

Blank Checks, Insufficient Balances

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Abstract

In this paper, we take issue with both the normative and the positive claims of Presidential unilateralists who wish to remove traditional political and legal checks on the power of the U.S. President, in favor of exclusive reliance on electoral restraints. We conduct our argument at several levels: first at the level of the political theory of the constitution, on the more practical plane of institutional design, and finally on the political question of which changes might plausibly be adopted in the short to medium term. On the normative side, we reject the idea that removing checks on presidential powers is always a good thing. Instead, we argue that a suitably updated version of Madisonian checks and balances will likely improve the President's democratic accountability with little loss of governmental efficiency. We can accept many of the empirical observations and theoretical architecture offered by the unilateralists, but remain skeptical that a president would be adequately checked by the mere prospect of election. Electoral accountability is too crude and too infrequent to perform the day-to-day role that Congress, courts, and, indeed, executive branch officials play in disciplining presidential adventurism.

We argue specifically that Congress has ample powers to check the President if only it could be induced to exercise those powers. While this is not always easy to do, Congress has often imposed checks on presidential authority and these checks have sometimes worked, at least to some extent. We suggest that, with some constitutionally modest institutional changes, the institution of the Congress could become more assertive of its constitutional prerogatives. The problem is that the incentives of individual congressmen do not necessarily align very well with Congress's institutional interests in maintaining and exercising its authority. And this misalignment leads to characteristic policy distortions that are at the root of presidential critiques of Congress. Successful congressional checks on the president are often localistic and partisan and are aimed to secure partisan interests or to ensure that particular constituents get their share of the pie. Still, we think there is some prospect of vindicating its constitutional prerogatives despite the distorting incentives of its members to shirk in their duty to protect constitutional prerogatives. Doing this will require reform and perhaps some new and unfamiliar institutions. But we think the thrust of the reforms would be Madisonian in the sense that they are aimed to achieve the constitutional goals that he and the other framers tried to implement.