Unchecked Above, Abdicated Below

The executive branch's recurring drift toward unchecked power, the legislature's voluntary surrender of its own — and what the convergence of the two does to the claim that the executive is "checked by other means."

This document extends the historical record sketched earlier and adds the part that matters most to the argument: the current administration as the latest chapter of executive concentration, set against a Congress that is not seizing unchecked power but doing the opposite — setting down the power it already holds. The two phenomena are usually discussed separately. They should not be. An unchecked executive and an abdicating legislature are the same event observed from opposite ends, and that identity is what hollows out the unitarian reassurance that the President is adequately restrained by other means.

Part One — The Executive as the Recurring Site of Concentration

The American near-miss with one-man rule has, with striking consistency, originated in the executive and followed a single template: an emergency is declared, a unilateral power is asserted, the courts or a later Congress eventually push back — and the precedent survives the repudiation, available to the next President who can plausibly invoke necessity. The pattern is the point. Each episode is defended as an exception; each leaves the baseline of presidential power permanently higher.

Lincoln and the Writ (1861)

Two weeks into the war, with the capital nearly cut off, Lincoln authorized the suspension of habeas corpus by executive order, alone, while Congress was out of session. The Suspension Clause sits in Article I — the legislative article — and Chief Justice Taney, riding circuit, ruled in Ex parte Merryman that the power was Congress's, not the President's. Lincoln ignored the ruling; the prisoner stayed held. His July 4 defense — should all the laws but one go unexecuted, and the government itself go to pieces, lest that one be violated? — is the emergency logic in its original form. Congress ratified the suspension in 1863, but the sequence had already established the move: the President acts first on a power the text reserves elsewhere, and dares the other branches to undo it.

Franklin Roosevelt — Internment and the Court (1937, 1942)

Executive Order 9066 (1942) uprooted roughly 120,000 people of Japanese ancestry, two-thirds of them U.S. citizens, into camps — no charges, no trials, guilt assigned by ancestry. In Korematsu (1944) the Court blessed it 6–3. Justice Jackson's dissent supplied the enduring warning: a judicial principle endorsing detention by race would "lie about like a loaded weapon" for any later authority with a plausible claim of urgent need. The conviction was vacated only in the 1980s, after it emerged the government had suppressed contrary evidence; reparations and an apology followed in 1988; Chief

Justice Roberts formally repudiated the decision in 2018. Disarming the weapon took roughly four decades.

The 1937 Court-packing plan belongs alongside it as the counter-example where structure held. Fresh off a 46-state landslide, Roosevelt proposed expanding the Court by up to six justices on a transparent pretext of efficiency, to manufacture a majority that would stop voting down the New Deal. It failed — in a Democratic Senate, whose Judiciary Committee called it a measure that should be so emphatically rejected that its parallel would never be presented again. The episode shows both halves of the story: the impulse was pure executive aggrandizement aimed at capturing a coordinate branch, and the thing that stopped it was a legislature still willing to defend its own design against a President of its own party. Hold that last clause; Part Three is about its disappearance.

Nixon — The Concentrated Case (1969–1974)

Nixon asserted the theory openly — "when the president does it, that means it is not illegal" — and acted on it across three fronts, losing on each in a way that drew the boundaries precisely by overrunning them. Surveillance: warrantless wiretapping of officials, journalists, and domestic dissidents, rejected unanimously in the 1972 Keith case. Spending: impoundment of billions Congress had appropriated, an attempt to rewrite the budget by refusing to spend it, struck down in Train v. City of New York (1975) and slammed shut by the Impoundment Control Act of 1974. Secrecy: an absolute, unreviewable executive-privilege claim over the Oval Office tapes, rejected unanimously — by a Court including three of his own appointees — in United States v. Nixon (1974). Each loss is also a marker of how far the office had reached before being stopped.

The Post-9/11 Ratchet — Across Two Parties

This is the most important historical example because it spans administrations of opposite parties and shows that seized powers institutionalize rather than recede. Under Bush: an Office of Legal Counsel theory expansive enough to argue the Commander-in-Chief could override a federal anti-torture statute; warrantless NSA wiretapping outside the FISA court; indefinite "enemy combatant" detention. The courts pushed back hard — Hamdi (2004), Hamdan (2006), Boumediene (2008) — doing exactly the reviewing the executive-supremacy theory says they should not. Then the continuity that proves the ratchet: Obama, elected substantially against those assertions, kept and deepened them — bulk telephone-metadata collection, the targeted killing of a U.S. citizen on a secret internal memo, and sustained operations in Libya (2011) without congressional authorization, defended with the claim that bombing did not amount to "hostilities." The powers outlived the party that built them.

Part Two — The Current Administration as the Latest Chapter

The second Trump administration is the template at its broadest scale yet — the same emergency-and-unilateralism structure, applied simultaneously across trade, spending, the agencies, and war. What follows is the verified record as of mid-2026, not a forecast.

Tariffs — the Power of the Purse, Claimed by Proclamation

Beginning in 2025 the administration used the International Emergency Economic Powers Act (IEEPA) to impose sweeping tariffs — a 10% “reciprocal” duty on nearly all imports plus punitive country-specific rates — by declaring emergencies over drug trafficking and trade deficits. The Constitution gives the taxing and tariff power to Congress; IEEPA never mentions tariffs. In Learning Resources, Inc. v. Trump (decided February 20, 2026), the Supreme Court ruled 6–3 that IEEPA does not authorize tariffs, invoking the major-questions doctrine and the core congressional power of the purse. Roughly $166 billion already collected from more than 330,000 businesses had to be refunded.

The revealing part is what happened next. Within hours, the administration declared a different emergency under Section 122 of the Trade Act of 1974 and reimposed a 10% tariff for 150 days, while leaning harder on Section 232 metals tariffs of 25–50%. Struck down on one statutory authority, the executive simply reached for another. This is the template in miniature — the specific assertion is repudiated, the underlying drive toward unilateral control is not, and the baseline of claimed power does not fall back to where it was.

Impoundment — Refusing to Spend What Congress Appropriated

The administration moved to freeze or withhold appropriated funds and to wind down congressionally funded bodies — USAID and the Department of Education among them — and created the Department of Government Efficiency (DOGE) to drive cuts. OMB Director Russ Vought has championed an “inherent” presidential impoundment power that the Supreme Court (Train v. City of New York), the Justice Department’s own past Office of Legal Counsel, and the Impoundment Control Act of 1974 all reject. This is Nixon’s impoundment claim revived after it was supposedly buried. Congress’s formal tool against it — the rescission process — was used in 2025 to claw back about $9.4 billion, and the Vice President reportedly assured House members the administration would keep pursuing impoundment regardless. The structural danger here is precise: if a President may decline to spend what Congress directs, the power of the purse becomes advisory.

The Independent Agencies — Removing the Insulation

Across 2025–26 the administration removed members of the National Labor Relations Board, the Equal Employment Opportunity Commission, the Privacy and Civil Liberties Oversight Board, the Merit Systems Protection Board, and the Consumer Product Safety Commission — the litigation campaign that produced Trump v. Slaughter (June 29, 2026), overruling Humphrey’s Executor and establishing at-will removal of principal officers in multimember agencies. The Federal Reserve was carved out by name. This is the one front where the administration has, for now, prevailed at the Supreme Court rather than been checked by it — which is itself significant: the judiciary is simultaneously restraining the executive on tariffs and expanding it on the agencies.

War Without Authorization — Venezuela and Iran

Through late 2025 and into 2026 the administration conducted a campaign of strikes in the Caribbean and a military operation in Venezuela that ended with the removal of Nicolás Maduro, followed by hostilities against Iran beginning February 28, 2026. The constitutional posture is the starkest of all: the President's March 2, 2026 message to Congress about the Iran operation did not so much as acknowledge the War Powers Resolution or the Constitution's allocation of the war power. Article I gives Congress the power to declare war; the executive has simply proceeded, characterizing acts of war as "law enforcement" or emergency response and treating notification as optional. This is the seventy-five-year trend of presidential war-making carried to the point where even the gestures toward legislative consent are dropped.

Part Three — The Other Half: Legislative Abdication

Here is the reframing your question turned on, and it is the analytical heart of the matter. None of the above describes Congress wielding unchecked power. It describes Congress declining to wield the power it unquestionably has. The legislature's pathology is the inverse of the executive's — not seizure but surrender — and that asymmetry is itself the strongest available evidence about where monarchical risk actually lives. A body structurally inclined to give power away is not a body at risk of becoming a Caesar.

The Purse, Set Down

Congress handed the President broad tariff authority through open-ended statutes (Sections 232 and 301, IEEPA, the Trade Act) and then, when the executive stretched even those, largely declined to amend or repeal them. On spending, the rescission mechanism lets a bare partisan majority revise, with 51 votes, bipartisan funding deals that required 60 — corroding the trust on which appropriations agreements depend, while the underlying impoundments go formally unchallenged by the body whose power they usurp. The institution that holds the purse is watching its grip be pried open and, for the most part, not closing its hand.

The War Power, Set Down

The record here is granular and damning. After the Venezuela operation, the Senate voted 52–47 to advance a bipartisan Kaine–Paul war-powers resolution — and then, on January 14, 2026, the Vice President broke a 50–50 tie to block it. Through the spring, the House blocked one war-powers resolution after another on near-party-line votes. Required 48-hour reports and 60-day clocks under the War Powers Resolution were treated as ignorable. In June 2026, for the first time in the statute's history, both chambers agreed to a concurrent resolution directing removal of forces from hostilities with Iran — a genuine institutional stirring, but one with a fatal defect: a concurrent resolution is not presented to the President and carries no force of law, a mechanism effectively neutered by the Supreme Court's 1983 ruling against the legislative veto in INS v. Chadha. Even Congress's most unified reassertion in this period was, by design, unable to bind. And oversight fared no better: House committees postponed hearings on the Iran war, with leading members noting that weeks into the conflict no public briefing had been given at all.

The Mechanism — Why a Branch Surrenders Its Own Power

Madison's entire design rests on one behavioral assumption, stated in Federalist 51: "ambition must be made to counteract ambition," and "the interest of the man must be connected with the constitutional rights of the place." The separation of powers is meant to be self-enforcing because each officeholder will jealously guard the prerogatives of his own branch. That assumption is precisely what has broken. When partisan identity outranks institutional identity, a legislator's ambition attaches to his party and its President, not to the Congress as an institution. A co-partisan majority then does not check the executive — it protects him, declines to investigate him, and votes down efforts to constrain him. The phrase a senator used on the floor in this very period captures it exactly: Congress exists to provide oversight, not to cheer from the sidelines. The cheering is the abdication.

The clearest articulation came, fittingly, from the bench. At the tariff argument, Justice Gorsuch pressed the government's lawyer on whether anything would stop Congress from handing the entire power to regulate foreign commerce — or even to declare war — to the President because it had grown "tired of this legislating business." The lawyer's answer was that this would be "an abdication, not a delegation." The exchange named the disease. The constitutional system has no remedy for a Congress that simply does not wish to exercise its powers, because the design never contemplated that the branches would decline to defend themselves.

Part Four — What This Does to the Unitarian Theory

The unitarian doctrine's reassurance, recall, is that stripping structural protections like agency independence is safe because the President remains checked by other means: elections, impeachment, the courts, and Congress's powers of law, purse, and oversight. The convergence of Parts Two and Three dismantles that reassurance in a specific, mechanical way.

Three of the four named checks are Congress's — and Congress is voluntarily setting them down. Law, purse, and oversight are exactly the tools the legislature is abdicating. Impeachment, the ultimate check, has proven nearly unusable in a polarized Senate. So the theory rests the safety of an expanded executive on backstops that are, in real time and on the public record, atrophying. The reassurance assumes a vigorous Congress; the evidence shows a deferential one.

"Unchecked executive" and "abdicated legislature" are not two problems but one. The executive is unchecked because the legislature abdicated; the abdication is the mechanism by which the check fails. The unitarian frames the question as accountable-President-versus-unaccountable-bureaucrat, but the live reality is an executive whose principal political check has chosen not to function. Removing the structural check (agency independence) on the premise that the political check remains robust is exactly backwards when the political check is collapsing.

Madison's self-enforcing design has lost its engine. The doctrine treats separation of powers as self-policing — ambition counteracting ambition. That engine runs only when ambition is tied to office. Polarization has tied it to party. With the engine stalled, the structural checks the founders built into the architecture become the only ones still operating by their own force — and the unitarian project is dedicated to dismantling precisely those.

The courts are the last functioning check, and they are partial. The judiciary did restrain the executive on tariffs (Learning Resources) as it once did after 9/11 (Hamdi, Hamdan, Boumediene). But courts are slow and reactive; they act after the money is collected, the agency is gutted, or the war is underway. They have, by serious accounts, largely abdicated the war-powers field altogether. And the same Court restraining the executive on trade is expanding it on the agencies (Slaughter). A check this selective and this delayed cannot carry the load the theory assigns to the political branches.

The Unitarian Rejoinder, and Why It Fails Here

The honest version of the doctrine has an answer, and it deserves to be stated. Proponents — including thoughtful libertarian ones — argue that congressional abdication is the true disease, that the President is merely filling a vacuum Congress created, and that dismantling the independent-agency apparatus might actually re-incentivize Congress to resume the lawmaking and oversight it has handed to the administrative state. On this view the cure is not agency independence but congressional re-assertion, and Slaughter, by forcing the question, could prompt it.

The trouble is that the evidence runs the other way. The theory predicts that, handed the chance to reclaim its role, Congress will take it. The actual behavior of Congress when handed exactly those chances — war-powers votes blocked or rendered toothless, impoundments left unchallenged, oversight hearings postponed, delegated authorities left un-repealed — is to decline. The rejoinder assumes a Congress that wants its power back. The record shows a Congress that keeps giving more away. A theory of executive restraint that depends on the legislature rediscovering an institutional ambition it has demonstrably lost is not a description of how the system is checked; it is a hope about how it might someday be.

Net Assessment

The historical record places the recurring American drift toward unchecked power in the executive, every time, across both parties, following one emergency-and-unilateralism template that leaves the baseline permanently higher. The current administration is that template at full extension — trade, spending, agencies, and war at once. And the legislature's contemporary posture is not a competing concentration of power but its opposite: a voluntary surrender that supplies the executive its opening. That asymmetry is the answer to the comparative question. The branch that becomes dangerous is the one that reaches; the branch that abdicates is, definitionally, not the monarchy risk.

Against this, the unitarian assurance that the executive is adequately "checked by other means" does not survive contact with the record, because three of the four named means belong to a Congress that is laying them down, and the fourth — the courts — is too slow and too selective to substitute. The doctrine removes the structural checks the founders built on the explicit premise that the political checks will hold, at the precise historical moment when the political checks are failing in plain view. It is not, in the end, a theory that the executive is restrained. It is a wager that someone other than the executive will choose to restrain it — placed just as the only institution positioned to do so has shown, vote after vote, that it would rather not.