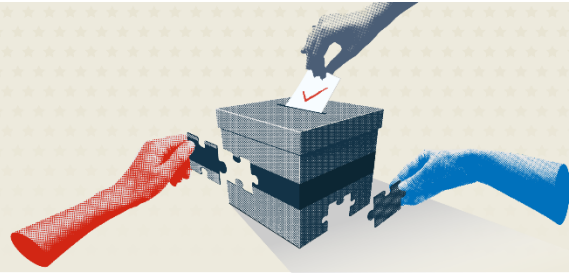


DEMOCRACY IN QUESTION

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THE BROOKINGS INSTITUTION *Democracy in Question* podcast

“Do eroding presidential norms undermine constitutional principles?”

Thursday, March 13, 2025

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Episode Summary:

Not even 100 days into a second term, the Trump administration is asserting expansive executive authority over the federal bureaucracy and spending, despite traditional congressional oversight, constraints, and presidential norms. In this episode, host Katie Dunn Tenpas discusses with legal expert and Fellow Scott Anderson how President Trump has deviated from central norms and practices of the modern American presidency and the potential consequences of such actions.

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TENPAS: Hi, I'm Katie Dunn Tenpas, a visiting fellow in Governance Studies at the Brookings Institution and the director of the Katzmman Initiative on Improving Interbranch Relations and Government. And this is season two of Democracy in Question, a podcast where we examine current events through the lens of America's political foundations, thinking about how recent events fit into the broader stream of democracy that runs throughout our history. You can find episodes of this podcast at Brookings dot edu slash DemocracyInQuestion, all one word.

On today's episode, I'm posing the question, do eroding presidential norms undermine constitutional principles? In his second term in the Oval Office, President Trump is already shaking up American politics in a big way, seemingly breaking the mold of the modern presidency and showcasing a muscular, aggressive approach to governing. In terms of personnel, his north star has been loyalty as demonstrated by nominees whose credentials pale in comparison to their predecessors. In terms of foreign policy, he seems to be avoiding diplomacy and ignoring alliances in favor of dealmaking. On the domestic front, the Trump administration has fired perceived adversaries and centralized control over many federal agencies, including independent ones.

These actions call into question the framers' vision for a system in which each branch checked the power of the other, to prevent the rise of another king. Much of what constrained prior presidents were norms and customs. And while Trump's predecessors generally stayed clear of violating these norms, President Trump has deviated from the central tenets and practices of the modern American presidency.

To dig deeper into this new version of presidential power, I'm talking with Scott Anderson, a brilliant scholar and fellow in the Governance Studies program at Brookings and general counsel and senior editor for Lawfare. A former U.S. diplomat and government attorney, Anderson is an expert in foreign relations law, international law, and national security law and policy, particularly as they relate to the Middle East region. Welcome to the show, Scott. I'm eager to dive into this discussion with you about presidential authority norms during this pivotal moment in American history.

ANDERSON: Thank you for having me.

TENPAS: So do you just want to kick it off by telling me your thoughts about kind of the co-existence of norm breaking and constitutional principles?

[2:51]

ANDERSON: Yeah, absolutely. I mean, the Constitution is defined by a separation of powers, and not always a neatly defined separation of powers, a neat cleavage between the different branches. Instead, we have a number of areas of overlapping and interdependent authorities. Sometimes there's reasonable ambiguity about where exactly the line is between the branches with the assignment of responsibilities, particularly between the political branches: Congress and the executive branch.

But we do have a clear sense about a lot of authorities and where traditionally they have laid on kind of the constitutional map, which branch plays a dominant role or particular types of roles in regards to those authorities. And we have a specific sense of the obligation of the branches to respect each other.

Hard questions do arise inevitably between the branches, but it's a defining precept of the three branches now that essentially the executive branch is responsible for implementing the law as enacted by Congress and as interpreted and understood by the courts.

Those norms, that principle, I say norm because the enforcement mechanisms that ultimately could be brought to bear to require the executive branch to act in that manner or the other branches potentially, particularly the executive branch, are sometimes a little unclear and rarely invoked because it rarely gets to the point where it's necessary to go that far.

But that balance, those norms that traditionally drive that interbranch practice are probably at under a degree of tension right now that is unprecedented in certainly recent American history and I think probably any American history, although it's still early. And I don't think quite we're at the point of a crisis that some people have described, but we can see the tensions emerging that if they fail to reconcile one way or the other could lead to a crisis down the road.

TENPAS: And how does the norm breaking affect checks and balances?

[4:46]

ANDERSON: Pretty dramatically. I mean, what we are seeing the Trump administration do in its first month in office—and it's part of a quite deliberate strategy; it's something that intellectually we've seen the foundations laid for in the Project 2025 book or policy manual that was rolled out in advance of the election, disowned at some point by the Trump campaign, but very clearly embraced in terms of who it's appointed and the policies it's pursuing. And it's got a longer lineage than that, tied to kind of the Trump-oriented universe of think tanks and research institutes that kind of sprung up after his first term in the White House.

TENPAS: Are you talking about the American First Policy Institute?

ANDERSON: American First Policy Institute being the most lean forward of those, but not the only one. There's kind of a set of those and some of that predate even the first Trump administration there. We think about the Claremont Institute and other groups that kind of embrace this line of thinking.

[5:35]

The essential idea that's being advanced here is that the executive branch has much more fulsome legal authorities to define what the federal government does than it has exercised traditionally in the past or that's traditionally been recognized. Key areas of this include around the control of the federal bureaucracy, meaning the actual personnel and, to some extent, structure. Those are issues where traditionally the legislative branch, Congress, has exercised a good degree of control, setting

restrictions on certain officials' removal, setting up different types of institutions to try and provide incentives for certain types of policymaking or certain paces of policymaking, making some, you know, more bipartisan, other ones more directly under the control of the presidency.

We have seen the Supreme Court and other courts, lower courts as well, begin to chip away at certain of those protections for over the last really 30 or 40 years because of this idea of the unitary executive, the idea that the president should have absolute control over the executive branch.

The Trump administration, though, has taken those steps, those chips that we've seen in the armor of that theory of congressional control over the bureaucracy and has leapfrogged them by several measures. You know, it has taken steps to fire federal employees that directly ignore statutes. It is taking steps towards institutions like USAID that are protected by statute to dismantle them, although it has now prevaricated a little bit on to what extent it is actually dismantling them as opposed to just shrinking them, because I think it recognizes it's not on the strongest legal terrain there. It's doing a lot of these things that have traditionally been understood to be congressionally mandated and were far down the spectrum of what most people thought was in contestation about where the line between Congress and the executive branch is broken.

Some items it's addressing like multi-member commissions, bodies, the Office of Special Counsel is one that's being litigated currently as we're recording, those are ones that have always been kind of on the target list for unitary executive believers, of which there are members on the Supreme Court that are distinctly believers of that. And a lot of traditional legal conservatives, people who subscribe to the Federalist Society buy into some version of this. But that doesn't mean that because you believe the theory the Constitution says the president has to have control of those officials, it goes all the way down to—

TENPAS: —right, to independent commissions—

ANDERSON: —or even, you know, just bureaucrats, just day-to-day staffers. But that's what we see the Trump administration trying to assert. First statutorily and the implementation of Schedule F and through regulations where it's reinterpreting certain statutory language in a unorthodox and I think legally questionable way. But nonetheless trying to implement that. But then foundationally underlying that is a constitutional assertion. The idea that this is what the president can do because he controls the executive branch.

Same goes for the impoundment authority. Traditionally, it's understood Congress has the power of the purse. When Congress appropriates money and says this money shall be spent on this purpose, the executive branch's job is to take care that the law be faithfully executed. That's what the Constitution says its duty is, and to implement that by spending that money within the confines of parameters that Congress has set out for it.

But we have seen the Trump administration stop funding across the board in ways that would generally be seen, and have traditionally been seen, as beyond the president's authority to direct or implement, because they require an interruption of

this impoundment authority of the distribution of funds and use of funds in the way Congress directed.

[9:05]

Again, the executive branch, the Trump administration has complicated this a little bit. It's said at various points, no, we're not really relying on a constitutional argument, we have statutory authorities, sometimes contracting authorities, sometimes regulatory authorities that led us to do this. This is kind of a piecemeal argument. But it's implemented them through one big hole that says, stop all payments for 90 days.

And so the real challenge with cases like these and on the personnel side is, are courts and judges viewing these as a forest or trees? Is this a case where there are just 10,000 little legal disputes that have individual little legal arguments that may or may not support them, and we have to fight over all 10,000 of those disputes? Which normally would get channeled into very specialized administrative procedures to resolve for both payments and for personnel. Or is this what President Trump said it was on day one, what Elon Musk has said at various points, an effort to implement a very big policy change, a forest so to speak, that really foundationally changes government, even if the lawyers in court are arguing it's actually 10,000 little things.

Does it all amount to one big thing that needs to be viewed as a cohesive whole? That's really what courts are wrestling with now because that really dictates the sorts of remedies they look to and procedures they look to in resolving these.

TENPAS: And this might be a difficult question, but how did we get here?

[10:25]

ANDERSON: It's a very good question. It's worth taking a step back and recognizing there has been a thread of thought, particularly prevalent, but not necessarily isolated to kind of conservative political wing of American politics, that the bureaucracy is an enemy and is particularly invested with its own ideological agenda, or some would argue, I think a little more reasonably, institutional inclinations that can impede the implementation of a president's policy agenda when he's elected.

This idea was really staked out in the 1970s and, like, coming into and out of the Nixon administration. We saw a lot of people viewed both the bureaucracy and actually specifically viewed the bureaucracy as kind of a tool of Congress to try and constrain the president, and so would push back against a lot of the idea that the president couldn't do a lot of policies they wanted to implement in very strong ways. And it's been a part of that sort of conservative legal view that we often associate with the Federalist Society and similar institutions since that point.

And threads of it have really caught on in ways that people across the legal academy now buy into.

TENPAS: What's an example?

ANDERSON: So an example is this idea about bureaucracy being a slowing element. Elena Kagan, you know, Democratic appointee to the Supreme Court, a

justice on the Supreme Court now, her kind of seminal academic work was a piece called Presidential Administration, a law review article, which kind of drew out the argument saying, actually, there are good reasons why the president can push the bureaucracy and make the bureaucracy break free of its usual kind of confines and inclinations because the bureaucracy actually is a small “c” conservative institution, a check on presidential policy making that is, I think some would call it undemocratic.

I think that goes too far. I think it is more of a long-term, you know, installed by democratic processes over a long period, again that kind of small “c” conservative, Burkean conservative model. And she argued, actually, it’s a good thing the president can do this, can disrupt the bureaucracy. That’s an idea that has cachet on the left and the right because the truth is presidents from both political parties have felt at different times like the bureaucracy wasn’t doing enough to implement their policies or setting up more barriers.

I think the true answer is the bureaucracy is there because Congress has set it up in a certain way, as have presidents over many years.

TENPAS: This didn’t just happen overnight.

[12:46]

ANDERSON: Yeah, exactly and it’s designed to present these checks and present certain barriers because they reflect the longer term consensus over many years, and particularly in Congress that this is a way to get what we want. Maybe not the most efficient but a reliable and stable way to produce certain public goods. Doesn’t mean it’s always perfect, doesn’t mean there isn’t ways to improve—everyone recognizes there are. But it’s that, you know, dismantling that architecture poses real threats to that.

That’s really what the Trump administration is doing. They’re stepping in and foundationally dismantling big parts of this federal bureaucracy and intend to do more. Again, at the time of recording, we’re only about a month into the Trump administration. They’re very vocal about intending to do much, much more. And they’re doing it in a way that we have always understood would require congressional support. And they know they can’t get the congressional support for that, both because you have the filibuster in the Senate, which even Senate Republicans are committed to. And so you would need 60 votes to implement most of this by statute. They’re not gonna get 60 votes because there aren’t 60 Republicans in the Senate. And even if you did on a strict majority line, I think there’s good reason to question as to whether you could get 51 Republican senators or 50 senators plus Vice President Vance on board to implement the full swath of what they’re trying to do, because it’s going to be disruptive and costly. It’s high risk to a lot of things that people really care about, a lot of goods the government delivers.

But the Trump administration seems willing to roll the dice on that. And that’s really what we’re going to see play out over the next few months is how costly does it prove, how much do those risks manifest, and what benefits manifest that have been promised, you know, economic benefits that have been promised by the Trump administration and others. And how is the public going to perceive that as we begin

to look ahead to 2026 midterm elections and kind of the broader political universe and timeline that we live in.

TENPAS: Right, and in a sense, there seems to be kind of this lag, right? So they've issued these executive orders, and his base seems to be very happy because he's basically checking boxes of all his campaign promises. But the rubber doesn't meet the road for a while, and when it does, it will presumably hurt a lot of Republican districts. And then maybe at that point, there's sort of a backlash to it amongst the public opinion at large, you think?

[15:03]

ANDERSON: You know, we'll have to see. We are beginning to see signs of discontent, some very real, some amplified by mobilizers and activists on the left who oppose these policies and have from the outset, but not solely by them. I mean, we are seeing job cuts really hit different districts around the country, parts of the country that might not have thought from the front end that cutting government jobs or cutting bureaucracy would hurt them. We are seeing real interruptions in the delivery of benefits and states have been able to work around it so far. They've sued over it. They tried to get injunctions to do it. Those will only go so far. We're gonna see more disruptions in the future.

We've seen a lot of different consequences in small ways pile up. The real question is how big do they pile up? When do they start hitting the public mentality, the public awareness, that they begin to really recognize and factor this in as a cost of these policies. And the sad truth is sometimes that only happens after you really have a disaster, after something really happens where people are really hurt or killed in an irrevocable way.

And I fear that that is the sort of thing that will really take to begin to see a sharp pendulum swing back in the other direction. But I think we are beginning to see that pendulum swinging.

The trick here is that Donald Trump, even though he won by a very slim majority in the popular vote in 2024, he has a lot of control over his party. And he has the support of Elon Musk with very deep pocketbooks who seems to be willing to threaten in a way that's perceived as credible to challenge in primaries or otherwise make the political lives difficult for people who oppose the Trump agenda. It's a bigger concern for House members, particularly a big concern for House members from Republican districts.

So, you know, first, I think you'll see pushback come from folks from blue districts that happen to go Republican in 2024, folks who are going to be in danger in a few years or senators who may be thinking about retirement or may not have to look for election for many years, and sort of a little less sensitive to those pressures. And those people are there. I think we'll see them begin to push back.

We're already seeing Lisa Murkowski, for example, really become more and more vocal about concerns about some of this stuff as someone who's relatively independent in her seat in Alaska. But it's gonna take time for people to steer up the political courage, frankly, for the threat that Musk and others leverage to diminish,

not just because, I mean, he probably will always be able to bring the money to bear, but at a certain point, his brand and his name may become tarnished enough that people accepting money from him doesn't become as real a threat because it seemed to have its own political costs. There's lots of counterpoints, but they don't take time and we're only a month in at this point.

TENPAS: Right, it's late February right now, so who knows. And tell me a little bit about your perspective on Congress. Is Congress sort of guilty of aiding and abetting? Has Congress lost complete sight of the fact that they are an institution that's supposed to be competing for power with the presidency, as opposed to letting the president do whatever he pleases? What's happening in the legislative branch?

[18:00]

ANDERSON: So, you know, I think it's fair to say a majority in both chambers—and that's the Republican majority that controls both chambers—is tacitly participating in what the Trump administration is doing. They have had opportunities where they can push they could push back, in particular the fact that we are in the process of negotiating a budget request and will need additional funding to keep the government open in the next several weeks. Those are points of leverage that a Congress that wanted to rein in the executive branch really could use to do it, even in spite of the threat of the veto that the president otherwise is able to yield to to really raise the threshold of what you want to do. But they're not interested in doing that.

In fact, it looks like they're going to enact a budget and other measures that if they get their way, if they have enough internal cohesion to pass both chambers, that will, you know, not really push back in a meaningful way against what the Trump administration is doing, even reinforce it in certain ways. Although not implement it statutorily, as many legal scholars would say, that's what's actually necessary to comply with the law. And that would get it out of the the risk of courts pushing back and reversing at least parts of it.

So, you know, that question about what Congress is doing, they really are standing on the job. They're not fully implementing this, and they're doing it for partisan reasons, because Congress is increasingly an institution where institutional interests have become secondary to partisan political interests, and that's been a long-term trend in American politics really for decades at this point.

Does it mean it will always lie that fallow? No, not necessarily. I mean, the margins are very slim for Republican control. Even just a few Republicans willing to push back and say no we actually do want to look into these matters or take steps and stances against them could complicate things for the Trump administration. Although having control of the chambers allows them to stifle a lot of dissent at small levels even within their caucus.

But you know you'll begin to hear the sort of vocal pushback. You'll have little points of pushback by Democrats. But really the pushback can only meaningfully come after 2026 midterm elections when there's a chance another party will control one chamber or the other, barring some huge break between Trump and his own party that seems very unlikely right now.

The most likely scenario then is Democrats control the House, which is a definite possibility. I think most people kind of project at this far out say that's more likely than not. But they're unlikely to take the Senate. And so then the issue becomes kind of a repeat of the last two years of Donald Trump's first time in the White House where you have a Democratic House that's able to engage in a lot of oversight, able to push for a lot of information, ask a lot of questions, make things difficult for the Trump administration to evade political accountability, but can't really enact contrary statutory measures, which you would really need to put a hard legal stop on some of these things. Although they'll be in a better position to negotiate for certain items in, you know, key must pass legislation like annual appropriations, annual funding, the National Defense Authorization Act, things like that.

TENPAS: And let's shift gears and talk a little bit about what was your sort of original expertise, which is national security and foreign policy. How does the norm breaking vary and sort of do the consequences vary when it's in that sphere as opposed to maybe domestic policy?

[21:12]

ANDERSON: It's a fair question. And we are seeing definite, very real norms being broken at the international plane as well. A lot of that is in a zone where the president exercises a lot more authority traditionally on his own authority than Congress or any other branch of government. The president really does drive the boat in foreign relations. Not exclusively in all domains but has the dominant hand. So when it comes to things like negotiating a peace deal in Ukraine or, you know, determining policy towards Gaza, the president can steer a lot in that direction within the traditional understanding of the legal boundaries.

International law traditionally sets some limits on that, but international law has always been something that American politics don't fully take on board, more of a soft constraint, one concern that tends to boil down to, you know, to what extent are we gonna get pushback from allies, from the international institutions about what we're doing because it's being perceived as contrary to national law. And is not always a hard barrier for better or for worse in terms of U.S. policymaking. It is significant in the serious consideration even under all administrations of any stripe, no one should discount it entirely, but it's not determinative, it's not a hard line like U.S. law sometimes is. So, on the international level, we are seeing things that are moving towards unlawful conduct in international law, certainly.

TENPAS: What's an example?

ANDERSON: Well, the clearest example is Gaza, I mean, you know, a case where the president has discussed relocating Gazans potentially contrary to their will, which is something pretty clearly contrary to human rights law and law of armed conflict. The United States somehow owning a share of Gaza, not as clear what he means by that. That seems to be buying into, at a minimum, some degree of kind of conquering territory by use of armed force, which is kind of the number one thing international law prohibits, and the whole reason why we've opposed Russian invasion of Ukraine, among other things.

And, you know, you also hear murmurings about his stance on West Bank and on potentially Israeli reoccupation of parts of Gaza that fits in that same vein, where at least to the international community, those very much look like territories under military occupation. That's been the international community, the United Nations position for many, many decades. The United States position, a little more wishy washy off and on. But certainly the Biden administration's view that it ended up on at the end of its time in office and several Democratic administrations before that, the Trump administration seems willing to buck that in ways that even prior Republican administrations would never have considered. Who knows if it will follow through on that? That's always the question. But we don't know.

TENPAS: I know that some people when they're looking at the status of Congress and its sort of unwillingness to uphold its constitutional duties and its ability to check the executive, do you have hope in the courts that some of their rulings might curb the behavior of an aggressive administration?

[24:02]

ANDERSON: I do. And I think the courts are for the next 12 to 18 months until the political cycle really begins to rev up for midterm elections. Probably the place where you'll see the biggest pushback and from private litigants who are in advocacy groups that are very bravely pushing back on lots of different fronts in the courts.

Because foundationally what the Trump administration is doing really pushes the limit of the law as we understand it. I think a lot of it is unlawful. There may be some in the gray areas where they have arguments. And the Trump administration really is relying upon obfuscation, distraction, the kind of forest and trees point I made before about trying to focus on these as a bunch of small measures while distracting from the big actual macro policy objective that's being advanced.

There is an effort really underway right now in litigation around foreign assistance funding that's really extraordinary where they have spent the last two weeks openly ignoring under very loose and flimsy legal pretext a direct order from the court to implement certain types of payments back in place, and they've pushed back on it and pushed back on it and now the court has really slapped them down and they're seeking an appeal. We'll see what comes of it.

But in the end, those sorts of case management measures are things traditionally district courts get a fair amount of leeway on. So unless you get some big, overriding, you know, constitutional principle, a higher court, in this case it would probably have to be the Supreme Court, intervenes on. And that may happen in certain of the cases where you've seen officials removed contrary to statutory restrictions and there's that unitary executive theory. I don't think you're likely to see it in these funding cases but it's possible, but I don't think so.

You know that's going to be a real pushback for the courts, for the Trump administration. They're going to be called out saying what you're doing is unlawful, and you're not even complying with the temporary measures to keep things static while we resolve the bigger legal questions.

[25:55]

Then the question becomes, well what if the Trump administration just ignores these things and doesn't comply with them? That is a hard question. Traditionally, the courts have really relied on the executive branch actually acting in good faith. It's worth noting the executive branch, even under the first Trump administration, did always abide by these. There's no real clear example of them really meaningfully ignoring these judicial orders. And the types of pushback we've seen so far, while I think not in good faith and highly problematic, particularly on the foreign assistance front and other funding fronts, are not yet to the point that you would say that they're beyond the pale, they're clearly ignoring the law, they are putting legal pretexts and arguments around what the administration is doing, and kind of daring the courts to push back on that. And now the court has in this particular case, and we'll see what happens.

You know, that might be where we get to a constitutional crisis, if you really see these orders towards final resolution and the executive branch just refuses to implement them or abide by them. I think that is gonna bear a political cost and other costs that's really gonna make it harder for the Trump administration to persevere in that for a long time, although in the first few cases, maybe they won't get that much pushback from their own party and supporters. We'll have to wait and see. It probably depends on the issue and the case.

But there are ways that courts and litigants can really make those bite down the road. And that sort of threat will matter. And in the end, I don't think the Supreme Court actually is going to back the administration up on the full scale of what it's doing. And when you get a contrary ruling by a Supreme Court of which you've appointed a third of them, and they still are not on board, and I think several of his appointees are unlikely to get on board with this, then it's hard to hide the fact that you're just acting lawlessly. And openly acting lawlessly is something that I still think a lot of Americans are not gonna be able to stomach when it's so clear as that.

TENPAS: And maybe even people who voted for him will have difficulty with that.

ANDERSON: I think so, I think so. But that may be a glass half full perspective, we'll have to wait and see.

TENPAS: Right. I'll have to have you back in the summer or something like that.

So shifting gears into a final question that I ask all of my interviewees. Imagine you're teaching a high school class about democracy. What's one lesson that you'd want them to leave your classroom with? What's one pivotal lesson about democracy that everybody should be holding close right now?

[28:11]

ANDERSON: It is that the separation of powers that is really central to our system, the checks and balances everyone talks about that you learn about in civics 101, isn't self-executing. It really has come to rely on a lot of norms and underlying practices, that if you have someone willing to defect from those expectations, don't have clear mechanisms for pushback beyond maybe the democratic process that in

our case operates on a two- slash four-year cycle, depending on which branch you're talking about. That can be a long time where a lot of pain can accrue when you see people acting and institutions acting unlawfully.

There is more the branches could do. There is more ways Congress could implement legislation to have more bite, to establish more safety guardrails against an executive branch that's not willing to act consistent with its laws, to help the court enforce laws. But it hasn't installed that. And in fact, during the Biden administration, after the first Trump administration, probably didn't do everything that it could have, or that, you know, Democrats in Congress should have, along with Republicans who sympathize with them, to solidify their prerogatives as an institution and set up a bulwark against this sort of executive branch behavior.

Moving forward, that's something they will have to seriously consider. And good faith, you know, norms is not something probably we want to rest our system of government on so so exclusively or so centrally moving forward.

TENPAS: Right. We never thought they'd be tested to this degree.

ANDERSON: I think that's right. And again, it's early. We'll see how far they are tested. But the trajectory we're on is a pretty serious test right now.

[music]

TENPAS: Yeah. Well, Scott, thank you so much for your time. It was a really fascinating discussion.

ANDERSON: Absolutely. Thank you for having me.

TENPAS: *Democracy in Question* is a production of the Brookings Podcast Network. Thank you for listening. And thank you to my guests for sharing their time and expertise on this podcast.

Also, thanks to the team at Brookings that makes this podcast possible, including Fred Dews, producer; Daniel Morales, audio engineer and video manager; the team in Governance Studies including associate producer Adelle Patten, plus Antonio Saadipour, and Tara Moulson; and our government affairs and promotion colleagues in the Office of Communications at Brookings. Shavanthi Mendis designed the beautiful logo and show art.

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I'm Katie Dunn Tenpas. Thank you for listening.