

The Dictator's Handbook, U.S. Edition
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Tyrannophobia, the fear of the dictator, is as old as the American republic.² The founders worried about being governed by a Caesar or Cromwell, and ever since, as regular as the election cycle, Americans have accused the serving president of harboring dictatorial ambitions. Although none of the 43 men who have occupied the presidency so far have succeeded in their supposed dictatorial goals, the public's tyrannophobia has never been stronger. George W. Bush and Barack Obama, for example, were both routinely compared to Hitler based on their alleged dictatorial behavior and ambition.

With the election of Donald Trump, tyrannophobia has reached a fever pitch. Even before taking office, Trump has been labeled a dictator. The accusations no longer come from the margins but have taken center stage. Journalists, politicians, academics, and other people with centrist, establishment credentials appear to genuinely fear that Trump will inaugurate authoritarian rule in the United States. Their fears are based on Trump's statements and actions during the campaign:

Trump has flouted the norms of American elections and governance at every turn, including calling for the jailing of an opposing candidate, encouraging violence against protesters, endorsing the torture of prisoners, suggesting he might not respect the results of the election, falsely claiming that millions of illegal votes were cast, failing to resolve unprecedented conflicts of interest or to even disclose his tax returns, and attacking a federal judge based on his ethnicity (and that's of course a highly incomplete list).³

While it's possible that this was all bombast, and Trump will settle down once he takes office, the stakes are high, and we should take seriously the claim that Trump seeks some level of authoritarian rule, whether or not "dictatorship" in its scariest sense is on the table. Is it possible that he can succeed? Can it happen here?

To answer this question, let's assume that Trump does seek to become a dictator in the fullest sense. The problem he faces is that an array of powerful institutions stand between him and the scepter. He would need to subvert these institutions in order to seize the prize. It's worthwhile, if only as an exercise, to imagine how this subversion might work.

¹ University of Chicago Law School. The first part of the title is filched from Bruce Bueno de Mesquita & Alastair Smith, *The Dictator's Handbook: Why Bad Behavior is Almost Always Good* (2012), whose book also provided some general inspiration for this piece.

² Eric A. Posner & Adrian Vermeule, *The Executive Unbound* (2010).

³ See Thomas B. Edsall, What Does Vladimir Putin See in Donald Trump?, *The New York Times*, January 19, 2017 (quoting political scientist Brendan Nyhan), <https://www.nytimes.com/2017/01/19/opinion/what-does-vladimir-putin-see-in-donald-trump.html?action=click&pgtype=Homepage&clickSource=story-heading&module=opinion-c-col-right-region®ion=opinion-c-col-right-region&WT.nav=opinion-c-col-right-region>.

Tactics

Attack the press. Trump has threatened to “open up” libel laws, to make it easier for him to sue journalists who defame him. Authoritarian leaders have used libel laws to intimidate journalists in other countries—in Russia and Turkey, for example, where thousands of libel lawsuits have targeted journalists critical of the regime.⁴ But Trump has his work cut out for him in the United States. Trump could try to persuade Congress to enact a new version of the Sedition Act of 1798, which criminalized defamation of the president of the United States, or he could invoke the Espionage Act of 1917, which criminalized various forms of disloyalty to the government. But the Supreme Court has made it extremely difficult for the government to prosecute journalists and for public figures like Trump to win civil actions against journalists and others who criticize them.

How could Trump evade this restriction? A frontal assault on the Court’s First Amendment jurisprudence would fail in the short and medium term. Justices on left and right are committed to strong protections for political speech; Trump would need to replace at least five of them, securing the Senate’s consent in each case, and it would be hard, perhaps impossible, for him to find even a single qualified, mainstream jurist who would supply the vote he needs.

But Trump could intimidate the press in other ways. He could order the Justice Department to prosecute journalists who are complicit in leaks of secret documents. While this approach would break with Justice Department precedent, it would be legal. And while it may be difficult to prevail in these prosecutions because of skepticism from judges and hostility from juries, cash-strapped media organizations may be deterred from aggressive investigations of executive-branch misconduct.

Trump might also be able to secure favorable but narrow legislation from Congress, and a degree of acquiescence from the courts, if a national emergency takes place and the legislation is tied to the threat in question. Suppose, for example, that a 9/11-style terrorist attack occurs, and Congress passes a law that prohibits anyone from celebrating radical Islam or promoting terrorism. Conceivably, courts could relax First Amendment protections for journalists who criticize Trump’s counterterrorism program, though this is highly speculative.

In the meantime, Trump has attacked the press in lawful, creative ways. He has used Twitter to send messages to the public without the intermediation of press reports, analysis, and editing. He has publicly chastised journalists who are, in his view, excessively critical of him, pursuing a divide and conquer strategy by blasting some journalists and media organization who have criticized him or reported unflattering facts about him while praising others for their fairness. Using tweets, he has directed public attention to fly-by-night media organizations that support his line, giving them hits from which they profit, and in this way stimulating the production of fake or biased news, and perhaps in the process creating an overall atmosphere of skepticism toward the press as a whole. Perhaps, he can persuade a significant portion of the public that anything the press says is wrong. But whether this strategy succeeds or fails remains to be seen.

⁴ See Ozan O. Varol, *Stealth Authoritarianism*, 100 *Iowa L. Rev.* 1673 (2015).

Trump, following on the footsteps of Obama and other predecessors, can also attempt to control the press by restricting the dissemination of information from the government. The Freedom of Information Act and other statutes compel the government to disclose some information, and whistleblower statutes encourage government employees to disclose certain lawful secrets, but Trump can use his executive power to push back against these requirements—for example, by refusing to disclose in the absence of a court order.

Finally, Trump can adopt a tactic of authoritarian governments the world over, which enforce generally applicable laws (tax, regulatory, criminal, and so on) more vigorously against journalists as well as political opponents of all kind, than against supporters and other people. The executive has nearly unlimited discretion to inflict burdensome investigations on people of its choice, the prospect of which may deter criticism even if prosecutions do not follow.

Attack (or Evade) Congress. Successful dictators who come to power in democracies need to push aside the legislature, which is the major institutional barrier to dictatorial rule. Some dictators simply shut down the legislature, but most maintain it as a fig leaf or as a subordinate body for airing public concerns but not for making policy. These dictators bribe or intimidate legislators, or simply disregard them, ruling by dictat through the military or security forces. And some dictators prevail over the legislature simply because they are immensely popular, and can call on the public to punish legislative opponents in the polls. None of these approaches are open to Trump. But he has other means to enforce his will.

The U.S. president possesses immense powers to act without congressional authorization. He can order the military to conduct operations. He can order the FBI, CIA, and IRS to harass his opponents, as we saw with Nixon. He can also refuse to enforce certain laws—as a series of presidents, including President Obama, refused to enforce the immigration law. And he can order the regulatory agencies to follow priorities that reflect his political interests. All of these things can already be done, lawfully, subject to weak and ambiguous limitations.

For example, Trump could, on his own, order immigration authorities to crack down on illegally present aliens, while directing the EPA to ease up on climate regulation. He can impose retaliatory tariffs against China. He can withdraw U.S. forces from the Baltic states and send them to Taiwan.

But all of these actions require the cooperation of the bureaucracy and the acquiescence of Congress. We will discuss the bureaucracy next; Congress could be roused to action if Trump's actions are too unpopular. Congress retains the power to withdraw delegations on which the president relies, or to pass new statutes that bar his actions. Congress can also use its spending power to block actions that Trump seeks to take, just as it did to prevent Obama from closing Guantanamo. In the end, these conflicts will be resolved either by the courts or by political power. Trump can narrowly interpret new statutes or claim that they violates his constitutional powers—as we saw on repeated occasions during the Bush administration when Congress tried to restrict its counterterrorism actions. Trump, taking a page from Richard Nixon (and Abraham Lincoln), might try to reallocate funds from programs that Congress favors to programs that he favors. Congress could also withdraw cooperation in other areas where Trump

needs legal authority (for example, to raise the debt ceiling); this would create new confrontations.

Attack the bureaucracy. Presidents rule through the bureaucracy. If the bureaucracy fails to cooperate, then the president cannot be effective. Trump faces not one but multiple bureaucracies, and the different agencies may respond differently to him. The immigration authorities might enthusiastically participate in crackdowns, while the EPA will drag its feet if asked to deregulate. The most important bureaucracy for an aspiring dictator is the military, on which most dictators depend for their power.

To control the federal government's vast civil service, Trump needs to appoint loyalists to leadership positions. In most cases, the Senate must consent. Strikingly, Trump has so far nominated several relatively independent people to important positions, who have contradicted Trump's views during their confirmation hearings. Trump is hampered by the small number of truly loyal supporters who also have significant government experience and hence the ability to control the agencies they are asked to head. Independent political appointees and members of the civil service will almost certainly disobey any orders from Trump requiring that they violate the law and be put in legal jeopardy. He will also have trouble motivating them to obey even lawful orders that are greatly at variance with precedents, their political preferences, and their agencies' historical missions.

What can Trump do? In the long term, Trump, if successful, may be able to replace disloyal appointees with loyal appointees, and may be able to attract loyalists to civil service positions. In the short term, he can threaten to undermine agencies that fail to do his bidding or in any other way pose a threat to his power.

Trump did just this, even before he entered office. Trump lashed out at the intelligence agencies, likening them to the Gestapo, because they reported to the press that Russian meddling helped Trump win the election. This was a high-stakes gambit. It is possible that the intelligence agencies, fearing that they will lose popular support, will think more carefully before crossing Trump. It is also possible that they will work to undermine him. Trump's attack on the intelligence agencies may also serve as a warning to other agencies that might otherwise be inclined to defy him.

A full-blown dictator needs military support. U.S. military leaders have shown exemplary refusal to meddle in politics or challenge civilian leadership—with the notable but short-lived exception of Douglas MacArthur during the Truman administration. This cuts both ways. Trump can expect loyalty from the military as long as he maintains his position in office and uses the military in lawful ways—even, one suspects, if he engages in unconstitutional behavior like harassing the press. But it is currently unimaginable that the military would cooperate if Trump called on it to shut down government institutions, as so many dictators in other countries have done.

Attack the courts. With a few exceptions, confined to early American history, the U.S. president has given significant respect to the courts. Courts can thwart a dictator's ambitions in many ways. They can protect dissenters from prosecution, civil litigation, and harassment. They

can strike down regulations and block executive orders. American judges are protected by life tenure; they benefit from a tradition of independence and are trusted by the public.

But there are significant limits on judicial power. The judiciary is largely reactive, and can rarely block the executive branch when the president acts swiftly. The courts have for the most part refrained from interfering with military orders and foreign policy. They give deference to the president's interpretation of treaties and have permitted the president to withdraw from them, while not interfering with "executive agreements" with foreign countries that evade the requirement of Senate consent under the Treaty Clause of the Constitution.

Moreover, if Trump obtains the cooperation of Congress, he can make significant inroads on judicial power. With legislation, he can strip courts of jurisdiction. He could also follow in the footsteps of Franklin Roosevelt and attempt to increase his support on the Supreme Court by packing it—increasing the number of justices and appointing a majority. But even though Roosevelt was immensely popular when he proposed to pack the Court, he failed to convince Congress. The episode seriously damaged his own political standing. Court-packing is not a plausible tool for Trump.

Trump could order executive officials to disregard judicial orders, putting them at risk of contempt of court. Although courts have been extremely reluctant to jail government officials for contempt, judges would likely be more aggressive if they believed that the president sought to defy and undermine the judicial system.

Attack the states and local governments. A dictator who sought total control over the country would need to punch through the walls created by the federal system. Consider, for example, the dictator's strategy of enforcing generally applicable laws more harshly against his political opponents than against ordinary people, who might be left alone completely. Most generally applicable laws are enforced by the states and local police, not by the federal government. Even enforcement of federal laws, which overlap with state laws in many ways, requires cooperation with local authorities. Already some cities have announced that they will not cooperate with Trump's plan to round up illegal immigrants; they could even actively shield illegal immigrants from federal authorities.

The federal government can impose its will on the states in many ways—by, for example, bestowing or withholding funds, or simply enacting new laws and enforcing them with federal agents. But limits on such control are formidable. The large number of states, their historical independence, the important role that state officials play in the party system, and numerous other factors suggest that they will present significant pockets of resistance to any president who seeks to be dictator. The only practical way for the federal government to seize states' police powers is through martial law, last accomplished on a wide scale during the Civil War. Barring a catastrophe, this can't happen here.

Attack the party system. The party system, though not recognized in the Constitution, has emerged as a significant constraint on presidential power. Parties are vast networks in which patronage and other benefits are transferred to the ranks in return for political support for the parties' leaders. Most presidents obtain power by working their way up a party hierarchy, in the

process being vetted for talent and ideological reliability. Once in power, they continually repay the party by distributing offices and other resources to prominent party members, and supporting the party's goals, and in return receive support by party members who occupy government offices and positions in the press and elsewhere in civil society. By the same token, a president's party can turn on him if he defies it. And the party that is out of power will marshal its own resources to undermine the president—by offering benefits to its own members who, by virtue of their positions in government or in civil society, can subvert the president and bring their own members to power.

Trump is unique in modern history as an outsider who came to power by overcoming his party's leadership. And while the Republican party gave him its support once he won the primary, he must continue to maintain that support, and he is vulnerable if it withdraws his support. Trump also must contend with the Democratic party, which seeks to undermine him. An ordinary president will rely as much as possible on his own party and occasionally govern with support of moderates of both parties. But such a president is constrained by the party system. What is an aspiring dictator to do?

Some dictators and aspiring dictators create new parties outside the established system (Huey Long, for example, if he can be considered an aspiring dictator), or rely on other groups to support them, like an ethnic or regional population, or the military, or the security services. Trump has not moved in this direction. The only likely route to dictatorship involves subordinating the Republican party establishment to his will. One possible approach is to achieve such a high layer of popularity that party members are afraid to defy him. But Trump is unpopular, and even very popular presidents—like Franklin Roosevelt—have been unable to dominate their parties except for short periods of time. Another approach is to use patronage to keep the party in line. But Trump—like previous presidents—does not have access to sufficient patronage. There are only so many offices that can be distributed, and these offices are worth only so much. Imaginably, an extremely wealthy president could keep party members in line by using his personal funds—or the funds of wealthy supporters—to (legally) bribe them with campaign contributions. But even if Trump is as rich as he says he is, he does not have that kind of money, nor does he appear to be willing to spend his own money for this purpose.

Attack civil society. The vague term, civil society, encompasses groups outside government, including the press and parties, which have already been discussed, But other groups play a role as well. Trump already faces significant opposition from the legal profession and from academics. Lawyers will bring lawsuits against any virtually any major executive action that smacks of executive overreaching—in many cases funded out of their own pocket, or by law firms, or by public interest groups. Government agencies constantly draw on the expertise of scientists and other researchers, who might boycott a Trump administration or (more likely) refuse to provide research and technical support to policies they disapprove of.

Public interest groups, religious groups, and other organizations will also organize marches and petitions, publicize executive overreaching, and take other actions to oppose Trump. Although one suspects that many such groups will support him as well, the overall effect is likely to turn the public against Trump if he overreaches, which in turn will embolden Congress, the courts, and the bureaucracy to constrain him.

Could a dictator attack civil society? In many countries, they have done just that—by harassing critics, and offering emoluments to those who give support to the regime. Erdogan has purged Turkish universities as well as the press and bureaucracy. But, in the United States, all such efforts would be nearly unprecedented. The closest analogy is the McCarthy era, but in that case the impetus came from Congress, not the president, and the era was short-lived and ended with McCarthy's disgrace.

Stir up the mob. The most tried-and-true method of becoming a dictator in the twentieth century has been to rely on extralegal methods, typically, involving a mob of supporters who use violence to intimidate opponents, whether they are journalists, bureaucrats, judges, politicians, or ordinary citizens. This was the method of Hitler and Mussolini, which Sinclair Lewis translated into the American setting for his novel, *It Can't Happen Here*. This method relies on a large group of disaffected people, usually young men, with little to lose, who are fired up by the promises and ideological aspirations of the would-be dictator. In principle, Trump could try to create his own blackshirts by rewarding supporters for their loyalty with offices and other compensation, along with the pardon if they are convicted of crimes. But while Trump has winked at violence on occasion, he has not tried to create a paramilitary to do his bidding. American soil seems especially unpropitious for such a transplant, perhaps because the country has always been too rich, large, and diverse, or the political system has always been effective at addressing the interests of groups that are large enough to pose this kind of threat.

Can It Happen here?: On Institutional Complementarities

An aspiring dictator would probably do best by pushing against all these margins rather than try to crush the institutional barriers seriatim. Imagine that Trump simultaneously: (1) harasses only the toughest and most critical journalists while encouraging a squid cloud of disinformation that keeps the public in the dark about his mistakes and failures; (2) defies Congress only in carefully selected cases where his goals are popular and Congress is divided; (3) harasses agencies that pose a threat to his power (intelligence agencies?) while lavishing resources and attention on those that support him (immigration agencies?); (4) disobeys a particularly unpopular judicial order while scorning the integrity of the judge; (5) divides both parties through skillful distribution of patronage; and (6) manages to inspire some of his supporters to threaten violence against journalists and government employees who dissent from Trump's rule. Could steady pressure against all of these institutions, all at once, cause them to crumble because they cannot rely on each other for support?

A point that emerges from the discussion is that the institutions that may block an aspiring dictator depend on each other for mutual support. Journalists can resist a dictator through courageous reporting, but not—or less so—if the dictators' supporters have infiltrated the judiciary, causing it to relax first amendment protections that would keep journalists out of jail or spare them from paying large fines. The judiciary can block illegal orders, but maybe not if judges fear that Congress will impeach them or strip them of jurisdiction. Congress can defy a dictator but maybe not if it believes that voters love their leader and will vote against members of Congress who oppose him. Congress may fear even an unpopular dictator if they suspect that the dictator can influence electoral outcomes—by manipulating and pressuring the press, or

controlling the agencies that conduct elections (which, unfortunately for the U.S. president, are mostly state agencies). Thus, while a frontal assault by the would-be dictator on a single institution standing alone seems bound to fail, it is possible that a series of more modest actions on multiple fronts, executed patiently over a long period of time, could eventually produce dictatorial power.

But, at the time of this writing, on the eve of Trump's inauguration, this turn of events seems extremely unlikely. Trump takes office as one of the most unpopular presidents in history, widely distrusted and even loathed by elected officials, journalists, and the public, and (one suspects) judges and a good portion of the bureaucracy. With a very long record of lies and broken promises, he can hardly expect enthusiastic cooperation even from people who sympathize with his goals. With critics in civil society nipping at his heels, and the public skeptical about his temperament and integrity, Trump is more dependent on the party establishment, the bureaucracy, and other institutions, than any president in recent memory. Presidential weakness rather than power may be the real worry.