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## Prosecuting Politicians

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# PROSECUTING POLITICIANS

*Shai Dothan\**

*The laws of many countries grant politicians special protection from prosecution before national courts. The content of such laws is usually regulated by a compromise between two conflicting goals: On the one hand, the principle that everyone is equal before the law should be upheld. On the other hand, because politicians cannot fully dedicate themselves to their office when they are subject to legal proceedings, they should be protected more than regular citizens. What many seem to take for granted is that a trial of a senior politician, such as a prime minister or a president, does bad things to society. It deepens divisions between citizens and increases polarization in a way that is unhealthy for the democratic process. This Article seeks to challenge that intuition. Based on a series of comparative examples, the Article argues that prosecuting politicians improves public deliberation by getting people who would otherwise not engage in politics to take part in the political debate.*

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## TABLE OF CONTENTS

INTRODUCTION .....	295
I. RULE OF LAW AND PROCEDURES.....	297
A. A Short Comparative History of Immunities for Politicians .....	299
B. Should Politicians Observe All Laws .....	302
C. The Risk of Incorrect Accusations.....	305
II. CHECKS AND BALANCES AND JUDICIAL DIALOGUE .....	307
A. Conflict Between the Judiciary and the Executive Is Not Bad .....	307
B. The Judiciary Does Not Have the Last Word .....	309
III. DIFFUSE INTERESTS AND CONCENTRATED INTERESTS .....	311
IV. THE IMPACT OF PROSECUTING POLITICIANS ON SOCIETY .....	314
A. The Prosecution of Benjamin Netanyahu in Israel .....	315
B. The Cases Against Bill Clinton in the United States .....	320
C. The Case Against Dilma Rousseff in Brazil .....	324
CONCLUSION .....	329

## INTRODUCTION

On April 4, 2023, the streets of Manhattan witnessed a peculiar scene: hundreds of Trump-supporters and hundreds of Trump-protesters were screaming at each other.<sup>1</sup> Inside the Manhattan criminal court, Donald Trump was charged for falsifying business records concerning hush money that he paid an adult film star so that she would not expose that they slept together while Trump was married to his current wife, Melania.<sup>2</sup> Outside the court, chaos reigned.<sup>3</sup> The hatred between the two opposing camps was explosive.<sup>4</sup>

Speaker of the U.S. House of Representatives Nancy Pelosi said about the potential impeachment of Trump several years ago, on very different grounds, “I’m not for impeachment . . . Impeachment is so divisive to the country that unless there’s something so compelling and overwhelming and bipartisan, I don’t think we should go down that path, because it divides the country.”<sup>5</sup> What Pelosi was trying to avoid was exactly the kind of scene that occurred in front of the Manhattan court: two polarized camps that hate each other because one feels threatened by the prosecution of their leader and the other feels vindicated by it.

In contrast, the Trump campaign did not seem overly concerned about deepening the rift in American society. It was quick to offer a special T-shirt to commemorate Trump’s arraignment for anyone who would donate forty-seven dollars.<sup>6</sup> The T-shirt had a fake mug shot of Trump with the words “NOT GUILTY” printed in uppercase letters.<sup>7</sup> The number printed under Trump’s name was 45–47, alluding to the number of his former presidency and the number his supporters hope

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1. See Adam Gabbatt, *Trump Gets Underwhelming Show of Support on Surreal Day in New York*, GUARDIAN (Apr. 4, 2023, 5:55 PM), <https://www.theguardian.com/us-news/2023/apr/04/trump-protests-reaction-new-york-court> [https://perma.cc/D28B-2QE7].

2. *Id.*

3. *Id.*

4. *Id.*

5. Joe Heim, *Nancy Pelosi on Impeaching Trump: ‘He’s Just Not Worth It,’* WASH. POST (Mar. 11, 2019), <https://www.washingtonpost.com/news/magazine/wp/2019/03/11/feature/nancy-pelosi-on-impeaching-president-trump-hes-just-not-worth-it/> [https://perma.cc/FPL5-SGCY]; see also CASS R. SUNSTEIN, *IMPEACHMENT: A CITIZEN’S GUIDE* 80–81 (2017) (“[Impeachment] can jeopardize the separation of powers. It can be profoundly destabilizing. It focuses the nation’s attention on whether to remove its leader—rather than how to promote economic growth, reduce premature deaths, increase national security, or cut poverty.”).

6. Alaina Demopoulos, *Trump Campaign Tries to Cash In on Arrest with Fake Mugshot T-Shirt*, GUARDIAN (Apr. 5, 2023, 1:00 PM), <https://www.theguardian.com/us-news/2023/apr/04/donald-trump-merchandise-mugshot-arrest-stormy-daniels> [https://perma.cc/7FNT-2TRW].

7. *Id.*

will be his next one.<sup>8</sup> Clearly, victimization is a tool that politicians, like Trump, can use to their advantage.

The question that this Article seeks to answer is: are salient trials of politicians necessarily an unmitigated bad? Sure, polarization could harm the country in a variety of ways.<sup>9</sup> But it may help to galvanize political views on both sides and give voice to some groups that would otherwise not have any influence on the political stage.<sup>10</sup> This Article is concerned with a particular kind of group that is usually left behind in political discussions: diffuse interest groups. Diffuse interest groups include regular citizens, consumers, and people with centrist political views who differ from small and concentrated interest groups that act well in unison.<sup>11</sup>

The scholar who first drew attention to the inferior position of diffuse interests in political settings was Mancur Olson, a brilliant and influential economist. Olson argued that diffuse interests will always be taken advantage of by concentrated interests because every member of a diffuse interest group has a strong incentive to free ride on the efforts of others.<sup>12</sup> Quite simply, the rewards from political action are divided among too many people when diffuse interests are concerned, and this means that even in case of success every member will not gain much.<sup>13</sup> If a concentrated interest group of three hundred people cheats all U.S. citizens out of three billion dollars a year, this means every American is only ten dollars short. Normal citizens would not even invest the time necessary to calculate that they are ten dollars

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8. *See id.*

9. *See* Tom Ginsburg et al., *The Comparative Constitutional Law of Presidential Impeachment*, 88 U. CHI. L. REV. 81, 84 (2021); *see also* Jennifer McCoy & Murat Somer, *Toward a Theory of Pernicious Polarization and How It Harms Democracies: Comparative Evidence and Possible Remedies*, 681 ANNALS AM. ACAD. POL. & SOC. SCI. 234, 247 (2019) (“As polarization extends into other areas of social interaction and sharpens Us v. Them identity politics, interactions along all other planes diminish considerably, channels of communication between groups break down, and intragroup solidarity increases at the expense of intergroup cohesion.”).

10. McCoy & Somer, *supra* note 9, at 255 (explaining that Turkey’s 2013 protests modeled grassroots mobilization and brought together diverse societal groups desiring democratization).

11. Shai Dothan, *Democracy, Populism, and Concentrated Interests*, 56 LOY. L.A. L. REV. 459, 462 (2023).

12. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 165–67 (1965) (“The rational individual in the economic system does not curtail his spending to prevent inflation . . . because he knows, first, that his own efforts would not have a noticeable effect, and second, that he would get the benefits of any price stability that others achieved in any case.”).

13. *Id.* at 166 (“Nor can such groups be expected to organize or act simply because the gains from group action would exceed the costs.”).

poorer every year, let alone initiate political action to change this situation. In contrast, everyone in the concentrated interest group earns ten million dollars every year, motivating them to work full-time to influence politicians to do their bidding.<sup>14</sup>

The only way for diffuse interests to effectively resist concentrated interests is to become informed and to become motivated.<sup>15</sup> A public trial against a politician with all the media attention associated with it can have exactly that result.<sup>16</sup> This does not mean that the costs in social solidarity and political stability are necessarily a price worth paying. That is a normative question that will not be answered here. The focus of this Article is on setting the stage for a potential cost-benefit analysis only by drawing attention to one surprising beneficial effect of conducting trials against politicians.

Part I reviews the rule of law aspect of prosecuting politicians and includes a comparative analysis of the rules meant to regulate such prosecution. Part II deals with the political theory of checks and balances underlying the role of the judiciary vis-à-vis the elected branches. Part III explains the predicament of diffuse interests according to the scientific literature that studied their weakened political position. Part IV discusses the impact of prosecuting politicians on diffuse interests using case studies from Israel, the United States, and Brazil.

## I. RULE OF LAW AND PROCEDURES

Hillary Clinton served as the U.S. Secretary of State under President Barack Obama from 2009 to 2013.<sup>17</sup> There was one controversy that haunted her following that tenure and may have prevented her

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14. See Guy Rolnik, *Meet the Sugar Barons Who Used Both Sides of American Politics to Get Billions in Subsidies*, PROMARKET (Sept. 16, 2016), <https://www.promarket.org/2016/09/19/sugar-industry-buys-academia-politicians/> [<https://perma.cc/7W98-HS9E>].

15. See GUNNAR TRUMBULL, *STRENGTH IN NUMBERS: THE POLITICAL POWER OF WEAK INTERESTS* 63 (2012) (describing how consumer advocates sought to put issues into the public debate by conducting and publishing research on product safety).

16. MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 28 (3d ed. 2019); see also Catherine M. Conaghan, *Prosecuting Presidents: The Politics Within Ecuador's Corruption Cases*, 44 J. LAT. AMER. STUD. 649, 652 (2012) ("As governments enhanced mechanisms of horizontal accountability, civil society mobili[z]ed to advance 'social accountability.'").

17. See *Hillary Rodham Clinton*, WHITE HOUSE, [https://www.whitehouse.gov/about-the-white-house/first-families/hillary-rodham-clinton/?utm\\_source=link](https://www.whitehouse.gov/about-the-white-house/first-families/hillary-rodham-clinton/?utm_source=link) [<https://perma.cc/7JFE-L7TW>].

from becoming President<sup>18</sup>—the email scandal. Clinton used a private email server for official emails instead of using the server provided by the State Department.<sup>19</sup> This behavior was careless and reprimandable.<sup>20</sup> Donald Trump squeezed every drop of public indignation he could muster from this unfortunate affair, claiming that if he were in charge, Clinton would “be in jail.”<sup>21</sup>

Trump spoke the truth when he said that some people’s lives have been ruined for indiscretions of this sort.<sup>22</sup> But when you try to make up your mind about the gravity of the entire episode, you need to imagine yourself walking a mile in Clinton’s shoes. Do you have thousands of confidential emails sent to you on a daily basis? Would you follow every regulation of information security even when working under the stress and uncertainty that are characteristic of the highest echelons of government?<sup>23</sup>

Politicians sometimes need to get their hands dirty, and they often cut corners where normal people would not have to.<sup>24</sup> This is why politicians have to get some form of immunity. This immunity protects them from being prosecuted for offenses that most people would never be in a position to commit.<sup>25</sup>

The other lesson from the Clinton affair is that politicians are not only at a greater risk of committing offenses: they also face the risk

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18. Chris Cillizza, *Hillary Clinton’s ‘Email’ Problem Was Bigger than Anyone Realized*, CNN POLITICS (May 26, 2017), <https://edition.cnn.com/2017/05/23/politics/clinton-email-2016/index> [<https://perma.cc/YF89-BKHK>].

19. *Id.*

20. See *Statement by FBI Director James B. Comey on the Investigation of Secretary Hillary Clinton’s Use of a Personal Email System*, FBI (July 5, 2016), <https://www.fbi.gov/news/press-releases/statement-by-fbi-director-james-b-comey-on-the-investigation-of-secretary-hillary-clinton-2019s-use-of-a-personal-e-mail-system> [<https://perma.cc/9M5K-C2DY>] (“[T]here is evidence that [Secretary Clinton or her colleagues] were extremely careless in their handling of very sensitive, highly classified information.”).

21. See Associated Press, *Trump to Clinton: ‘You’d Be in Jail,’* N.Y. TIMES (Oct. 10, 2016), <https://www.nytimes.com/video/us/politics/10000004701741/trump-to-clinton-you-d-be-in-jail.html> [<https://perma.cc/K3CA-MAMX>].

22. *Id.*

23. See Clay Posey & Mindy Shoss, *Research: Why Employees Violate Cybersecurity Policies*, HARV. BUS. REV. (Jan. 20, 2022), <https://hbr.org/2022/01/research-why-employees-violate-cybersecurity-policies> [<https://perma.cc/9SML-BVRH>] (“Our recent research, however, suggests that much of the time, failures to comply may actually be the result of intentional yet non-malicious violations, largely driven by employee stress.”).

24. See Frederick Schauer, *The Political Risks (if Any) of Breaking the Law*, 4 J. LEGAL ANALYSIS 83, 89 (2012) (“[O]fficials may claim the value of obedience to law . . . but when the law requires them to take actions inconsistent with their law-independent preferences, they may sometimes, often, or almost always, when no legal sanctions are in the offing, choose to go with their law-independent preferences rather than the law.”).

25. *See id.*

that their opponents would use their mistakes for political leverage.<sup>26</sup> The law needs to protect politicians from powerful adversaries that would use every one of their mistakes against them.

*A. A Short Comparative History of Immunities for Politicians*

In the United States around the end of the nineteenth century, senior members of the executive received full immunity from prosecutions or lawsuits against them.<sup>27</sup> This rule gave politicians a strong protection, grounded in the common law,<sup>28</sup> from having to excuse and clarify the motives for their official actions.<sup>29</sup> At the same time, such a rule created tension with the idea that politicians, unlike the king of England, have to obey the law and take responsibility for their actions.<sup>30</sup>

The U.S. Supreme Court had to rise to the challenge of circumscribing the limits of presidential immunity in *United States v. Nixon*.<sup>31</sup> In the midst of the Watergate affair, the Court struggled with the question of whether it has the authority to subpoena materials from the president.<sup>32</sup> The Court emphatically conceded that there are good reasons of national security to preserve the confidentiality of some communications of the President.<sup>33</sup> However, when the President's counsel argued that the doctrine of separation of powers itself protects

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26. SUNSTEIN, *supra* note 5, at 80, 99 (explaining that Clinton's supposed impeachable offense gave his political opponents "an opening" that they were willing to use).

27. Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1359–60 (2021).

28. Lisa Webley & Virginia Williams, *Executive Privilege*, in MAX PLANCK ENCYCLOPEDIA OF COMPARATIVE CONSTITUTIONAL LAW 5 (2018).

29. Keller, *supra* note 27, at 1356.

30. Saikrishna Bangalore Prakash, "Not a Single Privilege Is Annexed to His Character": Necessary and Proper Executive Privileges and Immunities, 2020 SUP. CT. REV. 229, 258 (2020); see also Kimberly L. Wehle, "Law and" the OLC's Article II Immunity Memos, 32 STAN. L. & POL'Y REV. 1, 22 (2021) (explaining that the framers of the U.S. Constitution intended to distinguish the presidency by withholding the same privileges and immunities commonly granted to the English monarch at the time).

31. 418 U.S. 683, 703 (1974) (noting that "[n]o holding of the Court has defined the scope of judicial power specifically relating to the enforcement of a subpoena for confidential Presidential communications for use in a criminal prosecution").

32. *Id.*

33. See *id.* at 708 ("A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications.").



the President from judicial subpoena, the Court could not accept that.<sup>34</sup> The President's immunity is not absolute, the Court ruled, and the ability of the judiciary to intervene in the actions of the executive cannot be fully excluded.<sup>35</sup> Sixteen days after this decision was made, President Nixon resigned.<sup>36</sup>

Nixon is responsible for another judgment that clarified the boundaries of the President's immunity. In *Nixon v. Fitzgerald*,<sup>37</sup> the Supreme Court decided that the President has immunity from civil suits for his official acts, but no immunity from the criminal process.<sup>38</sup> Moreover, if a President is removed from office following an impeachment procedure, he may still have to face a criminal trial for their actions.<sup>39</sup> The U.S. Supreme Court and the Constitution have not provided whether a President must be impeached before being vulnerable to criminal prosecution. Though this may be the route preferred by the Framers,<sup>40</sup> there is no clear indication that impeachment must come first before criminal prosecution. In *Trump v. Vance*,<sup>41</sup> the Supreme Court specified additionally that the President does not have immunity from state criminal subpoenas and that the President does not even deserve a special heightened standard of protection from such subpoenas when compared to other citizens.<sup>42</sup>

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34. *Id.* at 706 (“[N]either the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.”).

35. *Id.* at 704.

36. See John Herbers, *The 37th President Is First to Quit Post*, N.Y. TIMES (Aug. 9, 1974), <https://www.nytimes.com/1974/08/09/archives/the-37th-president-is-first-to-quit-post-speaks-of-pain-at-yielding.html> [<https://perma.cc/94S5-6CVG>].

37. 457 U.S. 731, 754 (1982).

38. *Id.* (“When judicial action is needed . . . to vindicate the public interest in an ongoing criminal prosecution . . . the exercise of jurisdiction has been held warranted. In the case of this merely private suit for damages based on a President’s official acts, we hold it is not.”); see Aviva A. Orenstein, *Presidential Immunity from Civil Liability: Nixon v. Fitzgerald*, 68 CORNELL L. REV. 236, 236 (1983).

39. *Fitzgerald*, 457 U.S. at 780 (White, J., dissenting) (explaining that the U.S. Constitution states that impeachment does not bar indictment, trial, or judgment and punishment).

40. H. LOWELL BROWN, PROSECUTION OF THE PRESIDENT OF THE UNITED STATES: THE CONSTITUTION, EXECUTIVE POWER, AND THE RULE OF LAW 11 (2022) (describing that during the ratification debate, Alexander Hamilton pressed for a “sequential” approach of impeachment followed by criminal prosecution of a president, if necessary, but that this plan was not specifically ratified).

41. 140 S. Ct. 2412 (2020).

42. *Id.* at 2429 (2020); see Prakash, *supra* note 30, at 234.

The process of impeachment is a unique tool used in the United States to remove from office politicians who abuse their power.<sup>43</sup> Impeachment is not designed to punish these politicians.<sup>44</sup> It does not replace a criminal trial.<sup>45</sup> After officeholders have been impeached, they may face criminal proceedings for their misconduct.<sup>46</sup>

In other countries, the regime of immunities is regulated differently and often more precisely.<sup>47</sup> While monarchs usually get full immunity, politicians usually enjoy only a restrictive immunity.<sup>48</sup> This restrictive immunity protects members of parliament from being prosecuted for opinions they voice or votes they cast in official settings.<sup>49</sup> With some rare exceptions, politicians can therefore perform their professional roles without fearing an indictment against them.<sup>50</sup>

The possibility that politicians would be harassed for offenses they commit outside of their professional roles is not ignored. To preempt such a scenario, many countries provide politicians with additional protections from the criminal process.<sup>51</sup> In Belgium, politicians cannot be summoned to a court or arrested without indication of having committed a “flagrant” offense and without authorization of a government body.<sup>52</sup> In Norway, members of parliament cannot be arrested unless they are charged with a public crime or it is clear that they committed an offense.<sup>53</sup> In Finland, there is an especially high threshold for bringing charges against politicians.<sup>54</sup>

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43. SUNSTEIN, *supra* note 5, at 173–74.

44. *See* BROWN, *supra* note 40, at 208 (“Impeachment was never conceived of as a criminal proceeding or either as a substitute for or alternative to a judicial action to enforce the criminal law.”).

45. *Fitzgerald*, 457 U.S. at 780.

46. SUNSTEIN, *supra* note 5, at 154; *see also Fitzgerald*, 457 U.S. at 754 (finding that criminal courts can exercise jurisdiction over officeholders to when it serves public interest).

47. *See* FRANK ZIMMERMANN, CRIMINAL LIABILITY OF POLITICAL DECISION-MAKERS 294 (2017).

48. *Id.*; *see also* Joseph Isenbergh, *Impeachment and Presidential Immunity from Judicial Process*, 18 YALE L. & POL’Y REV. 53, 57 (1999) (explaining that in England, the King was beyond reach of any official action whereas the President is expressly subject to impeachment).

49. ZIMMERMANN, *supra* note 47, at 296.

50. *See id.*

51. *See generally id.* at 294 (discussing the different approaches countries take to immunity).

52. *Id.* at 30–31; *see also* LA CONSTITUTION BELGE 2022, art. 59 (Belg.).

53. ZIMMERMANN, *supra* note 47, at 216; *see* GRUNNLOV [GrL] [CONSTITUTION] May 17, 1814, art. 66 (Nor.).

54. ZIMMERMANN, *supra* note 47, at 55; *see* GRUNDLAG [CONSTITUTION] Mar. 1, 2000, § 30. (Fin.).

In France, the President has personal immunity for all acts committed in his official capacity.<sup>55</sup> In addition to that, all the judicial proceedings that could harm their ability to work are suspended regardless if they deal with private offenses or offenses carried out prior to their election.<sup>56</sup> The French President can be removed from office in case of unacceptable behavior and could later be prosecuted for these acts.<sup>57</sup> However, simple abuse of office that does not go against the institution of the presidency itself would probably enjoy immunity even for former presidents.<sup>58</sup>

Examples can be multiplied, but the tension stemming from these comparisons is clear: politicians are not fully exempt from the strictures of the law, but their prosecution involves costs that most countries are willing to pay only in exceptional circumstances. This tension leads to compromises that differ greatly across jurisdictions and change over time. The underlying source of the tension still needs to be explored: should politicians observe the law at all times?

### B. *Should Politicians Observe All Laws*

Abraham Lincoln became the President of the United States on March 4, 1861.<sup>59</sup> By this time, seven southern states had already declared their secession from the Federation.<sup>60</sup> The rebel states appointed Jefferson Davis<sup>61</sup> as their president and began to marshal an army.<sup>62</sup> Congress was in recess, but Lincoln had to act immediately.<sup>63</sup> He launched a series of actions that were clearly unconstitutional. On April 19, Lincoln declared a naval blockade on the Southern rebel

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55. ZIMMERMANN, *supra* note 47, at 85; see LA HAUTE COUR [CONSTITUTION] Oct. 4, 1958, art. 67 (Fr.).

56. ZIMMERMANN, *supra* note 47, at 86; see LA HAUTE COUR [CONSTITUTION] Oct. 4, 1958, art. 68 (Fr.).

57. ZIMMERMANN, *supra* note 47, at 85; see LA HAUTE COUR [CONSTITUTION] Oct. 4, 1958, art. 68 (Fr.).

58. ZIMMERMANN, *supra* note 47, at 87.

59. *With Malice Toward None: The Abraham Lincoln Bicentennial Exhibition*, LIBR. CONG., <https://www.loc.gov/exhibits/lincoln/the-sixteenth-president.html> [<https://perma.cc/B9ZY-Y6N6>].

60. Joanne Freeman, *Timeline of the Civil War*, LIBR. CONG., <https://www.loc.gov/collections/civil-war-glass-negatives/articles-and-essays/time-line-of-the-civil-war/1861/> [<https://perma.cc/UMB5-YNGR>].

61. *Id.*

62. *Confederate States of America*, HISTORY (Aug. 21, 2018), <https://www.history.com/topics/american-civil-war/confederate-states-of-america> [[perma.cc/Z4QA-LVRD](https://perma.cc/Z4QA-LVRD)].

63. CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 223–25 (2002) (noting that Lincoln was “compelled to resort to his constitutional and statutory powers” to raise a militia and also that he “put out a call to the House of Congress to convene in a special session”).

states.<sup>64</sup> On May 3, he increased the Army and the Navy by tens of thousands of men and ordered the enlistment of tens of thousands of volunteers.<sup>65</sup> This went directly against the Constitution, which reserves the authority of raising armies to Congress.<sup>66</sup> Lincoln received congressional approval for these actions only retroactively after Congress was assembled in July.<sup>67</sup>

These and other illegal actions of Lincoln were considered by many as necessary and legitimate in light of the threat to the very survival of the republic.<sup>68</sup> In times of emergency, there are scholars who believe that politicians should have the right, and perhaps the duty, to violate the laws that regulate the conduct of democracies in normal circumstances.<sup>69</sup> The most famous example of a book promoting this idea is Clinton Rossiter's 1948 classic *Constitutional Dictatorship*.<sup>70</sup>

Rossiter argued that when a democracy is facing a major crisis such as war, natural disaster, or sudden economic decline, it must revert to types of behavior that are characteristic of dictatorships.<sup>71</sup> Democracies must strengthen the executive at the expense of the rights and liberties of citizens.<sup>72</sup> Once the crisis has ended, democracies should strive to return to law obedience as quickly and as fully as possible.<sup>73</sup>

Creating a clear distinction between normal times and times of crisis is a good way to limit the transgressions of politicians against the law.<sup>74</sup> But this distinction is not always easily made in the modern world. Wars today tend to be asymmetric, which means that they do not pose an existential threat to countries, but also that they can last

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64. *Id.* at 226.

65. *Id.*

66. U.S. CONST. art. I, § 8, cl. 12.

67. ROSSITER, *supra* note 63, at 228–30.

68. *The Brig Amy Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635, 670 (1863) (“Whether the President in fulfilling his duties as Commander-in-Chief, in suppressing an insurrection, has met with such armed resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by *him*. . . . He must determine what degree of force the crisis demands.”).

69. *See* ROSSITER, *supra* note 63, at 229–30.

70. *Id.* at 229 (“Thereby Mr. Lincoln subscribed to a theory that in the absence of Congress and in the presence of an emergency the President has the right and duty to adopt measures which would ordinarily be illegal, subject to the necessity of subsequent congressional approval.”).

71. *Id.* at 6 (noting that war, rebellion, economic depression, and natural disasters have been dealt with through unusual and “dictatorial” methods).

72. *Id.* at 7.

73. *Id.*

74. *See id.* at 8–10 (summarizing how institutions have various mechanisms to “mark” constitutional dictatorship, such as martial law, emergency laws, and delegation of power).

almost indefinitely.<sup>75</sup> Many challenges such as economic depression, climate change, and global epidemics tend to drag on for years and leave many democracies in a state of perpetual, relatively mild emergency.

Politicians need to react to the exigencies of unexpected conditions. Barring the existence of an extreme emergency, it may be unwise to allow politicians to break the rules completely or allow them to do whatever they want. But leaders may still be allowed to bend the rules and interpret them in a way that makes countering real threats possible.<sup>76</sup> The closer politicians get to the brink of illegality, the higher the chances that they will end up doing things that are plainly illegal.<sup>77</sup> This should be viewed as some sort of a professional hazard.

To help visualize this, think of the law as a major road with many legal lanes. Political leaders may also be allowed to go on the shoulders of the road, just like the police can do in real life. The shoulders of the road represent solutions that are barely legal. Going on the shoulders also involves a greater risk of falling off the road completely, which would symbolize instances of illegality. Despite this risk, it is vital to let politicians go on the shoulders sometimes because they bear a special responsibility for ensuring the security of the nation and its essential interests. This responsibility is not shared with the common citizen.

To conclude, politicians could be granted special permission to break the law in extreme emergencies and a right to bend the provisions of the law in more regular times. In addition, even when they end up committing clearly illegal acts, politicians may still avoid the full sanction merited by their infraction.<sup>78</sup> If they acted out of necessity, for example, the system can grant them a special defense. This would create what Meir Dan-Cohen called “acoustic separation” between the rules regulating the conduct of politicians and the rules that

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75. Toni Pfanner, *Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action*, 87 INT'L REV. RED CROSS 149, 149–74 (2005) (discussing the asymmetrical warfare prevalent today that is defined by unequal parties).

76. See *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819) (“[The Constitution was intended] to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. . . . It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.”).

77. ROSSITER, *supra* note 63, at 57–60 (explaining that the German Republic was consistently pushed closer to plainly illegal acts and despotism, which laid the path for Adolf Hitler’s rise to power).

78. *Id.* at 231.

deal with the enforcement of that conduct.<sup>79</sup> But these are not the only reasons politicians get immunity.<sup>80</sup> There is also the fear that they will be harassed in a way that would prevent them from doing their job.<sup>81</sup>

### C. *The Risk of Incorrect Accusations*

Israel is currently facing what is perhaps the biggest constitutional challenge in its history. At the beginning of 2023, the newly elected right-wing government declared a series of draconian measures intended to weaken the judicial branch.<sup>82</sup> This initiative led to a strong civil protest aimed at securing Israel's democratic safeguards and the independence of the Supreme Court.<sup>83</sup> The protestors are increasing the political involvement of hundreds of thousands of people,<sup>84</sup> with potentially beneficial effects for the social influence of diffuse interests, as will be discussed in Part IV.

While the long-term implications of the planned attempt to weaken the Israeli judicial system are still obscure, at least one of the reasons for this attempt is obvious: the trial of Israeli Prime Minister Benjamin Netanyahu. In 2019, Netanyahu was already the longest-serving Israeli prime minister, and he held that tenure uninterrupted for more than a decade.<sup>85</sup> But at the same time, evidence was gathering against him on several allegations of bribery, fraud, and breach of

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79. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 630 (1984).

80. See *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982).

81. *Id.*

82. Associated Press in Jerusalem, *Israel Unveils Controversial Plans to Overhaul Judicial System*, GUARDIAN (Jan. 4, 2023, 3:31 PM), <https://www.theguardian.com/world/2023/jan/04/israel-unveils-controversial-plans-to-overhaul-judicial-system> [<https://perma.cc/3FWR-VVXV>].

83. See Patrick Kingsley & Isabel Kershner, *Netanyahu's Judicial Overhaul Sparks Huge Protest in Israel*, N.Y. TIMES (Feb. 14, 2023), <https://www.nytimes.com/2023/02/13/world/middleeast/israel-judicial-protests-netanyahu.html> [<https://perma.cc/8CW6-MC64>] (explaining that demonstrations “would enhance Israeli democracy by restoring parity in the relationship between elected lawmakers and an unelected and interventionist judiciary, and ensuring that government decisions better reflect the electoral choices of a majority of the population”).

84. *Id.* at 82.

85. Oliver Holmes, *Benjamin Netanyahu Becomes Longest-Serving Israeli PM*, GUARDIAN (July 20, 2019), <https://www.theguardian.com/world/2019/jul/20/benjamin-netanyahu-becomes-longest-serving-israeli-pm> [<https://perma.cc/4A7P-7EEG>].

trust.<sup>86</sup> After a long and complicated process of investigation, Netanyahu was indicted in January 2020.<sup>87</sup>

Netanyahu claimed that the cases against him were cooked by leftist policemen and prosecutors.<sup>88</sup> He made that statement on live television on the first day of his trial with his political supporters—senior ministers and members of parliament—standing behind him to show their support.<sup>89</sup> The Israeli political system became divided between those who thought it was improper that Netanyahu would continue to lead the country despite the severe accusations against him and those who argued that many of these accusations were politically motivated.<sup>90</sup> The division between the two camps is so sharp that Israel was dragged into five expensive and polarizing parliamentary elections between 2019 and 2022.<sup>91</sup>

It is impossible, within the boundaries of this Article, to determine the fairness of Netanyahu's prosecutors and investigators. The people who made the crucial decisions are public servants and not politicians, but even public servants can harbor political wishes that could cloud their judgment. In the United States, the impeachment process is done at the Senate, and scholars have long realized that it is often motivated by partisan political considerations.<sup>92</sup> Regardless of the process for accusing incumbent politicians, the specter of deliberately making incorrect accusations against them should loom large before

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86. David M. Halbfinger, *Israel's Netanyahu Indicted on Charges of Fraud, Bribery and Breach of Trust*, N.Y. TIMES (Nov. 21, 2019), <https://www.nytimes.com/2019/11/21/world/middle-east/netanyahu-corruption-indicted.html> [<https://perma.cc/6NZW-283M>]

87. *See Netanyahu Indicted in Court on Corruption Charges After Dropping Immunity Bid*, BBC NEWS (Jan. 28, 2020), <https://www.bbc.com/news/world-middle-east-51277429> [<https://perma.cc/6S8R-76HG>].

88. *See* Aron Heller, *Israel's Netanyahu Attacks Justice System as Trial Begins*, ASSOCIATED PRESS (May 24, 2020, 10:59 AM), <https://apnews.com/article/8e0479ea534139e46dc0df2349b95ba3> [<https://perma.cc/MZC3-SWAT>].

89. *See id.*

90. Halbfinger, *supra* note 86 (stating that “Netanyahu has fomented right-wing anger . . . for months, accusing them of trying to bring him down” and that “the Blue and White party [believed] that the allegations disqualified Mr. Netanyahu from continuing to serve”).

91. Bethan McKernan, *Israel Braces for Fifth Election in Less Than Four Years*, GUARDIAN (June 29, 2022, 5:16 AM), <https://www.theguardian.com/world/2022/jun/29/israel-braces-for-fifth-election-in-less-than-four-years> [<https://perma.cc/HLF2-9MWV>].

92. J. Richard Broughton, *Conviction, Nullification, and the Limits of Impeachment as Politics*, 68 CASE W. RESV. L. REV. 275, 314 (2017) (“Senators, then, may—and likely will—bring their partisan or electoral concerns to the table at the trial’s inception.”); *see also* Joel K. Goldstein, *The Senate, the Trump Impeachment Trial and Constitutional Morality*, 95 CHI.-KENT L. REV. 475, 475 (2020) (indicating that the conduct of many members of the Senate were motivated by partisan considerations).

policymakers who determine the immunity that politicians enjoy from prosecution.

It is at least possible that politicians would be accused of things they didn't do to the satisfaction of their political opponents.<sup>93</sup> It is also possible that politicians broke the law, but instead of giving them the benefit of the doubt for the reasons mentioned in the previous section, they were held to an unjustifiably strict standard of behavior. Finally, it is possible that politicians will face trials for things they didn't do because of innocent errors of the officials involved. When these cases occur, the will of the people that elected these politicians to office is thwarted illegitimately. The accused may find it hard or impossible to fulfill the mandate that the public entrusted to them, and they may face later electoral defeat.<sup>94</sup> These are strong considerations for preserving some sort of immunity for politicians. However, they cannot be the only considerations when determining the social implications of prosecuting politicians. More importantly for the purpose of this Article, the possibility of false accusations should be distinguished from the key question discussed here: how the prosecution of politicians affects the political involvement of diffuse interests.

## II. CHECKS AND BALANCES AND JUDICIAL DIALOGUE

The famous saying by Justice Robert Jackson, "We are not final because we are infallible, but we are infallible only because we are final,"<sup>95</sup> is wrong. After a final judgment is issued, its policy implications are yet to be determined.<sup>96</sup> The executive often digresses from what the court commands it to do. And that is not necessarily a bad thing because conflict between the branches of government is part of the healthy system of checks and balances that is essential for any democracy, as this part argues.

### A. *Conflict Between the Judiciary and the Executive Is Not Bad*

Separation of powers between the judiciary, the executive, and the legislator is viewed by many as a prerequisite for a functioning

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93. See Ginsburg et al., *supra* note 9, at 145 (noting the close connection between removal mechanisms and a crisis of popularity).

94. Michael J. Gerhardt, *Impeachment Defanged and Other Institutional Ramifications of the Clinton Scandals*, 60 MD. L. REV. 59 (2001) (explaining that reminders of Clinton's impeachment were used during the 2000 election to attempt to influence the electorate).

95. Brown v. Allen, 344 U.S. 443, 540 (1953).

96. *Id.*



democracy.<sup>97</sup> But some scholars tend to misunderstand the way separation of powers is supposed to work. The principle does not require every branch of government to function in isolation. Instead, branches of government should continuously clash with each other so that every branch checks illegitimate behavior by the other branches. True separation of powers operates as a system of checks and balances.<sup>98</sup> That is how it was conceived by classical sources such as Montesquieu and the Federalist papers<sup>99</sup> and this is how modern democracies are designed to work.

This does not mean that a trial against a senior politician is a cause for celebration. The existence of such a trial shows that there is a good reason to believe some of the country's leadership is corrupt and violated the law. But corruption and illegal behavior are not things that can realistically be completely eradicated from any democracy.<sup>100</sup> If there is a moderate number of trials going on against politicians, this can be a sign that the system is working well<sup>101</sup>—that the judiciary is independent and that certain standards of behavior are enforced without discrimination.

The question that this Article is trying to resolve, however, is not how the prevalence of trials against politicians can serve as a proxy for the vitality of a democracy. The question is whether such trials themselves have beneficial consequences for the influence of diffuse interests. More recent literature on the separation of powers that realizes diffuse interests are often sidelined because they are uninformed elucidates the direct benefit that trials of politicians give to democracy.

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97. CHARLES DE SECONDAT, *THE SPIRIT OF LAWS* 177 (T. Ruddiman ed., 1793) (1748) (“When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty.”).

98. See ALLISON CLARK ELLIS, *IMPACT OF POLITICAL SOCIALIZATION ON THE SUPPORT FOR DEMOCRATIC PRINCIPLES: EMERGING RESEARCH AND OPPORTUNITIES* (Allison Clark Ellis ed., 2021) (describing how branches of government have separations of power between other branches and mechanisms to keep them in line, thereby causing democratic backsliding when these mechanisms are eroded); cf. GERHARDT, *supra* note 16, at 70 (“In defining the immutable aspects of separation of powers, one should keep in mind that separation of powers is a system designed to limit the three branches to their assigned responsibilities.”).

99. THE FEDERALIST NO. 47 (James Madison) (referring to Montesquieu and providing arguments for a system of checks and balances).

100. Mark E. Warren, *What Does Corruption Mean in a Democracy?*, 48 AM. J. POL. SCI. 328, 330 (2004) (explaining that the Federalist papers viewed corruption as a natural self-interest that individuals pursue, thereby necessitating the need for public offices to have built-in checks).

101. Ronald Christenson, *A Political Theory of Political Trials*, 74 J. CRIM. L. & CRIMINOLOGY 547, 554 (1983) (“Political trials are not incompatible with the rule of law . . . political trials can make a positive contribution to an open and democratic society.”).

Scholars have argued that a conflict between the branches of government can help to spread information to wider circles in the public.<sup>102</sup> Checks and balances work not only because they prevent every branch from becoming tyrannical in its own realm. Checks and balances also ensure that friction will occur between different branches. This friction means that more people will be aware of who holds real power in the government and how they are using this power.<sup>103</sup>

A trial against a politician is friction between the branches in its most extreme form.<sup>104</sup> The accused are not only defending their policies vis-à-vis other branches of government—they are trying to prove their innocence in the public setting of a trial. These trials are usually covered eagerly by the media and provide a wealth of information to the public.<sup>105</sup> As Part III explains, diffuse interests are usually disadvantaged in their competition with concentrated interests because they are uninformed and unorganized. A public trial can give diffuse interests the information they need to know and the motivation they need to organize. With these two qualities, their chances of resisting concentrated interests are significantly improved.

### *B. The Judiciary Does Not Have the Last Word*

Another misconception of the principle of separation of powers has to do with what happens after a trial is concluded. A judicial decision is usually phrased as an order that the elected branches need to obey.<sup>106</sup> But scholarship revealed that, many times, even the decisions of strong and independent courts are not complied with.<sup>107</sup> The government can avoid compliance by initiating legislative overruling of

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102. EYAL BENVENISTI & GEORGE W. DOWNS, BETWEEN FRAGMENTATION AND DEMOCRACY 165–70 (2017).

103. See Conaghan, *supra* note 16.

104. Christensen, *supra* note 101, at 557–58 (describing how the public confidence of the judiciary is at stake, how trials can become partisan, and generally present a “difficult entanglement of facts, legal issues, and ethical judgements”).

105. Mark Turner et al., *Making Integrity Institutions Work in South Korea: The Role of People Power in the Impeachment of President Park in 2016*, 58 ASIAN SURV. 898, 917 (2018). *But see* Teun A. van Dijk, *How Globo Media Manipulated the Impeachment of Brazilian President Dilma Rousseff*, 11 DISCOURSE & COMMUN 199 (2017) (noting that while media did provide the public with information, some coverage involved misinformation biasing the public against the accused president).

106. Diana Kapiszewski & Matthew M. Taylor, *Compliance: Conceptualizing, Measuring, and Explaining Adherence to Judicial Rulings*, 38 LAW & SOC. INQUIRY 803, 806 (2013).

107. *Id.* at 804 (explaining that compliance, though difficult to determine, varies widely).

judgments,<sup>108</sup> by dragging its feet,<sup>109</sup> and, rarely, by flat-out disobedience.<sup>110</sup>

Trials against politicians are not an exception when it comes to potential resistance to courts' rulings. There may be plenty of legal ways to allow politicians to stay in power after the court has ruled against them. And if the law does not allow it, then the law can be changed. The case studies in Part IV demonstrate that politicians can continue to lead their countries for years, even under the constant threat of multiple civil and criminal processes.

Furthermore, if a direct attempt to preempt the consequences of a trial against politicians doesn't suffice, politicians can attack the court in other ways. Courts can suffer from criticism that damages their public support and makes future noncompliance with their decisions easier. The procedures of judicial selection can be tampered with to give greater influence to politicians and damage the independence of the court. Courts can also be threatened with reduced funding as a penalty for acting against incumbent politicians.<sup>111</sup>

Finally, politicians in the executive can declare an all-out confrontation with the courts and take away their power.<sup>112</sup> Populist politicians naturally view courts as a threat, and they can promote such policies as part of a process of backsliding, which can culminate in the destruction of what used to be a democracy.<sup>113</sup> In Hungary, for example, hundreds of judges were forced into early retirement by changing the retirement age from seventy to sixty-two.<sup>114</sup> In Poland, judges

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108. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 77 (2003) (stating that losing parties in courts may overturn the judicial interpretation through institutional means).

109. James E. Pfander, *Brown II: Ordinary Remedies for Extraordinary Wrongs*, 24 LAW & INEQ. 47, 78 (2006) (noting that *Brown* was not originally complied with, which made *Brown II* necessary).

110. GINSBURG, *supra* note 108, at 77.

111. See Kapiszewski & Taylor, *supra* note 106, at 808 (describing how "retaliation" against the judiciary can occur to target actors or lessen the power of the judiciary overall to alter the court's performance).

112. Paul Blokker, *Populist Constitutionalism*, in ROUTLEDGE HANDBOOK OF GLOBAL POPULISM, 185 (Carlos de la Torre ed., 2019).

113. JORDAN KYLE & YASCHA MOUNK, THE POPULIST HARM TO DEMOCRACY: AN EMPIRICAL ASSESSMENT 16–22 (2018) (explaining in their findings that twenty percent of populist leaders cause democratic backsliding as they limit civil liberties, diminish the checks and balances on the executive branch, and allow rampant corruption).

114. See Johnny Luk, Opinion, *Could Hungary Break the EU?*, AL JAZEERA (July 15, 2021), <https://www.aljazeera.com/opinions/2021/7/15/could-hungary-break-the-eu> [<https://perma.cc/KM E6-Y6HE>] (recounting the Hungarian Prime Minister Viktor Orbán's decision to drop the age of retirement on the first day of 2012).

were threatened with punishment by a disciplinary chamber.<sup>115</sup> In Israel, since the beginning of 2023, numerous changes have been proposed by a populist right-wing government with the clear objective of destroying the independence of the judiciary.<sup>116</sup>

If the judiciary is effectively destroyed, diffuse interests will eventually suffer.<sup>117</sup> Even though the critics of the judiciary may enjoy popular support and present themselves as the representatives of diffuse interests, they will soon betray even the public that supported them.<sup>118</sup> As the famous saying of Lord Acton goes, “absolute power corrupts absolutely.”<sup>119</sup> Without democratic safeguards and an independent judiciary, the government would soon begin to serve only the politicians in power and the concentrated interest groups that collaborate with them.<sup>120</sup>

The menace of complete democratic collapse should never be ignored by diffuse interests. But not every trial against a politician, even if it leads to backlash against the court, indicates that democracy is destined to perish. In fact, the conflict instigated by the trial may have positive effects on the amount of information held by diffuse interests and on their motivation to act. Before demonstrating these effects, this Article now turns to clarifying why diffuse interests in a democracy are usually at a disadvantage compared to concentrated interests.

### III. DIFFUSE INTERESTS AND CONCENTRATED INTERESTS

On the face of it, diffuse interests should be superior to concentrated interests in a democracy. They simply have more voters.<sup>121</sup> It took hundreds of years until democracy spread across the globe and until democracies accepted a genuine, universal—or close to universal<sup>122</sup>—adult suffrage. But now, a larger group should be able to win

115. Allyson Duncan & John Macy, *The Collapse of Judicial Independence in Poland: A Cautionary Tale*, 104 JUDICATURE 41, 41 (2020).

116. See Raffi Berg, *Israel Judicial Reform Explained: What Is the Crisis About?*, BBC NEWS (Sept. 11, 2023), <https://www.bbc.com/news/world-middle-east-65086871> [<https://perma.cc/8CJN-2Q37>].

117. Dothan, *supra* note 11, at 491–93.

118. *Id.* at 494–97.

119. *Lord Acton Quote Archive*, ACTON INST., <https://www.acton.org/research/lord-acton-quote-archive> [<https://perma.cc/8JHF-427G>].

120. Dothan, *supra* note 11, at 497.

121. TRUMBULL, *supra* note 15, at 10.

122. See also Shai Dothan, *Comparative Views on the Right to Vote in International Law: The Case of Prisoners' Disenfranchisement*, in *COMPARATIVE INTERNATIONAL LAW* (Roberts et. al. eds., 2018); see also Richard Lappin, *The Right to Vote for Non-Resident Citizens*

at the ballot and take better care of its members than a smaller group of citizens.

John Hart Ely is famous for pointing to the new challenge to the functioning of a democracy.<sup>123</sup> Instead of a small tyrannical group of oligarchs, the real threat to democracy seems to be majorities that are discriminating against discrete and insular minorities. His theory justifies judicial intervention to protect the minorities from the majority.<sup>124</sup>

The problem with Ely's theory, as Bruce Ackerman was quick to argue, is that it goes against scholarship in political science that explains what the real source of power is in a democracy.<sup>125</sup> The most famous proponent of the view that concentrated interests dominate diffuse interests in a democracy is Mancur Olson.

Olson explained that political power in a democracy does not come from winning elections.<sup>126</sup> It comes from controlling the government and extracting special favors, known as "rents," for your social group.<sup>127</sup> Rents can include tariffs or trade barriers that help certain groups counter economic competition.<sup>128</sup> It can include subsidies that funds groups directly or any other form of exclusive rights that are enjoyed by guilds or unions.<sup>129</sup> Those who can control politicians and officers of the state can acquire these benefits at the expense of others.<sup>130</sup>

Concentrated interests have an advantage at extracting rents because they can work well in unison. Because concentrated interest groups are small, every member of the group has a strong enough incentive to fight for the success of the group.<sup>131</sup> To use the same example used in the Introduction, if a group of three hundred people gains

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in *Europe*, 65 INT'L & COMP. L.Q. 859 (2016) (examining the fundamental right to vote and its limitations with respect to residency).

123. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 7 (2002).

124. *See id.* at 8.

125. *See* Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 742 (1985).

126. *See* OLSON, *supra* note 12, at 132.

127. *Id.* at 133 n.2.

128. *Id.* at 144.

129. *Id.* at 96–97 (describing the collective good of collective bargaining offered to these groups).

130. *See* Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1127 (1994) (delineating how the wealthy have captured politicians through financing to extract benefits from them that are ultimately against the interests of the general public).

131. MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* 20–24 (2018).

\$3 billion in rents every year, every member of the group will get on average \$10 million a year. For this amount of money, people will protest, hire professional lobbyists, write letters, and convince their colleagues and employees to vote only for a specific candidate. In contrast, if the same amount of money would be divided among the 335 million citizens of the United States, every citizen can expect to get less than ten dollars a year. No one would work hard for this sum. People would prefer to free-ride on the work of others, and the result would be that no one in the diffuse interest group would put in the effort that is necessary to make the political system work in favor of the group.<sup>132</sup>

The first problem of diffuse interest groups is therefore that their members lack the motivation to work for the group and to punish anyone who free-rides on the work of others.<sup>133</sup> But there is also a deeper problem that harms diffuse interests: their members do not have access to the relevant information.<sup>134</sup> It is much easier to acquire information about the behavior of politicians and to spread it within a concentrated interest group.<sup>135</sup> Spreading this information is a prerequisite for coordinating the group to fight for its rights. People who are members of diffuse interest groups do not have a strong enough incentive to get informed, and without being informed about the actions of the government, they can never hope to influence government officials.<sup>136</sup>

There seems to be one problem with this theory. If it is true that diffuse interests are in such a position of inferiority compared to concentrated interests, why is it that in advanced democracies, diffuse interests are not completely impoverished? Gunnar Trumbull presented a more nuanced theory on the interaction of diffuse and concentrated interests with the government that could better account for the situation in many countries.

Trumbull argued that in advanced democracies, all major policy reforms involve a coalition between two out of three centers of power:

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132. See Rolnik, *supra* note 14; see also Friedrich Schneider & Werner W. Pommerehne, *Free Riding and Collective Action: An Experiment in Public Microeconomics*, 96 Q.J. ECON. 689, 693–702 (1981) (providing a similar explanation through an experiment conducted on students at the University of Zurich).

133. OLSON, *supra* note 12, at 165–67.

134. OLSON, *supra* note 131, at 26 (emphasizing the rational ignorance of the diffuse public when it comes to public affairs).

135. See Susanne Lohmann, *An Information Rationale for the Power of Special Interests*, 92 AM. POL. SCI. REV. 809, 811–12 (1998).

136. OLSON, *supra* note 131, at 28.

(1) the government, (2) the corporate world, and (3) civil society.<sup>137</sup> The challenge in sustaining such a coalition is that it must be defended by a legitimating narrative that is accepted by the rest of the population.<sup>138</sup> Here is where diffuse interests have an advantage over concentrated interests. When diffuse interests promote a narrative that supports a coalition between their representatives in civil society and the government, this narrative looks altruistic and legitimate. When business leaders try to justify a coalition with the government that supports their social circles in concentrated interest groups, their motivations look egoistic, and they cannot present them as legitimate.<sup>139</sup>

Trumbull suggests that diffuse interests may have a fighting chance against concentrated interests, but their victory is certainly not guaranteed.<sup>140</sup> Concentrated interests still have an advantage in providing stronger motivation to work in unison and greater access to information.<sup>141</sup> For that reason, any change that spreads information among diffuse interests and gets them more involved in politics can tilt the scales in favor of diffuse interests.<sup>142</sup> This is exactly where courts come into the picture. Part IV demonstrates that trials against politicians can make diffuse interests more informed and more motivated.

#### IV. THE IMPACT OF PROSECUTING POLITICIANS ON SOCIETY

Trials against politicians have a lot of negative impacts on society. They can cause polarization and increase partisanship at the expense of commitment to values and ideas. They can damage the public support for the courts and the trust in experts, the media, and the political system itself. They can lead to a political impasse and hinder the ability of politicians to fulfill the mandate they received from the public.

This part argues that despite all the bad things associated with prosecuting politicians, such action may also have a positive side effect—it can increase the political participation of diffuse interests. To demonstrate this effect, three very different case studies have been

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137. TRUMBULL, *supra* note 15, at 124.

138. *Id.* at 28–29.

139. *Id.* at 2 (“On the other hand, concentrated interests with easy access to policymakers are viewed with suspicion, and the policies they advocate necessarily attract critical scrutiny.”).

140. *Id.* at 6–7.

141. *Id.* at 20.

142. *Id.* at 62–63.

chosen: the prosecution of Netanyahu in Israel, the cases against Bill Clinton in the United States, and the case against President Dilma Rousseff in Brazil. The aim is to show that the beneficial impact on diffuse interests occurs in diverse and distinct sets of circumstances.<sup>143</sup>

### *A. The Prosecution of Benjamin Netanyahu in Israel*

The beginning of Netanyahu's trial saga was already described in Section I.C above. But to understand the long-term impact of Netanyahu's trial on the political involvement of diffuse interests, it is necessary to go much deeper into the facts.

Let us start at the end—the point that changed everything. On January 4, 2023, just after the most right-wing government in Israel's history was formed by Netanyahu,<sup>144</sup> his Minister of Justice, Yariv Levin, made a historical public statement. Levin unveiled a far-reaching and extreme plan to weaken and practically destroy the judiciary.<sup>145</sup> The plan included a set of changes such as increasing political influence on the selection of judges, constraining judicial review on legislation and allowing the parliament to override it, and preventing judges from annulling administrative actions because they considered the actions unreasonable.<sup>146</sup> This plan came as a huge surprise to many, but what happened later was probably even more surprising.

Hundreds of thousands of people took to the streets in protest, not once, but every week for months on end.<sup>147</sup> People gathered regularly in more than a hundred and fifty places in Israel<sup>148</sup> and also in some

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143. Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125, 139 (2005) (“According to the ‘most different cases’ approach to selecting comparable cases, researchers should compare cases that are different on all variables that are not central to the study but match in terms that are, thereby emphasizing the significance of consistency on the key independent variable in explaining the similar readings on the dependent variable.”).

144. Raffi Berg, *Israel's Most Right-Wing Government Agreed Under Benjamin Netanyahu*, BBC NEWS (Dec. 22, 2022), <https://www.bbc.com/news/world-middle-east-63942616> [<https://perma.cc/JK8L-9UTH>].

145. Dan Williams & Emily Rose, *Netanyahu Gov't Unveils Plan to Rein in Israel's Top Court*, REUTERS (Jan. 4, 2023, 12:07 PM), <https://www.reuters.com/world/middle-east/netanyahu-government-unveils-plan-reform-israels-top-court-2023-01-04/> [<https://perma.cc/CQA2-B28S>].

146. Associated Press in Jerusalem, *supra* note 82; *see also* Berg, *supra* note 116.

147. Kingsley & Kershner, *supra* note 83 (“The protest followed weeks of regular demonstrations in Tel Aviv, where a similar number of people have gathered every Saturday since the start of the year.”).

148. Michael Starr, *Tens of Thousands Protest Judicial Reform for 13th Consecutive Week*, JERUSALEM POST (Apr. 2, 2023, 11:41 AM), <https://www.jpost.com/breaking-news/article-736104> [<https://perma.cc/VP53-ER42>].



places in Europe<sup>149</sup> and the United States.<sup>150</sup> The government tried to back down on several parts of the proposed reform.<sup>151</sup> It tried to negotiate a compromise.<sup>152</sup> It tried to buy time. All was to no avail.<sup>153</sup> The protest continued in full force until the horrible massacre of civilians around the Gaza Strip committed by the terrorist organization Hamas on October 7, 2023, plunged the country into war.<sup>154</sup>

There may be many reasons why the protest could maintain its momentum for such a long time despite facing significant resistance and evasion attempts by the government. A key reason is the feeling of many Israelis that without the protection of a strong and independent court, the Israeli public will be subject to the whims of a radical anti-liberal government.<sup>155</sup> Many people that had never been politically active before came to believe that they could only prevent the destruction of Israeli democracy by taking to the streets.<sup>156</sup>

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149. See Jorge Liboreiro, *Protesters Plead for EU Intervention over Israel's Judicial Reforms 'Before It Is Too Late,'* EURONEWS (Sept. 9, 2023, 12:15 PM), <https://www.euronews.com/my-europe/2023/03/08/protesters-plead-for-eu-intervention-over-israels-judicial-reforms-before-it-is-too-late> [https://perma.cc/VT48-H27K].

150. Ben Samuels, *Nearly 1,000 Protest Netanyahu Government at NYC's Israel Parade,* HAARETZ (June 5, 2023), <https://www.haaretz.com/israel-news/2023-06-05/ty-article/.premium/1000-protest-netanyahu-govt-at-nycs-israel-parade/00000188-880c-dded-a58e-ab8cf4cf0000> [https://perma.cc/N4ZA-W2F6].

151. Bethan McKernan, *Israel: Netanyahu Announces Delay to Overhaul Plan,* GUARDIAN (Mar. 27, 2023), <https://www.theguardian.com/world/2023/mar/27/israel-netanyahu-judiciary-plans-halt> [https://perma.cc/94C9-AWCR].

152. *Id.*

153. See *id.*; see also Michael Hauser Tov, *Compromise Talks on Israel's Judicial Overhaul Resume,* HAARETZ (May 16, 2023), <https://www.haaretz.com/israel-news/2023-05-16/ty-article/.premium/compromise-talks-on-israels-judicial-overhaul-resume/00000188-2399-d18b-a79d-27d93e820001> [https://perma.cc/RR9G-MDXX].

154. *Hamas Leaves Trail of Terror in Israel,* N.Y. TIMES (Oct. 10, 2023), <https://www.nytimes.com/2023/10/10/world/middleeast/israel-gaza-war-hamas-deaths-killings.html> [https://perma.cc/M5RL-UWDF].

155. Raffi Berg, *Israel: Police and Anti-Judicial Reform Protesters Clash as Bill Advances,* BBC NEWS (July 11, 2023), <https://www.bbc.com/news/world-middle-east-66069529#> [https://perma.cc/SVY4-HS3Z] (“Critics of the reforms say the government’s plans are too extensive and are a grave threat to the country’s democratic system.”); see also *Majority of Israelis Oppose Netanyahu Gov’t Plan to Weaken Legal System, Poll Shows,* HAARETZ (Jan. 5, 2023), <https://www.haaretz.com/israel-news/2023-01-05/ty-article/.premium/majority-of-israelis-oppose-netanyahu-govt-plan-to-weaken-the-legal-system-poll-shows/00000185-81a3-d579-abe5-a5e3af030000> [https://perma.cc/3PWP-HPHA] (showing the results of a survey by the Israel Democracy Institute suggesting a majority of the public does not support most parts of the plan).

156. See *Israel: Netanyahu Delays Judicial Overhaul Plan, Backtracking After Unprecedented Protests,* MONDE (Mar. 27, 2023, 7:38 PM), [https://www.lemonde.fr/en/international/article/2023/03/27/israel-netanyahu-delays-judicial-overhaul-plan-backtracking-after-unprecedented-protests\\_6020874\\_4.html](https://www.lemonde.fr/en/international/article/2023/03/27/israel-netanyahu-delays-judicial-overhaul-plan-backtracking-after-unprecedented-protests_6020874_4.html) [https://perma.cc/F794-7JG6] (demonstrating that protests, including in the forms of demonstrations and strikes, have taken place across broad swaths of society including schools, trade unions, malls, and other areas).

Yet there is probably another reason why the protest against destroying the judiciary could sustain such levels of energy and commitment. The reason is that the protest had an experienced leadership.<sup>157</sup> The hard core of the protestors did not wait until Netanyahu released the plan to destroy the judiciary to speak. They started organizing years earlier, primarily driven by Netanyahu's indictment.<sup>158</sup>

Part of the leadership of the protest against reforming the judiciary is known as the "Black Flags Protest."<sup>159</sup> A social movement that started in March 2020, one of its primary objectives was to initiate a change to the law that would prevent anyone who is being criminally indicted from serving as a prime minister.<sup>160</sup> It is worth reminding that Netanyahu was indicted just two months earlier yet continued to serve as the prime minister.

The Black Flags movement helped maintain the protest against judicial reform by securing some of the necessary funds.<sup>161</sup> It was also responsible for launching some of the key figures of the protest into the public eye. One example is Shikma Bressler, an Israeli physicist who, together with her two brothers, started the Black Flags protest and later became a frequent and well-known speaker against the attempted judicial reform.<sup>162</sup>

157. *Protest Leaders Urge Strike Action to Pressure Government Against Judicial Overhaul*, TIMES ISRAEL (Jan. 15, 2023, 11:21 AM), <https://www.timesofisrael.com/protest-leaders-urge-strike-action-to-pressure-government-against-judicial-overhaul/> [https://perma.cc/CHK6-QBFY].

158. Uri Cohen, *Israel Ramps Up Security Ahead of Weekend Demonstrations*, JERUSALEM POST (Aug. 3, 2020, 6:38 PM), <https://www.jpost.com/israel-news/israel-police-ramps-up-security-ahead-of-weekend-demonstrations-637008> [https://perma.cc/J67L-MGBQ]; see Ehud Barak, Opinion, *A Sick Country and a Black Flag*, HAARETZ (May 31, 2020), <https://www.haaretz.com/opinion/2020-05-31/ty-article-opinion/.premium/a-sick-country-and-a-black-flag/0000017f-dc2a-d3a5-af7f-feaea1a00000> [https://perma.cc/FU4B-Y2L5].

159. See *Protest Leaders Urge Strike Action*, *supra* note 157.

160. See Gadi Hitman, *More Divided Than United: Israeli Social Protest During Covid-19 Pandemic of 2020*, 7 COGENT SOC. SCIS. 1, 6 (2021) ("They claimed that a person against whom three indictments had been filed, on counts of bribery, fraud, and breach of trust, could not serve in the most important public position in Israel (prime minister) . . .").

161. Carrie Keller-Lynn, *Protest Leader Says 'Grassroots' Initiative Raised NIS 50M to Fight Judicial Overhaul*, TIMES ISRAEL (May 24, 2023, 1:11 PM), <https://www.timesofisrael.com/protest-leader-says-grassroots-initiative-raised-nis-50m-to-fight-judicial-overhaul/> [https://perma.cc/92UH-LLB2].

162. See Cohen, *supra* note 158; Shikma Bressler, Opinion, *It's Time to Make Israel's Protest Impolite*, HAARETZ (July 2, 2023), <https://www.haaretz.com/opinion/2023-07-02/ty-article-opinion/.premium/its-time-to-make-israels-protest-impolite/00000189-1653-dc81-a9db-5f7bdeb70000> [https://perma.cc/2M4R-B5LA]; Amanda Borschel-Dan, *What Matters Now to Arrested Activist/Physicist Shikma Bressler: 'Saving Israel,'* TIMES ISRAEL, (Mar. 24, 2023, 6:17 AM), <https://www.timesofisrael.com/what-matters-now-to-arrested-activist-shikma-bressler-saving-israel/> [https://perma.cc/8B5R-EUSB].

Another example of an undeclared leader of the protest against the judicial reform is Ehud Barak.<sup>163</sup> Barak was a previous Prime Minister and Chief of Staff and a decorated war hero who had been critical of Netanyahu for years before the judicial reform saw light.<sup>164</sup> He radicalized his statements significantly in response to that reform and called on Israelis to engage in civil disobedience.<sup>165</sup> There are many other political leaders—such as the current head of the opposition Yair Lapid and the head of the Labor party Merav Michaeli—who to a large extent built their political careers as antagonists to Netanyahu.<sup>166</sup> Years before the judicial reform was conceived, all these politicians were publicly critical of the notion that an indicted prime minister can lead the country.<sup>167</sup>

The leadership of the protest is important, but so are the hundreds of thousands of anonymous people that spend countless hours demonstrating in the streets, sometimes in the face of police violence or assault by hecklers. The perseverance that these people show may be partly explained by the years of experience some of them gathered from protesting against Netanyahu prior to the judicial reform. A key part of this experience was acquired during the height of the COVID-

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163. See Josh Breiner, *Former PM Barak and ex-Meretz Lawmaker Could Be Investigated for Sedition by Israel Police*, HAARETZ (June 27, 2023), <https://www.haaretz.com/israel-news/2023-06-27/ty-article/netanyahus-party-demands-investigation-after-ex-mk-calls-for-illegal-resistance-to-coup/00000188-fda0-dd5e-a1ac-fdffcd4c0000> [https://perma.cc/ES48-BZK2].

164. Aida Edemariam, *Ehud Barak on the Crisis in Israel: 'Netanyahu Has to Resign.'* GUARDIAN (May 25, 2018, 10:49 AM), <https://www.theguardian.com/world/2018/may/25/ehud-barak-on-the-crisis-in-israel-netanyahu-has-to-resign> [https://perma.cc/YRP9-U5G4].

165. Josh Breiner, *Former PM Barak and ex-Meretz Lawmaker Could Be Investigated for Sedition by Israel Police*, HAARETZ (June 27, 2023), <https://www.haaretz.com/israel-news/2023-06-27/ty-article/netanyahus-party-demands-investigation-after-ex-mk-calls-for-illegal-resistance-to-coup/00000188-fda0-dd5e-a1ac-fdffcd4c0000> [https://perma.cc/ES48-BZK2] (“Barak spoke to protesters at the weekly rally on Tel Aviv’s Kaplan Street saying ‘We must intensify the struggle and employ non-violent civil disobedience. We call it civil insubordination.’”).

166. See, e.g., Laurie Kellman & Alon Bernstein, *Israeli Opposition Leader Says Netanyahu Tried to Get Him to Back Tax Breaks for Hollywood Mogul*, ASSOCIATED PRESS (June 12, 2023, 2:50 AM), <https://apnews.com/article/netanyahu-trial-corruption-lapid-28b7f01cb0d4070cd16a0f4ef471b5ea> [https://perma.cc/5NVK-MX8W] (describing Lapid as a major Netanyahu rival); Ehud Olmert, *Opinion, Michaeli Is the Opposite of Everything Netanyahu Represents*, JERUSALEM POST (Feb. 4, 2021, 8:26 PM), <https://www.jpost.com/opinion/michaeli-is-the-opposite-of-everything-netanyahu-represents-opinion-657886> [https://perma.cc/MJP7-76C4].

167. See *Lapid After the Recommendations: Netanyahu Cannot Continue to Serve as Prime Minister*, KAN (Feb. 14, 2018, 4:40 AM), <https://www.kan.org.il/content/kan-news/law/233774> [https://perma.cc/Q3HB-UD3W] (noting that Lapid said in 2018, when the police indicated there was enough evidence to indict Netanyahu, that he cannot continue to serve as the prime minister); see also Merav Michaeli (@MeravMichaeli), TWITTER (May 23, 2020, 11:08 AM), [https://twitter.com/MeravMichaeli/status/1264256966953664513?ref\\_src=twsrc%5Etfw](https://twitter.com/MeravMichaeli/status/1264256966953664513?ref_src=twsrc%5Etfw) [https://perma.cc/TJ2Q-CUVS] (criticizing other politicians who formed a coalition with Netanyahu despite his indictment).

19 pandemic in the fall of 2020.<sup>168</sup> Faced with regulations that forbade protesters from being more than a kilometer away from their homes, demonstrators splintered to many hundreds of centers all over the country.<sup>169</sup> The kind of resolve that evolved in these difficult times may have nourished exactly the type of fortitude the much larger protest against the judicial reform needed to survive.

In light of this, it seems that Netanyahu's trial may have led to the attempts by his supporters and collaborators to neutralize the judiciary, but it was also crucial in allowing civil resistance against this move to coalesce. The trial initiated a series of occurrences whose endpoint is still in the unknown future. So far, it is safe to say that the trial damaged the stability of Israeli society and made it much more vulnerable.<sup>170</sup> It radicalized and polarized political views on both sides and is probably responsible for numerous wasteful and exhausting elections and protests.

Without underplaying these costs, it is also possible to state, with some confidence, that the trial drew many more people into the civil protest. It informed and motivated people that would otherwise show no interest in politics.<sup>171</sup> Many of these people are prime examples of diffuse interests. Because they have relatively centrist political views and no clear characteristics that set them apart from other social groups, these people are usually much less powerful than their numbers seem to dictate. But when these group members become informed and motivated to act, they form a formidable force that can stand even against a government that is both stable and radical.

Trying to predict what route Israel will take a year from now, let alone ten years from now, is pure guesswork. At the moment, the only takeaway from this case study is that despite significant costs to the country and political system from Netanyahu's trial, the trial created conditions that strengthened diffuse interests. Moreover, it formed

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168. Hitman, *supra* note 160.

169. See *Thousands of Israelis Protest Against Netanyahu Despite Lockdown*, REUTERS (Oct. 3, 2020, 12:43 PM), <https://www.reuters.com/article/us-health-coronavirus-israel-protests-idUSKBN2600XQ> [<https://perma.cc/W8D2-Z4YY>] (noting that protests were small and scattered throughout the country).

170. Josef Federman & Tia Goldenberg, *How Netanyahu Judicial Plan Sparked Massive Unrest in Israel*, ASSOCIATED PRESS (Mar. 27, 2023, 8:50 PM), <https://apnews.com/article/israel-netanyahu-protests-judicial-overhaul-what-is-happening-d65c2ff5d40289ad3699e499304abb18> [<https://perma.cc/K9FV-JX88>] (describing the current and future economic impacts as well as the political and social tensions caused by the proposed reforms).

171. See *Israel: Netanyahu Delays Judicial Overhaul Plan, Backtracking After Unprecedented Protests*, *supra* note 156.

these conditions at a critical point in the country's history where there is at least a possibility that these empowered diffuse interests will protect the country from losing its democratic nature.

*B. The Cases Against Bill Clinton in the United States*

In 1972, Chinese Premier Zhou Enlai was asked about the influence of the 1968 student protest in France. He replied, "too soon to tell." Due to a mistranslation, many seemed to believe that Enlai was referring to the French Revolution of 1789.<sup>172</sup> Thus, a nifty witticism was born about the impossibility of assessing historical impacts even centuries down the line. The Israeli case study confirms the veracity of this witticism. The example of Paula Jones's civil suit against President Bill Clinton and his later impeachment process further demonstrates how surprising and unpredictable history can be.

It all started with a sexual harassment suit that Jones filed against Clinton in May 1994. The civil suit concerned a sexual proposal that Clinton made to Jones in 1991 when he was the governor of Arkansas and she was an Arkansas state employee.<sup>173</sup> The U.S. District Court for the Eastern District of Arkansas ruled that Clinton could not be sued in a civil suit because he was at the time the President of the United States and so he enjoyed immunity.<sup>174</sup> In contrast, the Court of Appeals and later the Supreme Court held that the President did not have immunity from civil lawsuits.<sup>175</sup>

While Jones's case against Clinton was back on track,<sup>176</sup> events were about to take a dramatic turn. Monica Lewinsky submitted an affidavit in the trial stating that she didn't have a sexual relationship with Clinton while she was working at the White House.<sup>177</sup> However, a later co-worker of Lewinsky, Linda Tipp, recorded phone calls with

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172. Samuel Wade, *Zhou Enlai's Caution Lost in Translation*, CHINA DIGIT. TIMES (June 10, 2011), <https://chinadigitaltimes.net/2011/06/zhou-enlais-caution-lost-in-translation/> [<https://perma.cc/QV76-HEPW>].

173. RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 17–18 (1999); *Jones v. Clinton*, 869 F. Supp. 690, 691 (E.D. Ark. 1994), *aff'd in part*, 72 F.3d 1354 (8th Cir. 1996).

174. *Jones*, 869 F. Supp. at 699 ("To protect the Office of President, however, from the potential harm that could result from unfettered civil litigation, and to give effect to the policy of separation of powers, it is necessary to provide that the President cannot be tried in the context presented here until he leaves office.").

175. *Clinton v. Jones*, 520 U.S. 681, 707–08 (1997).

176. *See, e.g., Jones v. Clinton*, 974 F. Supp. 712 (E.D. Ark. 1997).

177. POSNER, *supra* note 173, at 20.

Lewinsky in which she admitted sexual acts with Clinton.<sup>178</sup> Tripp gave the recordings to the independent counsel Kenneth Starr who was then investigating the far more technical Whitewater controversy, also involving Clinton. Starr then decided to broaden his investigation into acts of perjury that Clinton committed when he lied under oath in his trial by claiming he did not have a sexual affair with Lewinsky.<sup>179</sup>

This unexpected turn of events led to an impeachment process against Clinton for lying under oath and obstructing justice.<sup>180</sup> The House of Representatives approved the articles of impeachment that were submitted to the Senate.<sup>181</sup> In the Senate, Clinton was finally acquitted because no article received the two-thirds majority of senators required to convict him.<sup>182</sup>

So far, the relevant facts about Clinton's civil lawsuit and impeachment process have been described, but what was their social impact? Let's start with the immediate impact. On November 3, 1998, the mid-term elections occurred, right in the middle of the impeachment process and in the heat of the public scandal.<sup>183</sup> The result: the balance of seats in the Senate was not changed, but the Democrats gained five seats in the House of Representatives.<sup>184</sup> This was a phenomenal victory for the Democrats, Clinton's party. How phenomenal? This was the first time since 1934 that the President's party did not lose seats in both houses of Congress, and it was the first time since 1822 that the President's party gained seats in the House of Representatives in the President's second mid-term.<sup>185</sup>

How can this victory be explained? Scholars have indicated that Republicans who were critical of the impeachment process voted in smaller numbers than usual.<sup>186</sup> Additionally, voters who cared about the campaign and followed the news closely were likely to change

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178. *Id.* at 23.

179. *Id.* at 20–27.

180. *Id.* at 1.

181. *Id.* at 158 n.48.

182. *Id.* at 1–2.

183. *Id.* at x.

184. Alan I. Abramowitz, *It's Monica, Stupid: The Impeachment Controversy and the 1998 Midterm Election*, 26 LEGIS. STUD. Q. 211, 211 (2001).

185. *Id.*

186. *Id.* at 218 (“[D]issatisfaction with the impeachment inquiry did have a modest but significant negative effect on turnout among Republican[s].”).

their vote as a result of the impeachment scandal in favor of the Democrats.<sup>187</sup> While the core Republicans supported the impeachment, those with moderate Republican views opposed it, and this changed their voting behavior.<sup>188</sup>

What this means is that the results of the mid-term election reflected the rising power of Republican moderates. The diffuse interests that include people with Republican views but without strong partisan commitments may have been influenced by the media scandal around Clinton, and as a result, some of those people either decided to stay home or to vote for the Democrats, thereby handing the Republican leadership a humiliating defeat.

It looks like an impeachment process conducted by radicals against a relatively popular and successful president may hurt them and empower more moderate diffuse interests. But history did not stop with the 1998 mid-term elections, and it was about to take some sharp turns.

First, the decision of the Senate to acquit Clinton was very popular, and polls showed that only 20 percent of the public disagreed with it.<sup>189</sup> There were even some demonstrations against the impeachment, but these were not of special size and significance given that Clinton stayed in office.<sup>190</sup> But all this may not have prevented Clinton's smeared personal reputation from hurting his favored successor Al Gore in the next presidential election in 2000. George W. Bush ran against Gore with a campaign that promised to restore the honor and integrity of the presidency.<sup>191</sup> His contested victory by a hair's difference may very well have been made possible by the salacious details

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187. *Id.* at 222 (explaining that the influence of the impeachment controversy among high-involvement voters had effects comparable in magnitude to party identification and incumbency).

188. *Id.* at 224–25 (describing how Republican incumbents in the House who were in “safe” districts were not likely to feel the effects of the controversy surrounding the impeachment, but Republican incumbents in “marginal” districts and competitive races did, and that a substantial minority of Republicans opposed impeachment).

189. POSNER, *supra* note 173, at 185.

190. See *Impeachment Protest Rally*, C-SPAN (Dec. 16, 1998), <https://www.c-span.org/video/?116680-1/impeachment-protest-rally> [<https://perma.cc/WK9A-GJ5R>]; see also *Impeachment; Harvard Rally Urges Protest Against Impeachment*, N.Y. TIMES (Dec. 16, 1998), <https://www.nytimes.com/1998/12/16/us/impeachment-harvard-rally-urges-protest-against-impeachment.html> [<https://perma.cc/9VN3-ZC4W>] (showing a few of the handful of protests that gathered against impeachment, though most were moderate in number, usually no more than a few thousand participants).

191. See Ronald Brownstein, *Democrats Learned the Wrong Lesson from Clinton's Impeachment*, ATLANTIC (June 6, 2019), <https://www.theatlantic.com/politics/archive/2019/06/did-clintons>

that were tied to Clinton's name and affected the public image of Gore as well.<sup>192</sup> To this, one must add the discontent of Republicans who saw both the acquittal of Clinton in the Senate and the defeat in the mid-term elections as a call for arms and made a special effort in the critical 2000 elections.<sup>193</sup>

In a universe where Bill Clinton was never involved in any scandalous affair and nobody knew the name Monica Lewinsky, there is at least some chance Bush never became President. And then it is likely that Barack Obama would not be President. Donald Trump would never run against Hillary Clinton, and if he did, she would probably win. Joe Biden would probably not be America's oldest President. He would either get to the White House earlier or not at all.

The American case study provides a larger benefit of hindsight than the Israeli one, but even though we know how events turned out several years down the line, establishing a causal link to Clinton's civil trial and impeachment is practically impossible. It looks like the media attention did empower diffuse interests in the short term by getting them informed and motivated enough to reconsider their voting behavior.<sup>194</sup> At the same time, the sensational nature of the entire affair made the political climate more hostile, radical, and polarizing.<sup>195</sup> This

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-impeachment-actually-hurt-republicans/591175/ [https://perma.cc/CH7P-GJB3] ("Clinton's behavior provided a crucial backdrop for George W. Bush's winning presidential campaign—particularly his defining promise 'to restore honor and dignity' to the Oval Office.").

192. David Leonhardt, *The Clinton Legacy: Impeachment Hurts the President*, N.Y. TIMES (Oct. 13, 2019), <https://www.nytimes.com/2019/10/13/opinion/impeachment-clinton.html> [https://perma.cc/D9LE-SBEN] ("He lost a large share of voters who approved of Clinton's performance but disapproved of Clinton personally."); see also *The 2000 Presidential Election—A Mid-Year Gallup Report*, GALLUP (June 22, 2000), <https://news.gallup.com/poll/9898/2000-presidential-election-midyear-gallup-report.aspx> [https://perma.cc/RW89-V89A] (indicating that perceived characteristics of the presidential candidates increasingly affected support for those candidates).

193. Brownstein, *supra* note 191.

194. Compare Abramowitz, *supra* note 184, at 213 (concluding the "most important reason for the Republican party's poor showing in the 1998 midterm election was a voter backlash against Special Prosecutor Kenneth Starr and congressional Republicans over their handling of the presidential sex scandal and impeachment"), with Drew DeSilver, *Clinton's Impeachment Barely Dented His Public Support, and It Turned Off Many Americans*, PEW RSCH. CTR. (Oct. 3, 2019), <https://www.pewresearch.org/short-reads/2019/10/03/clintons-impeachment-barely-dented-his-public-support-and-it-turned-off-many-americans/> [https://perma.cc/2K5S-G86W] ("Clinton benefitted from . . . skepticism about the media's coverage of the allegations.").

195. See Abramowitz, *supra* note 184, at 219 (stating that those who strongly favored impeachment voted for Republicans during the 1998 midterm elections); see also David S. Broder & Dan Balz, *Scandal's Damage Wide, if Not Deep*, WASH. POST (Feb. 11, 1999), <https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/impact021199.htm> [https://perma.cc/K32N-HQGC] ("Congress has suffered from its displays of excessive partisanship.").



is exactly the climate that is nourished by populist leaders like Netanyahu in Israel and Trump in the United States. The long-term costs of prosecuting politicians are therefore also made evident by this example. The next case study involving Brazil makes these costs even clearer.

### C. *The Case Against Dilma Rousseff in Brazil*

By the end of 2015, Dilma Rousseff was a year into her second term as the President of Brazil.<sup>196</sup> Her popularity was already in decline due to allegations of corruption and an economic recession.<sup>197</sup> At the same time, an investigation was taking place by the federal police against the country's leadership with accusations of fiscal irresponsibility and administrative misconduct.<sup>198</sup>

Specifically, a police investigation called Operation Car Wash focused on corruption in the nationally-owned energy company Petrobras.<sup>199</sup> Rousseff was the chair of the board of directors of this company between 2003 and 2010.<sup>200</sup> Although there was no evidence that Rousseff herself engaged in corruption in Petrobras,<sup>201</sup> more than one million Brazilians took to the streets in protest against her, and many called for her impeachment.<sup>202</sup> Despite the public pressure, the Supreme Court decided that an incumbent president cannot be investigated for allegations about her conduct before she entered office.<sup>203</sup>

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196. *President Dilma Rousseff's Second Term: What's in Store for Brazil?*, CTR. FOR STRATEGIC & INT'L STUD. (Mar. 19, 2015), <https://www.csis.org/events/president-dilma-rousseffs-second-term-whats-store-brazil> [<https://perma.cc/5LT7-DZYT>].

197. Matt Sandy, *Dilma Rousseff's Impeachment Is the Start of Brazil's Crisis—Not the End*, TIME (Sept. 1, 2016), <https://time.com/4476011/brazil-dilma-rousseff-crisis-impeachment/> [<https://perma.cc/B8VQ-8RB2>]; see also Alonso Soto, *Fiscal Probe for Brazil's Rousseff Poses Impeachment Threat*, REUTERS (Aug. 11, 2015, 10:08 PM), <https://www.reuters.com/article/us-brazil-rousseff-impeachment-idUSKCN0QG0BS20150811> [<https://perma.cc/Y8Q9-2EWW>] (discussing the damage to Rousseff from the scandal compounding with Brazil's worst recession in twenty-five years).

198. Alexandra Rattinger, *The Impeachment Process of Brazil: A Comparative Look at Impeachment in Brazil and the United States*, 49 U. MIA. INTER-AM. L. REV. 129, 150–56 (2017).

199. *Id.* at 150.

200. Luciana Otoni, *Brazil's Rousseff Replacing Petrobras CEO*, REUTERS, (Feb. 3, 2015), <https://www.reuters.com/article/us-brazil-petrobras-agreement/brazils-rousseff-replacing-petrobras-ceo-source-idUSKBN0L72M420150204> [<https://perma.cc/AGX7-CLP3>].

201. Rattinger, *supra* note 198, at 152.

202. Reed Johnson & Luciana Magalhaes, *Brazilian President Faces More Heat After Protests*, WALL ST. J. (Mar. 16, 2015, 7:25 PM), <https://www.wsj.com/articles/brazilian-president-faces-more-heat-after-protests-1426548319> [<https://perma.cc/9R8M-4QR9>].

203. André Richter, *Supreme Court Dismisses Allegations Implicating Rousseff over Pasadena Deal*, AGÊNCIA BRASIL (May 5, 2016), <https://agenciabrasil.ebc.com.br/en/politica/noticia/2016>

But public pressure continued to mount when Rousseff was accused of falsifying fiscal accounts in her government and when the Brazilian federal audit court (Tribunal de Contas da União or TCU) declared that the government's actions violated fiscal responsibility.<sup>204</sup> By August 2015, 68 percent of Brazilian's disapproved of Rousseff leadership.<sup>205</sup>

Finally, in December 2015, the President of the lower house of Congress, Eduardo Cunha—himself investigated for corruption in Operation Car Wash—accepted one of many requests to impeach Rousseff.<sup>206</sup> The allegations that supported the impeachment process involved shady deals made in the Petrobras company, allocation of funds for political aims without congressional approval, and secret use of funds from state-owned banks to fund social programs.<sup>207</sup>

A special committee was formed to decide on the impeachment<sup>208</sup> while demonstrations both for and against impeachment took place across Brazil.<sup>209</sup> The committee had sixty-five members and thirty-seven of them faced charges of corruption or other crimes.<sup>210</sup> In this dubious setting, the committee voted and supported impeachment.<sup>211</sup> So did the lower house of Congress, which also included 303 out of

-05/supreme-court-dismisses-allegations-implicating-rousseff-over-pasadena-deal [https://perma.cc/8QMH-X2RR].

204. Fernando Rêgo Barros, *TCU Conclui Que o Governo Infringiu a Lei de Responsabilidade Fiscal*, JORNAL GLOBO (Apr. 16, 2015), <https://g1.globo.com/jornal-da-globo/noticia/2015/04/tcu-conclui-que-o-governo-infringiu-lei-de-responsabilidade-fiscal.html> [https://perma.cc/ZJ7A-C5RL]; see also Sandy, *supra* note 197 (noting that Rousseff's approval ratings fell to single digits thanks largely to the recession and widespread anger among the population, which was sparked primarily by a \$3 billion corruption scandal at state oil giant Petrobras).

205. Filipe Matoso, *Governo Dilma Tem Aprovação de 9%, Aponta Pesquisa Ibope*, JORNAL GLOBO (July 1, 2015), <https://web.archive.org/web/20170108192305/http://g1.globo.com/politica/noticia/2015/07/governo-dilma-tem-aprovacao-de-9-aponta-pesquisa-ibope.html> [https://perma.cc/6E7H-A47U].

206. Rattinger, *supra* note 198, at 130.

207. Andrew Jacobs, *Brazil Impeachment Debate Hinges on a Thorny Legal Question*, N.Y. TIMES (Apr. 19, 2016), <https://www.nytimes.com/2016/04/20/world/americas/dilma-rousseff-impeachment-brazil.html> [https://perma.cc/34WM-463V].

208. Vincent Bevins, *The Politicians Voting to Impeach Brazil's President Are Accused of More Corruption Than She Is*, L.A. TIMES (Mar. 28, 2016, 3:04 PM), <https://www.latimes.com/world/mexico-americas/la-fg-brazil-impeach-20160328-story.html> [https://perma.cc/86ZP-7WVC].

209. Jonathan Watts, *Dilma Rousseff Impeachment: What You Need to Know—The Guardian Briefing*, GUARDIAN (Aug. 31, 2016), <https://www.theguardian.com/news/2016/aug/31/dilma-rousseff-impeachment-brazil-what-you-need-to-know> [https://perma.cc/N8DU-5W2N]. (“In March, an estimated 3 million people joined rallies against Rousseff's government. Since then, hundreds of thousands have demonstrated for or against impeachment.”).

210. Bevins, *supra* note 208.

211. Watts, *supra* note 209.

513 members facing criminal charges or investigations at the time.<sup>212</sup> The Senate decided to suspend Rousseff's powers and eventually, on August 31, 2016, decided to remove her from office.<sup>213</sup> The Supreme Court rejected Rousseff's defense team's attempts to challenge the impeachment.<sup>214</sup>

The public was mesmerized by the proceedings: more than 35 million Brazilians watched the impeachment vote.<sup>215</sup> Protests against Rousseff's government included 3.6 million people in over three hundred cities.<sup>216</sup> Counterprotests against the impeachment also occurred after the Senate decision.<sup>217</sup>

In the short term, therefore, political involvement certainly increased. In a country completely immersed in corruption, it looks like the two primary conditions for empowering diffuse interests—spreading information and increasing motivation to act—were clearly fulfilled. The fight against corruption of concentrated interests in the Brazilian leadership could certainly gain from the greater public participation of the masses. Alas, history was just about to take an unfortunate turn against diffuse interests.

With Rousseff out of the way, her powers were transferred to Vice President Michel Temer.<sup>218</sup> He never enjoyed any significant public support: a poll from 2017 found his regime secured a meager 7 percent popular approval, while 76 percent supported his resignation.<sup>219</sup> Temer did not resign despite protests against him.<sup>220</sup> He couldn't even

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212. *Id.*

213. Rattinger, *supra* note 198, at 154.

214. Felipe Pontes, *Supreme Court Justice Rejects Request to Annul Session That Ousted Rousseff*, AGÊNCIA BRASIL (Sept. 8, 2016), <https://agenciabrasil.ebc.com.br/en/politica/noticia/2016-09/supreme-court-justice-rejects-request-annul-session-ousted-rousseff> [<https://perma.cc/3Y4Y-LGJN>].

215. *See Gênero Jornalismo Ultrapassa Alcance de Novela no Segundo Semestre*, TELAVIVA (Dec. 23, 2016), <https://telaviva.com.br/23/12/2016/genero-jornalismo-ultrapassa-alcance-de-no-vela-no-segundo-semester/> [<https://perma.cc/2QUF-G6WC>].

216. *See Manifestantes Fazem Maior Protesto Nacional Contra o Governo Dilma*, GLOBO (Mar. 14, 2016), <https://g1.globo.com/politica/noticia/2016/03/manifestacoes-contra-governo-dilma-ocorrem-pelo-pais.html> [<https://perma.cc/PPE8-L3BM>].

217. Dom Phillips, *Watch Brazilian Police Attack Anti-Impeachment Protestors*, WASH. POST (Sept. 5, 2016, 2:50 PM), <https://www.washingtonpost.com/news/worldviews/wp/2016/09/05/watch-brazilian-police-attack-anti-impeachment-protesters/> [<https://perma.cc/CC53-2HNK>].

218. Rattinger, *supra* note 198, at 154–55.

219. Dom Phillips, *President Michel Temer of Brazil Is Charged with Corruption*, N.Y. TIMES (June 26, 2017), <https://www.nytimes.com/2017/06/26/world/americas/brazil-temer-corruption-charge-joesley-batista.html> [<https://perma.cc/ZVF9-S73N>].

220. Sam Cowie, *Brazil's Beleaguered President Temer Refuses to Resign*, ALJAZEERA (May 19, 2017), <https://www.aljazeera.com/news/2017/5/19/brazils-beleaguered-president-temer-refuses-to-resign> [<https://perma.cc/7DW5-FX3N>].

stand for President in the next elections in 2018 after being disqualified due to a conviction of breaking campaign finance laws.<sup>221</sup>

At the same time, Lula da Silva—Rousseff’s predecessor and mentor who used to be an immensely popular president—was convicted in July 2017 of money laundering and corruption.<sup>222</sup> His trial was highly controversial and, in fact, was nullified by April 2021 by the Supreme Court for lack of jurisdiction.<sup>223</sup> Nevertheless, his conviction disqualified him from running in the 2018 elections.<sup>224</sup> By the time of the general elections, in October 2018, Lula was already in jail.<sup>225</sup>

The two main candidates that remained in the race were Fernando Haddad, who was not really known to the Brazilian public, and the extreme right-wing populist leader Jair Bolsonaro.<sup>226</sup> Bolsonaro campaigned on a platform of hatred for Rousseff’s and Lula’s center-left Worker’s Party (PT).<sup>227</sup> He had followed that path consistently for years: in February 2016, he and his son were holding a banner in Congress during Rousseff’s speech that said “Brazil can’t take you anymore. Get out.”<sup>228</sup> With one of his potential opponents impeached for

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221. Glenn Greenwald, *Credibility of Brazil’s Interim President Collapses as He Receives 8-Year Ban on Running for Office*, INTERCEPT (June 3, 2016, 8:14 AM), <https://theintercept.com/2016/06/03/credibility-of-brazils-interim-president-collapses-receives-8-year-ban-on-running/> [https://perma.cc/L948-GM6A].

222. Dom Phillips, *Brazil’s Ex-President Lula Sentenced to Nearly 10 Years in Prison for Corruption*, GUARDIAN (July 12, 2017), <https://www.theguardian.com/world/2017/jul/12/brazil-president-lula-convicted-corruption> [https://perma.cc/L948-GM6A].

223. Ricardo Brito, *Brazil’s Supreme Court Confirms Decision to Annul Lula Convictions*, REUTERS (Apr. 16, 2021, 3:21 PM), <https://www.reuters.com/world/americas/brazils-supreme-court-confirms-decision-annul-lula-convictions-2021-04-15/> [https://perma.cc/23PL-RML4].

224. *Brazil’s Lula Convicted to Keep Him from 2018 Elections: Report*, ALJAZEERA (June 10, 2019), <https://www.aljazeera.com/news/2019/6/10/brazils-lula-convicted-to-keep-him-from-2018-election-report> [https://perma.cc/UT2U-6G5D].

225. *Id.*

226. *Brazil Candidate Bolsonaro Attacks Workers Party from Hospital Bed*, REUTERS (Sept. 16, 2018, 2:52 PM), <https://www.reuters.com/article/us-brazil-election-bolsonaro-idUSKC N1LW0QO> [https://perma.cc/JQV4-XA43].

227. *See id.* (“Bolsonaro alleged the PT was willing to win through fraud.”).

228. Afonso Benites, *Dilma Enfrenta um Hostil Congresso e Pedu Ajuda para Superar Crise*, PAÍS (Feb. 2, 2016), [https://brasil.elpais.com/brasil/2016/02/02/politica/1454449234\\_500788.html](https://brasil.elpais.com/brasil/2016/02/02/politica/1454449234_500788.html) [https://perma.cc/9XGW-R2LQ].

corruption and the other in prison, and after a turbulent election process in which Bolsonaro himself was stabbed and wounded,<sup>229</sup> Bolsonaro managed to win the elections and became the President of Brazil.<sup>230</sup>

Over the next four years, Brazil was ruled by a clique of Bolsonaro, his family, and his collaborators.<sup>231</sup> Bolsonaro was named the Organized Crime and Corruption Reporting Project's 2020 Person of the Year for his corruption, populist propaganda, and undermining of the judicial system.<sup>232</sup> President Lula returned to the political arena and beat Bolsonaro in the 2022 general elections.<sup>233</sup> Shortly after that, Bolsonaro's supporters attacked the Supreme Court, the National Congress, and the Presidential Palace in an attempted coup that was fortunately repelled by security forces.<sup>234</sup>

The circumstances that allowed Bolsonaro to take over Brazil should worry anyone who supports trials of politicians for their short-term benefit in informing diffuse interests. Populist leaders are adept at taking advantage of the polarizing and sensational media attention that follows politicians' trials.<sup>235</sup> The organizing idea behind populist ideology is that there is a corrupt elite who controls the country and steals its riches from the healthy and upright core of the people.<sup>236</sup>

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229. Ernesto Londoño & Shasta Darlington, *Jair Bolsonaro, Presidential Candidate in Brazil, Is Stabbed*, N.Y. TIMES (Sept. 6, 2018), <https://www.nytimes.com/2018/09/06/world/americas/brazil-jair-bolsonaro.html> [https://perma.cc/9G3X-FNU4].

230. Ernesto Londoño & Shasta Darlington, *Jair Bolsonaro Wins Brazil's Presidency in a Shift to the Far Right*, N.Y. TIMES (Oct. 28, 2018), <https://www.nytimes.com/2018/10/28/world/americas/jair-bolsonaro-brazil-election.html> [https://perma.cc/L7J5-PR9P].

231. *See Jair Bolsonaro: 2020 Person of the Year in Organized Crime and Corruption*, ORGANIZED CRIME & CORRUPTION REPORTING PROJECT (2020), <https://www.occrp.org/en/poy/2020/> [https://perma.cc/66XP-A5HZ].

232. *Id.*

233. John Otis, *Lula Beats Far-Right President Bolsonaro to Win Brazil Election*, NPR (Oct. 30, 2022, 11:04 PM), <https://www.npr.org/2022/10/30/1132561987/brazil-election-lula-da-silva> [https://perma.cc/G6FS-WQ4L].

234. *Pro-Bolsonaro Rioters Stormed Brazil's Congress, Supreme Court and Presidential Palace*, CNBC (Jan. 8, 2023, 2:55 PM) <https://www.cnn.com/2023/01/08/bolsonaro-supporters-invade-brazils-congress-supreme-court-in-brasilia.html> [https://perma.cc/SYJ2-RARU].

235. RALPH SCHROEDER, SOCIAL THEORY AFTER THE INTERNET: MEDIA, TECHNOLOGY, AND GLOBALIZATION 80 (2018) ("Populist counterpublics thrive in the online public arena. In terms of media theory, digital media add to the mediatization of politics; however, in the sense of circumventing traditional gatekeepers, online populists also disintermediate (vis-à-vis traditional gatekeepers) while adding to the role of media with regard to how political actors respond to civil society." (citation omitted)).

236. *See* Cas Mudde, *The Populist Zeitgeist*, 39 GOV'T & OPPOSITION 541, 543–44 (2004).

When a politician is being tried in court, the trial reinforces this populist imagination within the general public.<sup>237</sup>

### CONCLUSION

The three case studies surveyed in this Article demonstrate a similar pattern in three very different countries and in very different conditions. During and immediately after a trial against a senior politician, the public's interest in politics increases. Parts of the public that are usually not informed about their representatives and not motivated to monitor them get involved and make their voices heard. This development is beneficial for diffuse interests who are usually suffering from too little political influence because they lack information and motivation.

At the same time, the media coverage of the trials of politicians and the following demonstrations and protests tend to make societies more polarized. In the wake of such a trial, people tend to view their own political camp as the only legitimate option, and their adversaries are perceived as rotten and corrupt. Populist politicians capitalize on this type of thinking to get to power or to justify strengthening their rule.<sup>238</sup>

In Israel, Netanyahu used the trial against him as a symbol of injustice and double standards within the legal system.<sup>239</sup> This was his excuse for trying to neutralize the country's judiciary. In the United States, the sensational nature of Bill Clinton's affair and impeachment poisoned the political discourse with implications that continue to reverberate decades later.<sup>240</sup> In Brazil, Bolsonaro's populist electoral campaign succeeded because his potential adversaries were disqualified due to legal proceedings, which he could easily use to present himself as fighting against corruption.<sup>241</sup>

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237. SCHROEDER, *supra* note 235, at 60 (“[P]opulist politicians, parties and movements have used digital alternatives to get around the mainstream media, which populists and their leaders perceive as biased against them.”).

238. Dothan, *supra* note 11, at 493 (“If your opponents are all crooks, say the populists, then helping out the righteous people on your side is the right thing to do.”).

239. Aron Heller, *Israel's Netanyahu Attacks Justice System as Trial Begins*, PBS (May 24, 2020, 10:28 AM), <https://www.pbs.org/newshour/world/israels-netanyahu-attacks-justice-system-as-trial-begins> [https://perma.cc/D5P3-WFPW] (“When he arrived at the courthouse, Netanyahu revived his claims that he is the victim of a deep state-type conspiracy by media, police, prosecutors and judges out to oust him.”).

240. See Brownstein, *supra* note 191.

241. Shasta Darlington & Manuela Andreoni, *Bolsonaro Finds Anticorruption Vow Threatened by Cases Close to Home*, N.Y. TIMES (Jan. 24, 2019), <https://www.nytimes.com/2019/01/24/world>

When populists get stronger, the first casualty is usually the courts. National courts need their independence to be effective.<sup>242</sup> They usually reach solutions that are pragmatic and form reasonable compromises between different sides of the debate.<sup>243</sup> Populist leaders cannot accept such compromises because their worldview divides society sharply as “us versus them.”<sup>244</sup> Furthermore, populists usually position themselves against formal institutions, and the courts are especially vulnerable to their criticism as an elitist institution that doesn’t yield to the charisma of popular leaders.<sup>245</sup> This is why there is a strong correlation between populism and democratic backsliding that includes weakening the judiciary and removing the checks and balances that constrain the government.<sup>246</sup>

If the courts are weakened, diffuse interests can be vulnerable again to concentrated interests that surround the populist government. Even though populists claim they represent the general ordinary public, they often exclude from their protection large groups of diffuse interests that do not suit their ideal of society.<sup>247</sup> Foreigners and religious and ethnic minorities are usually the first diffuse groups that will be hurt by a populist leader.<sup>248</sup> Beyond that, an unconstrained government can easily increase corruption, and the cronyism and nepotism that accompany corruption will usually translate to favoring concentrated interest groups at the expense of diffuse interests.<sup>249</sup>

Even without the instigation of populist leaders, highly politicized trials can damage public support for the courts.<sup>250</sup> Politicians can further inflame the public against courts and use a variety of forms of

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/americas/jair-bolsonaro-davos.html [https://perma.cc/UK6Z-PF97] (“Mr. Bolsonaro, who rode to power by denouncing elitist privilege, fend[s] off charges that his administration is engaging in more of the same.”).

242. Dothan, *supra* note 11, at 476–81.

243. *Id.* at 487.

244. *See* Mudde, *supra* note 236, at 544 (“Populism presents a Manichean outlook, in which there are only friends and foes.”).

245. Dothan, *supra* note 11, at 487–88.

246. *Id.* at 487–91.

247. *Id.* at 494.

248. *Id.* at 494–96.

249. *Id.* at 491–93.

250. Logan Strother & Shana Kushner Gadarian, *Public Perceptions of the Supreme Court: How Policy Disagreement Affects Legitimacy*, 20 FORUM 87, 130, 130–31 (“The prospective of consistent losses in a polarized era creates the threat for serious, if one-sided, erosion of Court legitimacy.”); *see also* Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 653 (1992) (“The most potent predictor is commitment to social order: those most concerned with order show less support for the Court.”).

backlash—from noncompliance to criticism to cutting funds and legislative overrules—in order to damage the court’s reputation.<sup>251</sup> Hence, courts are vulnerable to any politicians to whom they pose a threat, even if they cannot be defined as populists.

The final takeaway from this Article about the ultimate impact of politician’s trials on diffuse interests is therefore mixed. Trials of politicians can help diffuse interests by informing and motivating them, but they can also help the enemies of diffuse interests get stronger and make the court itself weaker as a result.

When Benjamin Franklin was asked after he signed the U.S. Constitution whether the country now had a republic or a monarchy, he famously replied: “A republic . . . if you can keep it.”<sup>252</sup> The same answer is true for diffuse interests after a sensational political trial. The trial will give them the power that comes with information and with motivation to act. Whether they will use this power to support their long-term interests or to follow the promises of populists is in their hands.

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251. *See generally* SHAI DOTHAN, REPUTATION AND JUDICIAL TACTICS: A THEORY OF NATIONAL AND INTERNATIONAL COURTS 62–113, 157–211 (2015) (discussing in Chapter 3 the backlash options against courts, and showing in Chapter 5 that the Israeli Supreme Court was weakened and under attack years before Netanyahu’s trial started).

252. Gerald M. Pomper, *The 2000 Presidential Election: Why Gore Lost*, 116 POL. SCI. Q. 201, 222 (2001).



