Checks Without Illusions

Why Constitutional Enforcement Is Failing—and Why That Matters Now

Public debate about executive power in the United States is often framed in familiar terms: policy disagreements, ideological divisions, or the personal character of those who hold office. That framing misses the deeper issue. What is at stake is not which policies prevail, but whether the constitutional system designed to restrain power continues to function as intended. The present moment makes that question impossible to avoid.

This failure does not arise because the Constitution has been abandoned. It arises because its enforcement mechanisms have weakened, and because they have been replaced—often unconsciously—by norms of good faith that no longer reliably operate.

Separation Is Not the Same as Restraint

The Constitution is commonly described as a system of separated powers. That description is accurate but incomplete. Separation of powers describes how authority is distributed among branches. Checks and balances describe how that authority is restrained when exceeded. A system may preserve separation in form while abandoning checking in practice. When that happens, constitutional government persists in appearance but not in function.

The Framers did not design the Constitution on the assumption that officeholders would act virtuously. They assumed ambition, self-interest, and institutional conflict, and sought to channel those forces rather than suppress them. Power was meant to be checked by counter-power, not by trust. Congress could compel testimony and control funding. Courts could issue binding judgments. Impeachment existed not only for crimes, but for defiance.

Over time, however, many of these formal tools fell into disuse. Congressional contempt gave way to “accommodation.” Oversight became negotiated rather than enforced. Prosecutorial independence hardened into custom rather than obligation. Courts assumed their orders would be obeyed without confrontation. In place of enforcement emerged a reliance on norms: voluntary compliance, institutional restraint, and shared commitment to legality.

For decades, that norm-dependent equilibrium appeared stable. Presidents generally complied with court orders. Congress relied on informal pressure rather than coercion. The system worked—not because its enforcement mechanisms were robust, but because those in power broadly accepted the same constraints. That equilibrium was always contingent. Norms function only when they are shared. They do not bind actors who reject them.

From Warning to Diagnosis

Legal scholars and jurists have long warned that reliance on norms creates latent vulnerability. A substantial body of work has described how emergency procedures can entrench power, how executive unilateralism can substitute for legislation, and how judicial restraint can become judicial abdication when enforcement weakens. Much of that work was cautionary. It described what *could* happen if good-faith assumptions failed.

Those warnings now describe present condition. The failures they anticipated are visible in practice, across multiple institutions, and at sufficient scale to reveal a systemic pattern rather than isolated episode.

Executive Orders as Lawmaking by Other Means

The modern use of executive orders illustrates the shift. Increasingly, they function not merely as instruments to implement statutes, but as substitutes for legislation. They restructure regulatory regimes, alter enforcement baselines, and establish rules of general applicability—often in areas where Congress has declined to act or has legislated differently.

Courts have repeatedly struck down executive actions that exceed statutory authority or encroach on legislative prerogatives, treating the boundaries between execution and creation of law as meaningful limits. That boundary, however contested at the margins, has not been abandoned in doctrine. The Trump administration has tested it aggressively. An executive order challenged in court as contesting a settled reading of the Fourteenth Amendment—rather than implementing any ambiguous statute—is a different kind of action than ordinary regulatory overreach. So is the restructuring of congressionally created agencies through executive direction alone, which courts have found exceeds the president's authority to direct the execution of existing law. In both cases, courts intervened. The question the emergency stay mechanism poses is whether judicial intervention arrives in time to matter.

The deeper problem lies in what happens next.

When a lower court enjoins an executive action as unlawful, emergency stays are increasingly used to revive the executive-created regime while appeals proceed.

Traditionally, emergency relief exists to preserve the *status quo ante*—the last uncontested legal state—so that appellate review does not itself cause irreparable harm. In these cases, however, the "status quo" preserved is the newly imposed executive order. The legal baseline created by unilateral action becomes the default law, while constitutional compliance is treated as a disruption to be paused.

This inversion is often justified by appeals to administrative stability or institutional caution. In practice, it shifts power decisively toward the Executive. Unilateral action takes effect immediately; constitutional correction is delayed, sometimes for months or longer. As several Justices have warned in dissent, the routine use of emergency relief to impose or preserve sweeping legal change undermines transparency, accountability, and reasoned decision-making. The law changes first; explanation comes later, if at all.

The Chevron Retreat and the Enforcement Gap

For four decades, *Chevron U.S.A. v. Natural Resources Defense Council* governed the relationship between courts and executive agencies: where a statute was ambiguous, courts deferred to the administering agency's reasonable interpretation. The doctrine gave agencies wide latitude to shape regulatory regimes through their reading of their own enabling statutes. Its repudiation in 2024 placed that interpretive authority squarely back with the judiciary.

In theory, this should strengthen checks on executive power. In practice, it has coincided with increased judicial hesitation to impose effective remedies. The practical sequence matters: an agency acts, a court finds the action unlawful under its newly reclaimed interpretive authority, but declines to issue an injunction pending full appellate review. Months pass. The unlawful policy governs. Courts now claim greater interpretive authority while simultaneously narrowing the circumstances in which they will enforce that authority promptly. Responsibility has increased as enforcement has weakened—a combination that favors executive dominance.

Several dissenting opinions have noted the institutional mismatch. If courts assume the role of primary interpreters of statutory meaning, they must also accept responsibility for ensuring that unlawful executive action does not govern by default. Interpretive authority without remedial urgency leaves the Executive free to act first and litigate later.

Courts Without Enforcement Power

Judicial authority faces a structural limit that cannot be ignored: courts lack independent enforcement power. This weakness is not new. In *Worcester v. Georgia*, the Supreme Court's judgment went unenforced when the executive declined to intervene. The remark attributed to President Andrew Jackson—"John Marshall has made his decision; now let him enforce it"—is almost certainly apocryphal, but the constitutional reality it captures is not. Courts ultimately depend on executive cooperation.

That logic has resurfaced in modern rhetoric suggesting that judicial orders are advisory, negotiable, or subject to executive reinterpretation. While courts continue to issue binding rulings, compliance increasingly depends on voluntary obedience rather than institutional compulsion.

This is not merely theoretical. The case of Kilmar Abrego Garcia—a Maryland resident deported to El Salvador in acknowledged violation of a standing court order—produced a unanimous Supreme Court ruling directing the government to "facilitate" his return. The administration interpreted that word to mean it had no affirmative obligation to act. The district judge overseeing the case characterized the government's response as willful noncompliance and deliberate obstruction of her discovery orders. The administration eventually returned Abrego Garcia to U.S. custody, then immediately filed criminal charges; the chief of the criminal division in the relevant district resigned over the decision. A unanimous Supreme Court order functioned, in practice, as the opening of a negotiation rather than its conclusion.

The pattern extends well beyond a single case. During Operation Metro Surge, a mass immigration enforcement action in Minneapolis, Chief Judge Patrick Schiltz of the District of Minnesota—a George W. Bush appointee and former Antonin Scalia clerk—documented that ICE had violated nearly a hundred court orders in a single month. Judges across the district had repeatedly ordered detainees released or granted access to counsel. The orders accumulated. Compliance did not. Judge Schiltz is not a firebrand; his decision to speak publicly reflected a degree of institutional frustration with few modern precedents.

Formal authority remains intact. Practical enforcement increasingly does not.

Emergency Power Without End

The enforcement gap is most dangerous when the Executive invokes emergency authority. Emergency reasoning has a powerful logic: speed is essential, ordinary process is too slow, and harm will result if action is delayed. That logic is not new—and neither is its danger.

As the Supreme Court held in *Ex parte Milligan*—an 1866 case arising from the military trial of a civilian during the Civil War—the Constitution is not suspended by crisis. So long as the courts are open, civil law governs. Emergency powers, once normalized, tend to persist beyond the emergency itself. Dissenting opinions across eras have warned that extraordinary authority, once exercised without consequence, becomes precedent rather than exception.

Contemporary assertions that emergency conditions justify prolonged detention without individualized process, or the use of wartime statutes absent declared war, echo precisely the reasoning *Milligan* rejected. The Trump administration's invocation of the Alien Enemies Act of 1798 against Venezuelan migrants offers a concrete illustration. The statute was designed for wartime use against nationals of an enemy power with which the United States is at war. The administration applied it during peacetime, against individuals the government alleged—without individualized adjudication—were members of a designated criminal organization. Deportation flights were arranged on timelines designed to outrun judicial intervention; in several instances, planes departed while courts were still considering emergency stays. The risk is not only abuse in individual cases, but the quiet redefinition of what process is considered optional—and how fast a government must move to place it beyond reach.

The Fragility of DOJ Independence

The erosion of enforcement is compounded by the decline of another critical norm: the independence of the Department of Justice. DOJ independence is not constitutionally mandated. The Attorney General is a principal officer of the Executive Branch, appointed by and accountable to the President. Independence developed after Watergate as a form of constitutional hygiene—a shared understanding that prosecutorial power must not be used for personal or political ends.

When that hygiene fails, prosecutorial discretion risks becoming prosecutorial immunity or selective enforcement. The clearest recent example is the Trump administration's 2025 intervention in the federal corruption case against New York City Mayor Eric Adams. DOJ leadership ordered the case dropped—without assessing the strength of the evidence—citing the mayor's cooperation with the administration's immigration enforcement priorities. The acting U.S. attorney for the Southern District of New York, a Trump appointee and former Scalia clerk, refused the order and resigned, writing that the mayor's attorneys had "repeatedly urged what amounted to a quid pro quo." Seven prosecutors resigned in total rather than carry out the directive. The presiding judge dismissed the case with prejudice, writing that “everything here smacks of a bargain: dismissal of the indictment in exchange for immigration policy concessions.” The check held—but only because individuals acted with integrity under pressure, not because any structural mechanism compelled it. That outcome illustrates the nature of the check itself.

But it is downstream and discretionary. It operates only after investigations are launched, resources expended, and reputations burdened. Even when charges fail, the cost of defense itself exerts a chilling effect on political participation and dissent. A system that relies on personal virtue rather than institutional design is not robust. It is fragile by definition.

A Pattern, Not an Episode

Across these domains, formal constitutional structures remain in place. Their effectiveness, however, depends increasingly on norms and good faith rather than mechanisms that compel compliance. Checks function as friction: they work by forcing each branch to expend something—time, political capital, institutional credibility—when it pushes against the others. When that friction is optional, power moves to whoever is willing to ignore it. Where those values hold, the system appears stable. Where they have eroded, the Constitution supplies fewer automatic safeguards than commonly assumed. What was once latent vulnerability has become present condition.

What makes the current moment distinct is not merely the frequency of norm violations but their character. Prior administrations—of both parties—pushed against constitutional limits, asserted broad executive authority, and at times acted in ways courts later found unlawful. But they generally did so while accepting the legitimacy of the checking institutions: they argued their actions were legal; they complied, however grudgingly, when courts disagreed; and as a rule they did not publicly contest whether judicial orders were enforceable at all. The Trump administration has, in several domains, moved past that framework. It has questioned whether courts have authority to review executive action at all, treated Supreme Court orders as subjects of creative interpretation rather than commands, and timed enforcement actions to outrun judicial intervention. A match and a wildfire are not simply different in degree.

This does not mean the Constitution has failed. It means it is being under-enforced.

What Restoration Requires

The remedies required are not extra-constitutional. They are institutional.

Congress must reclaim its oversight and coercive powers rather than relying on accommodation. Courts must insist that their judgments restore the lawful baseline and are obeyed in practice, not merely acknowledged. Emergency relief must return to its traditional role of preserving the last uncontested legal state, not entrenching unilateral action. The Executive must be confined once more to its role as executor of the law, not arbiter of its limits. None of this happens through goodwill. It happens through the willingness of each institution to impose costs on the others when limits are exceeded—which is precisely what the Framers designed and precisely what atrophied.

The Constitution does not promise harmony. It promises restraint. That restraint is not self-executing. It depends on institutions willing to confront one another when power exceeds its bounds. To insist on that confrontation is not destabilizing. It is the essence of constitutional government.