug who jails his critics, when he doesn't murder them.

At least in the short term, Trump's tactics may be politically advantageous, galvanising his base, provoking the Democrats into paroxysms of outrage and forcing congressional Republicans to choose between defending him or being seen to cast their lot with the other side. But the gains come at a steep price.

After all, as the poet James Russell Lowell warned, the American constitution, for all its ingenuity, is not a "machine that would go of itself". Nor does its survival really rest on its institutional architecture. Rather, as The Federalist Papers emphasised, its proper functioning "depends on the spirit of moderation", which in turn relies on preserving a degree of civility in public life.

That means nothing to Trump; and he is hardly alone in that respect. As an age of disappointments melts into an age of extremes, his style is merely part of a global trend.

More than anyone, however, he is that trend's uniquely powerful epicentre. With the potential to shake the world to its foundations, Trump v the Republic may prove the most dangerous battle of all.

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