The People’s Check

How recent voting rights restrictions impact our ability to check the executive branch

Our nation writes its history with the 2020 presidential election. Will we check this president, or will his abuses continue unabated? Election didn’t have to be our last stand; the legislature, the judiciary, and independent government agencies are designed to check the president. Unfortunately, they have been unable to restrain Trump, who has benefit from a hyper-partisan senate, a compliant judiciary, and ostensibly independent agencies welcome to do his bidding. This leaves November’s election as a final check on the president. However, the integrity of this check is undermined by a decade of Republican led disenfranchisement, which has denied the vote from thousands through a series of voter roll purges, restrictive voter ID laws, and more. These practices have disproportionately affected minority voters, undoing decades of civil rights advancement. Furthermore, Republicans loyal to Trump have proven that they are unwilling to safely administer an election during the ongoing coronavirus pandemic, forcing Americans to choose between their health and their right to vote. If the American people are to be given a fair shot at restoring political normalcy, we must put an end to Republican-led voter suppression and restore other checks on the executive branch.

The most visible failure to check the presidency is the Senate’s failure to impeach. Our constitution says that the president shall be removed from office for high crimes and misdemeanors, which the founders understood to be any crime involving the abuse of high office for personal gain[[1]](#endnote-1). Trump’s withholding of congressionally appropriated military aid from the Ukraine in exchange for political favors clearly constitutes such an abuse, yet Republican senators refused to hear witnesses, subpoena executive documents or even acknowledge the severity of the Trump’s actions during his trial. Ultimately, the impeachment decision fell along near partisan lines, which suggests that the Senate’s impeachment check on the president is not operating as envisioned in our Constitution. The founding fathers recognized that impeachments are liable to be “regulated more by the comparative strength of parties, than by the real demonstrations of innocence or guilt”[[2]](#endnote-2), and therefore gave the power to the Senate, which at the time was considered a non-partisan body. Clearly, this does not describe the Senate of today. Unlike in the 18th century, senators are now elected directly, a more democratic process, but one which exposes them to the political thicket. Pro-Trump states have rebuked Senators for even the smallest criticisms of the president, leaving little space for dissent within the Republican party[[3]](#endnote-3), which in turn has disarmed the Senate of its constitutional check on the executive.

The judicial branch has also fallen into the orbit of Trumpism. While its power of judicial review allows it to rule on whether executive actions are constitutional, this check is effective “so long as the judiciary remains truly distinct from both the legislature and the Executive”[[4]](#endnote-4). This distinction is blurred under Trump due the refusal of Trump appointed judges to recuse themselves from cases involving the president. When Trump appealed a subpoena to release his tax returns to the U.S. District Court of Appeals for the District of Columbia, former Trump administration official and Trump appointee Neomi Rao refused to recuse herself and was the lone judge on the three-judge panel to rule in favor of Trump[[5]](#endnote-5). Most famously, Supreme Court judge and Trump appointee Brett Kavanaugh said during his Senate confirmation hearing that he would not recuse himself were a suit to be brought against Trump at the conclusion of the then ongoing Mueller investigation[[6]](#endnote-6). Their refusals call into question the impartiality of the judiciary should it be forced to check the president. The volume of Trump appointees exacerbates this problem; he has appointed 193 judges to federal office, more so than any other president except Jimmy Carter, who benefited from a 1978 law creating 152 new judgeships[[7]](#endnote-7). Furthermore, Trump would not have had the opportunity to appoint these judges had Mitch McConnell fulfilled his constitutional obligation to hold confirmation hearing for Obama’s 2015-2016 judicial appointments. The fact that Trump’s judges were appointed through an act of political force, rather than through the intended constitutional process, further undermines their impartiality and gives the judiciary a partisan hue.

Not all presidential checks are constitutional: limits on campaign fundraising are an example of a statutory check on the President. They make it harder to fundraise through the sale of political favors, a practice Trump has enthusiastically embraced. In the Nixon era, you had to pay for political favors by flying briefcases full of cash to Washington[[8]](#endnote-8). Today you can just cut a check. It’s how Geoff Palmer, CEO of a Los Angeles real estate corporation, and Jonathan Gray, president of Blackstone Group, found their way onto Trump’s coronavirus economic recovery task force, despite lacking any experience in macroeconomic policy. The two men’s organizations funneled over $7 million to the president’s 2020 reelection campaign through various SuperPACs and direct donations[[9]](#endnote-9). This exchange is not illegal. Citizens United allows individuals and corporations to give unlimited amounts of money to these SuperPACs, so long as there is no communication between donor and recipient. Trump doesn’t need communication to make his message clear: donations are rewarded with political favors. The sale of venal office allows Trump to use the presidency to benefit himself politically, a behavior that should be checked under U.S. law, but is nearly unstoppable in the wake of the Supreme Court’s ruling on Citizens United.

Norms and standard have been another historical check on the executive. Since Watergate, there has been broad consensus that the Department of Justice should operate with a level of independence from the president. This idea has been challenged under Trump, who interfered with the DOJ’s investigation into Russian meddling in the 2016 election[[10]](#endnote-10). While that interference was met with some resistance from DOJ staff, the new attorney general, William Barr, has demonstrated his fealty to the president. In early 2020, Barr interfered with sentencing recommendations for Roger Stone, a Trump ally, after the president tweeted about the matter, leading to the resignation of four top federal prosecutors in protest[[11]](#endnote-11). Trump later applauded Barr for “taking charge of a case that was totally out of control”[[12]](#endnote-12). Barr again acted on behalf of Trump’s political interests when he moved to drop federal charges against Michael Flynn, Trump’s former national security advisor, a move that prompted 1,900 former Justice Department officials to sign a petition calling for Barr’s resignation[[13]](#endnote-13). Moreover, Barr publicly denies that the Justice Department should be independent at all, and instead has stated that the president has full control over all executive offices, even when those offices are responsible for investigating presidential abuses. This belief would force the American people to question the result of any Barr-led DOJ investigation into future presidential abuses. When considered with the Senate’s hyper-partisanship, the judiciary’s refusal to recuse and the president’s ability to fundraise through sale of office, a non-independent DOJ paints a picture of a government beholden to Trump. Therefore, a check on the executive must come from the American people.

However, even the people’s electoral check is undermined by Republican state legislatures and a conservative Supreme Court who in the last decade have enacted and upheld a slew of laws and practices that make it harder to cast a ballot. One of the most pernicious of these practices is overzealous purging of the voter role. In advance of Georgia’s 2018 gubernatorial race, the state removed more than 500,000 people in one of the biggest voter role purges in U.S. history[[14]](#endnote-14) because they failed to respond to an official election mailer and had not voted in either of the two previous elections. The stated intent of this policy is to identify and remove voters who have left the state to prevent duplicate voting. In this respect, it is horribly ineffective. In a similar voter purge, Florida scrubbed 180,000 names from the voter roll in advance of the 2012 election, but after the election the state revealed that only 85 of these names were removed appropriately[[15]](#endnote-15). Given the known inadequacies of failure to vote as a proxy for moving out of a voting district, and the availability of tools that can accurately determine whether a voter has moved, such as USPS’s change of address system or ERIC, the Electronic Registration and Information Center, we can only assume that the intent of states that pass these voter purge policies is to disenfranchise their citizens for political gain.

Despite the known inefficiencies of voter role purges, in 2018 the Supreme Court ruled 5-4 that voter deregistration primarily based on previous failure to vote was legal under the National Voter Registration Act of 1993[[16]](#endnote-16). This ruling, founded upon a narrow reading of the NVRA’s conditions for permissible deregistration, violates the spirit of the NVRA as a whole. The laws states goal is to “increase the number of eligible citizens who register to vote” and “enhance the participation of eligible citizens as voters”[[17]](#endnote-17). We should question any application of the law that is contrary to these aims. This is especially true when the law is used to deregister for non-voting, an application explicitly forbidden by the NVRA[[18]](#endnote-18). While failure to vote was not the only reason voters are purged, the other reason, failure to respond to a postcard, is so easy to do that failure to vote may as well have been the only reason for deregistration. Indeed, only 10 percent of election mailers sent out in advance of Georgia’s 2018 election were returned by the recipient[[19]](#endnote-19). The reason Republicans push ineffective voter purge laws becomes clear when we look at who they disenfranchise:in Ohio’s 2015 voter purge, 5 percent of voters from Cleveland neighborhoods that voted for Obama in 2012 were removed, compared to 2.5 from neighborhoods that did not. In Cincinnati, 10 percent of the city’s predominately black downtown population was removed, compared to 4 percent of the predominately white suburban population[[20]](#endnote-20). Voter purges have a clear partisan and racial bias, which republicans abuse for political gain.

Other Republican policies enacted to ostensibly maintain electoral integrity have an even clearer partisan and racial bias. Restrictive voter ID laws and reductions in electoral services in Democratic and minority neighborhoods are particularly discriminatory. States like Texas and Georgia have passed laws that require one to possess one of a handful of valid photo IDs when voting, such as a driver’s license, a passport, or a handgun license[[21]](#endnote-21), all forms of ID disproportionally owned by white voters. Obtaining valid photo ID is statistically harder for black voters in many states. Georgia, for example, requires that voters prove their address by producing two pieces of mail, generally a bank statement and a utility bill, with the voter’s name on it. Given that 20 percent of Georgia’s black population, compared to 3 percent of its white population, do not have a bank account, and that black Americans are more likely to live in mixed-generation households and therefore not have their name on a utility bill, photo ID requirements are biased in favor of white voters[[22]](#endnote-22). This problem is compounded by Republican efforts to close ID issuing offices in Democratic strongholds: Texas does not have ID issuing offices in almost a third of its counties, and only a quarter of those offices have extended hours, making it hard for working Texans to acquire the IDs necessary for voting[[23]](#endnote-23).

In North Carolina the racial implications of restrictive voting laws were made explicit when Republican legislatures requested data on the differences in voting patterns by race and proceeded to shut down methods of voting disproportionately used by black Americans[[24]](#endnote-24). When the data revealed that white Carolinians owned drivers’ licenses at much higher rates than black Carolinians, the state made drivers’ licenses one of the few acceptable forms of voter ID. Upon discovering that black voters were more likely to vote in the first seven days of early voting, Republican legislatures shortened the early voting period from 17 to 10 days. Most damningly, the state admitted to the Fourth Circuit Court of Appeals that it eliminated the opportunity to vote the Sunday before election day because “counties with Sunday voting in 2014 were disproportionately black” and “disproportionately Democratic”[[25]](#endnote-25). The court concluded that the origin of North Carolina’s discriminatory provisions did not lie in the back-and-forth routine of partisan politics, but rather in a concerted effort to suppress black voters.

Until the Supreme Court’s 5-4 decision on Shelby County v. Holder in 2013, the federal government could have prevented southern states from enacting the discriminatory policies described above. The ruling struck down the Voting Rights Act’s preclearance section, which required states and counties with a history of discriminatory voting practices to seek the Department of Justice’s approval before changing voting procedures. Without preclearance it is extremely difficult to strike down discriminatory voting laws: plaintiffs must demonstrate that the government denied the vote on account of a protected class, like race, in order to receive 14th amendment protections. With preclearance, the burden of proof is much lower: its provisions explicitly instruct the DOJ to only approve changes that have neither “the purpose [nor] the *effect* of denying or abridging the right to vote on account of race or color”[[26]](#endnote-26). Therefore, laws that are not discriminatory on their face, like voter role purges and voter ID laws, but do discriminate in practice, would have been denied under preclearance were it not for the Shelby ruling.

The court’s majority opinion outlined two competing rights; the right of southern states to be treated the same as other states under the “fundamental principle of equal sovereignty among the states”[[27]](#endnote-27), and the right to vote unencumbered by racial discrimination under the 14th amendment’s Equal Protection Clause. The court held that while the VRA was justified in subjecting only southern states to greater federal oversight in the 1960s, it was only because of the then blatant disenfranchisement of black voters, and that such subjection was no longer appropriate today because of the near equal rates of white and black voter registration and turnout throughout the south[[28]](#endnote-28). This argument is flawed on multiple counts. For one, the fundamental principle of equal sovereignty used to strike down preclearance isn’t a right found in our constitution, while the right to equal protection under the fourteenth amendment is. The right to equal state treatment under federalism may be hinted at by article IV of the constitution and the written work of our founding fathers (James Madison described our nascent government as “federal [in] nature, consisting of many coequal sovereignties”[[29]](#endnote-29)), but this poor foundation does not to justify the supremacy of the rights of states over the rights of citizens under the Equal Protection Clause. Even if one holds that all states must be treated equally under federalism, preclearance should have been found constitutional because it *does* treat all states equally. It provides a set of voting rights requirements to which all states must adhere, and it includes a provision to “bail-out” states who comply with the requirements for ten years without federal intervention. If the VRA disproportionately effects southern states, it is only because those states disproportionality discriminate against minority voters. There is some sick irony in this logic— both the VRA and modern voter restriction laws discriminate not on their face but in practice, yet the Supreme Court only holds the former unconstitutional.

Furthermore, the Supreme Court’s argument that increased minority registration and turnout, which were in large part due to the ongoing success of the VRA, warrant its repeal is at best ignorant, and at worst willfully discriminatory. As Justice Ginsburg aptly phrased it, throwing out preclearance when it has worked and is continuing to work “is like throwing away your umbrella in a rainstorm because you are not getting wet”[[30]](#endnote-30). The very fact that a state is subject to preclearance suggests that preclearance is still necessary; had Shelby Country gone even 10 years without federal intervention in their voting practices, they would not have been subject to preclearance according to the “bail-out” provision. Texas is a prime example of this repetitive cycle of VRA violations; the state has been found in violation of the Voting Rights Act in every redistricting cycle since 1970[[31]](#endnote-31). We are now seven years out from Shelby, and we no longer have to hypothesize about the effects of the ruling. We know it had had a direct negative effect on voter participation, and minority voter participation in particular. The Brennan Center for Justice estimates that 2 million fewer voters would have been purged between 2012 and 2016 had the Supreme Court ruled against Shelby, and that a disproportionate number of these voters were purged in states previously subject to the preclearance requirement[[32]](#endnote-32).

The difference between having the Federal government to preclear voting procedures instead of weighing in on them via later legal action, which can take years to make its way to the court after the act in question is perpetrated, is a meaningful one. Consider SB 14, a particularly restrictive Texas voter ID law that left nearly six hundred thousand Texans without the documentation required to vote[[33]](#endnote-33). While the law was initially struck down under preclearance, it was later resurrected by the Texas state house after the Shelby ruling and subsequently challenged by the NAACP and the League of United Latin American Citizens. These groups brought the case to a district judge who found that the law “creates an unconstitutional burden on the right to vote”, and that “S.B. 14 constitutes an unconstitutional poll tax”[[34]](#endnote-34). This ruling did not prevent Texas from enacting the new law— the state sought injunction against the ruling which was ultimately granted by the Fifth Circuit Court of Appeals and as a result hundreds of thousands of Texans were unable to vote in the 2014 federal election. This is the product of a VRA without preclearance. It subjects plaintiffs to litigious delays that prevent justice from being enacted in a timely manner, if at all. To ensure that states that have historically discriminated against minority voters do not continue to do so, Congress must re-arm the Voting Rights Act.

This is exactly what House Democrats attempted to do in early 2019 when they passed H.R. 1, a sweeping bill that prohibits voter role purges, automatically registers citizens to vote, sets limitations on voter ID requirements and makes election day a national holiday[[35]](#endnote-35). These changes have been met with stiff opposition from Republican legislators. Kevin McCarthy, Republican congressman from California, opposed automatic registration because, “voting is a right, not a mandate”[[36]](#endnote-36), implying that automatic registration would simultaneously disenfranchise and require voting, two false conclusions. Senate majority leader Mitch McConnell referred to the creation of a national election day as a “power grab” and scoffed that it was “just what America needs, another paid holiday”[[37]](#endnote-37), despite the fact that the idea enjoys broad support from the American people. A 2018 Pew Research Center survey found that 71 percent of Democrats and 59 percent of Republicans support making election day a national holiday[[38]](#endnote-38). Any politician who truly cares about expanding the franchsie should be in favor of these policies— but Republicans in Congress have shown that they have no desire to make it easier to vote or expand the franchise to anyone who won’t vote for them.

Opposition to expanding the franchise is not limited to Republicans in Congress— President Trump has been more than happy to join the states in the suppression of voting rights. Most recently, this suppression has taken the form of Trump’s opposition to state initiated vote-by-mail expansions, especially important now that we must conduct an election in the midst of the coronavirus pandemic. Vote-by-mail is a popular program that enjoys bipartisan support and eleven of the 16 states with restrictions on absentee voting have eased them in light of the coronavirus. Still, some conservative groups have headed Trump’s call. True the Vote, a conservative vote-monitoring organization whose members have physically impeded and harassed voters at the ballot box[[39]](#endnote-39), is suing to end vote-by-mail in Nevada and Virginia arguing in an extraordinary act of cognitive dissonance that it would “result in the disenfranchisement of voters”[[40]](#endnote-40). Some conservative state houses have also opposed vote-by-mail. Oklahoma defended a law in court that required absentee ballots to be signed by a notary public[[41]](#endnote-41) and the Louisiana House rejected a bill along party lines that would have allowed no-excuse absentee voting[[42]](#endnote-42).Trump’s motives for opposing expansion are unclear because it has been proven that vote-by-mail does not favor one party over another[[43]](#endnote-43). Nevertheless, Trump *believes* the policy will hurt him, and is willing to force voters to choose between their health and their right to vote because of it.

While Trump cannot compel states to shut down vote by mail efforts, he can control the agency responsible for delivering those vote-by-mail ballots: the U.S. Postal Service. While Trump would probably not go so far as to forbid the postal service from delivering ballots, he has threatened to withhold a $10 billion federal loan from the agency[[44]](#endnote-44), which could weaken its infrastructure to such a degree that state governors decide a full vote-by-mail election are unfeasible and revert to in-person elections despite the risks of coronavirus transmission. While Trump has heretofore been unable to withhold the loan, one of the five members of the USPS board of governors recently resigned due to the capitulation of fellow board members to executive branch conditions for receipt of the loan[[45]](#endnote-45). Aside from defunding, Trump has asserted his control over the agency by appointing RNC convention finance chairman and Trump mega-donor Louis DeJoy as postmaster general, who has donated a total of $2.5 million to Republican state parties, committees and candidates since 2016[[46]](#endnote-46). DeJoy’s financial ties to the president are troubling considering that the agency he administers will soon be responsible for delivering millions of vote-by-mail ballots.

Despite his threats, Trump does not have the legal authority to withhold funds from the USPS. The Impoundment Control Act of 1974, passed in response to executive overreach during the Nixon administration, requires the president to release federal funds to their intended recipients. Whether he has the political authority to do so is another question. It would not be unprecedented: In July 2019, Trump refused to release congressionally approved funds for Ukrainian military aid. While the House did impeach Trump for his dealings with the Ukraine, that justification for the impeachment lay in the *exchange* of funds for political dirt, not in the withholding of funds themselves. For this violation, Trump remains uncensured, implying that he could successfully wield the power again— even to interfere with the upcoming election. Had Congress meaningfully punished the president for withholding funds to the Ukraine, we might not find ourselves in this situation. Past congressional inaction has left us with a president, who could, in his own words, “could stand in the middle of 5th Avenue and shoot someone”[[47]](#endnote-47). If he believes he could get away with murder, surely, he believes he could get away with election fraud.

Throughout his Presidency, Trump has displayed a willingness to corrupt his office and disenfranchisement the American people for personal gain and our hyper-partisan legislative and judiciary branches have demonstrated their inability to check him. Donald Trump embodies our nation’s worst characteristics— its bigotry, its violence, its hate— while being void of its best— its inclusivity, its compassion, its hope. November is an opportunity for the country to decide which side of America will occupy our current moment. These high stakes demand a free and fair election, but restrictive voting laws and the confusion of the coronavirus pandemic threaten its integrity. If the country is to have an honest chance at condemning this president, we must end voter roll purges, automatically register eligible voters, make it easier to access the polls, and require that all states adopt no-excuse absentee voting this fall.

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