The Trump Administration, Democracy, and American Constitutional Law

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The presidential election of November 2016 was a monumental event in American politics. Donald Trump, a populist billionaire with no political experience, won an unexpected victory over Hillary Clinton, shocking the political establishment, which he characterized as corrupt and out of touch. Trump's opponents speculated that he might try to deliver on his wild campaign promises to "lock up" Hilary Clinton, undermining a key norm of constitutional democracy. While he quickly moved away from this position, he did continue his attacks on the press and federal judges after taking office, declaring the media "the enemy of the American people." Meanwhile, hate crimes against Muslims, Jews and other minorities skyrocketed. The President himself, who had cast doubt on the integrity of the election during the campaign, continued to assert that there was widespread voter fraud, stating without evidence that several million illegal immigrants had cast votes for Hilary Clinton.

As the administration continues into its second year, the President seems intent on undermining many of the norms that his predecessors had followed. He failed to release his tax returns and issued numerous secret waivers of ethics rules for his appointees, a group that included business associates, family and friends, and even his son's wedding planner. For the first time in history, he fired a sitting FBI Director without any allegation of misconduct. He attacks the FBI, the media, and even his own Attorney General.

Constitutional concerns entered the picture early in the Trump administration, with some asserting that the President had violated the previously obscure emoluments clause, prohibiting officers of the United States from receiving titles or payments from foreign governments. As an investigation of Russian involvement in the campaign escalated, the President claimed an expansive power to pardon. A series of executive orders on immigration was locked up in court, prompting angry denunciation from the President and his proxies. Commentators spoke of the risks to American democracy. Indeed, several comparative indicators of the quality of democracy have downgraded the United States in the last couple of years: the Economist Intelligence Unit, for example, now considers the country a "flawed democracy" rather than a full democracy.

This brief assessment provides an update on constitutional law in the Trump administration. There have been a number of novel issues raised, and no doubt there will be more. I can not cover all of the issues, but will start with some of the smaller issues and then move to the ones that I think are more consequential.

Before turning to the issues, let us first clarify what we mean by democracy. Democracy is sometimes called an "essentially contested concept" meaning that it is capable of a wide range of definitions. Clearly it involves the possibility of elections whose result is not known in advance, after which the loser concedes defeat and, if an incumbent, transfers power to the winner. This minimal definition rests on some legal underpinnings, especially the idea of a nonpartisan electoral administration. As Josef Stalin may have said, "The people who cast

the votes decide nothing. The people who count the votes decide everything." In addition there must be robust constitutional protections for free speech, association, and organization. Elections have no meaning if there is a single source of media coverage, or if people can be arrested for criticizing those in power. Democracy, also, in my view, depends on the idea of the rule of law, the idea that the law applies to everyone, and is administered by officials who follow it.

This is a relatively thin definition of democracy that does not encompass any particular vision of the economy, the welfare state, or social policy on many questions. All that is required is that elections continue, be genuinely contestable, and be governed by law. I lay out this vision because I want to ask, at the end of the chapter, whether democracy so defined is at risk in the United States.

Emoluments

Even before President Trump took office, there has been a good deal of attention to the question of the "emoluments clause", a previously obscure clause of the Constitution. Article I of the Constitution says that "no Person holding any Office of Profit or Trust [under the United States], shall, without the Consent of the Congress, accept of any present, **Emolument**, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." Many scholars have asserted that the President violated this clause on his first day in office because foreign states and state-owned firms do business with Trump and his family. Unlike earlier presidents, Trump did not sell his business interests but instead transferred management of them to his children.

Is the president violating the emoluments clause? This is not so clear. By its terms, Article II applies only to "officers" of the United States, a category usually thought not include the president himself. Furthermore, the word emolument is obscure, and not in regular use today. It is of French origin, and few Americans had ever heard of it before the Trump election. The Constitution uses the word "emolument" in two other places: once in Article I, Section 6 where it prohibits members of Congress from sitting in executive jobs and drawing "emoluments" that were created during the legislative term. It mentions emoluments there, with the meaning of a salary. And Article II states that the President's salary cannot be changed while in office but also that he shall not receive any "other emolument" from the United States or any of the states. This clause became an issue when Ronald Reagan was elected President; as a former governor of the State of California, he received a pension, which might count as an emolument, but this was not found to violate the emoluments clause because it was for services rendered in the past. Later, Barack Obama's Department of Justice wrote an opinion explaining that he should be allowed to accept the Nobel Peace Prize without violating the emoluments clause, because the prize was not given by a foreign state.

In short, the President may not be violating the Constitution, even if he is violating ordinary rules of ethics and conflicts of interests. One issue that has arisen is who if anyone would have "standing" to challenge the president's action in court. Usually, standing requires showing a concrete injury and one that is particular to an individual or group, not simply a generalized grievance. In July 2018, a federal court allowed a claim to go forward that was brought by the state of Maryland and the District of Columbia, so there is a chance that there will be a ruling in the future on the meaning of emolument.

The Use of Executive Orders and Federalism

The administration has already brought an interesting and centralizing perspective on federalism. Even though the President campaigned on a standard Republican platform of returning power to the states, he has sought to constrain them once in office. His Attorney General, Jeff Sessions, has made marijuana enforcement a policy priority. Although drug enforcement is an area that would seem to fall within the traditional "police power" of the states, the federal government has become increasingly involved over the last several decades, and has designated marijuana to be an illegal drug of the most dangerous kind. But in the past few years, states have adopted their own policies, in favor of more tolerance. Some 46 states have medical marijuana laws, while 8 states have fully legalized the drug and 13 more have decriminalized it.

In other policy areas, states have announced their own policies that are inconsistent with those of the Trump administration. Trump's Director of the Environmental Protection Agency, Scott Pruitt, is known to deny climate change and is hostile to environmental protection. Trump loudly withdrew from the Paris Climate Change agreement (which he could do by himself because it only had the status of an Executive Order under American law.) But the State of California, which would be the world's sixth largest economy were it an independent country, has announced that it will continue to meet the requirements of the Paris agreement. So in practice, states can undermine the federal policy.

On immigration, too, the President's policies are at odds with those of some states. In accordance with his campaign promises, the President has increased immigration enforcement by the Department of Homeland Security. However, many states and cities have declared that they would be "sanctuary cities" for undocumented immigrants. This means that the local and state police will not actively enforce the federal immigration laws. If they arrest someone, they will not ask for identification or proof of citizenship; only if they happen to learn that the person is undocumented might they contact the Federal Department of Homeland Security. Some sanctuary cities prohibit their local civil officials from asking about someone's citizenship status, when delivering government services.

In April 2017, Trump responded with an executive order threatening to withhold federal funds from cities that did not provide "proof" of cooperation with federal immigration authorities. Unfortunately for the President, the Congress is the branch of the federal government that directs spending, not the President. Furthermore, the Constitution has been interpreted to prohibit the "commandeering" of state enforcement power by the federal government, meaning that the President cannot force state officials to actively use their police power.[1] So Trump's Executive Order was meaningless political theater.

These examples illustrate a more general example of American federalism. Many people have developed principled arguments for why the states or the federal government should be more powerful. But often their views switch depending on who is in power. Republicans have traditionally called for policy to be decentralized to the states, and have emphasized the

[1] *Prigg v. U.S.* 41 U.S. 539 (1842). This principle dates back to the period of slavery, when it was used to limit federal power to compel states to return slaves to their owner. See also ***New York v. United States***, 505 U.S. 144 (1992).

"sovereignty" of states. This made sense during the long period in which Democrats controlled Congress and expanded federal regulation. Now, however, it is the Democrats emphasizing state power to resist federal laws. The sides have switched.

The immigration issue also raised constitutional issues about executive power. In his first week, President Trump issued an order denying entry to people from seven designated countries, effective immediately. The order included in its scope people with valid visas, who were already flying to the United States, and so implementation was chaotic. But even more significantly, President Trump's campaign call for a ban on Muslim immigration to the United States led lower courts to issue a stay of the order, because it was discriminatory. After the administration redrafted the order and issued it again in March, taking out some of the offensive language and removing the obvious violations of due process, the courts still blocked it. However, in *Trump v. Hawaii,* the Supreme Court upheld the travel ban, saying it was within the executive's discretion and allowing the biased statements of the president's motives to be read out of the order. In other words, the Court said that if the executive branch has a facially neutral order, it will be able to do what it wants, even if there is evidence of biased motive.

Executive orders are not mentioned in the Constitution but have been long used as part of the President's power to "faithfully execute the laws." The immigration cases suggest that the Courts will give a close look to make sure that the Executive Orders of the Trump administration do not violate the Constitution. More broadly, these cases show that the Federal courts are willing to play a strong role in "checks and balances." This is a critical issue for those concerned about the overall health of the country's democracy.

Obstruction of Justice

The President's campaign involved numerous actions that were highly unusual and possibly illegal. His advisor Michael Flynn received payments from foreign governments both during the campaign and while in government service as National Security Advisor; his son Donald Trump Jr. met with persons alleged to represent the Russian government, trying to gather information on Hillary Clinton. His son-in-law, along with Mr. Flynn and his Attorney General, either lied on federal disclosure forms or in confirmation hearings about foreign government contacts.

These and other incidents raised concerns about whether there should be an investigation of the campaign, and the FBI had in fact been conducting one as a routine matter because of the contacts with foreign governments. When this news was revealed, it led Trump to fire James Comey, the FBI Director, in May 2017. This shocking development exposed a huge problem with our Constitution. It does not really stop a president from taking over the law enforcement machinery for political ends, or to protect himself. There was no law prohibiting the President from firing the FBI Director, but only an unwritten norm. Nor is there a law preventing the President from firing an Attorney General who does not follow instructions. The House Republicans have rallied around President Trump, arguably seeking to undermine the investigation while it is ongoing by exposing the documents through subpoena of the Deputy Attorney General Rod Rosenstein, whom they have also threatened with impeachment.

What can be done about a president who interferes with an investigation? Several statutes prohibit the obstruction of justice, and these were part of the basis of the impeachment proceedings initiated against Richard Nixon and Bill Clinton. But if the President can fire the investigators, how would we ever learn about any obstruction of justice?

Federal regulations permit the Attorney General, or a person acting in his stead, to appoint a 'special prosecutor' or 'special counsel' to pursue a criminal investigations, and potentially issue indictments, when it is "warranted" and "in the public interest." The special counsel can only be fired by the Attorney General, and can only pursue criminal investigations within the mandate given by the Attorney General. Subsequently, the Deputy Attorney General appointed a Special Counsel, the highly respected lawyer Robert Mueller, to determine whether any crimes had been committed. Special counsels, however, have neither statutory nor constitutional protection from termination. The relevant regulations stipulate that the Attorney General needs "good cause' to fire a special counsel, but regulations can be easily changed.

In this regard, the scheme is quite unlike the "independent counsel" office created under Title VI of the 1978 Ethics in Government Act, which lapsed in 1999. The independent counsel had power to investigate and prosecute high-level misconduct, and was statutorily insulated from termination except for "good cause." It did so in more than fifteen cases, including the investigation that led to the impeachment of Bill Clinton. Despite a record of successful investigations, the idea of an independent counsel was heavily criticized on constitutional grounds. In the famous case of *Morrison v Olson,* Justice Scalia pointed out in dissent that the prosecutorial power had to be accountable to the President.[2] He argued, unsuccessfully, that the statute violated the separation of powers. Scalia's was a view of expansive presidential power. It relies exclusively on political remedies to deal with presidential malfeasance. Might these be relevant to Trump?

Removal and Pardon

The President's opponents have been speculating about his removal since his first day in office. When he nominated Neil Gorsuch to the Supreme Court, many Democrats joked that "Trump should not be allowed to make a Supreme Court appointment in his last year in office", echoing the argument Republicans had used during the last year of President Obama's term.

If I can offer a private comment, I do not think that discussing the removal of the president is either productive or realistic. Trump maintains a large base of voters and a powerful media presence. He is simply the most commented-upon man in the country, and possibly the world. Each time he uses Twitter, the news media covers it. The entire country is obsessing over his moods. His own party is therefore somewhat afraid of him, and they control Congress.

Removal of a sitting president can take only two routes. First is impeachment, which requires a majority of the House of Representatives to "impeach", followed by a 2/3 vote of the Senate to "convict", on the basis of "treason, bribery and other high crimes and misdemeanors." Two presidents in American history, Andrew Johnson and Bill Clinton, were impeached, but not

[2] 487 U.S. 654 (1988).

convicted and so not removed from office. Impeachment typically requires that the opposition controls Congress, because of the high vote thresholds. The phrase "high crimes and misdemeanors" comes from English law, and is very vague, but usually seen as setting a high standard. Impeachment, therefore, is treated as a "nuclear option", or "the most powerful weapon in the political armory, short of civil war."[3]

What counts as a high crimes or misdemeanor is ultimately a political question, and the remedy is political. When President Trump suggested in July 2017, based on an aggressive, if plausible, reading of Article II of the Constitution, that a president has power to pardon himself for crimes (presumably including obstruction of justice), this would immunize him from criminal and civil charges, but not impeachment. But the politics suggest impeachment will never happen.

The second way a president can be removed is through a procedure outlined in the 25th amendment, adopted after the assassination of John F. Kennedy to secure an orderly political transition. Section (4) of that amendment provides a procedure for removal if a President is deemed by his Vice-President and a majority of the cabinet to be unable to fulfill the duties of office. This is designed for a case when a president is ill, or perhaps too old to effectively carry out his duties. It requires a 2/3 vote by the entire Congress if the President contests the finding. It has never been used; though at one point President Reagan's advisors considered it, they decided that he was still competent. While many have fantasized that this procedure could be used for President Trump, it seems unlikely as a political matter, unless there is a major change in the 2018 congressional elections.

Is Democracy at Risk?

When faced with this evidence, we see that there have been many new issues raised by the Trump presidency, largely around the scope of executive power. Does this amount to a risk to democracy? In general, the founding fathers of the country thought that freedom would be protected by the separation of powers; as Madison put it, "ambition must be made to counteract ambition."[4] But history has proved that this idea, conceived of before the era of the modern political party, has not always played out in practice. Congress, when allied with the president as it is at this writing, has not demanded accountability and tended to defer to the executive. The courts have, in general, not been robust defenders of rights, especially in the face of executive invocation of national security.[5]

One doctrine that has emerged in Republican legal thought in recent decades is that of the "unitary executive."[6] This theory emerged in the Reagan administration and was adopted by President George W. Bush as a feature of his presidential signing statements, which are statements issued when the president signs a bill into law. They are seen as embodying the president's independent power to interpret the Constitution. Under the unitary executive

[3] T.F.T. Plucknett, "Presidential Address" *Transactions of the Royal Historical Society* 3: 145-58 (1953). The leading treatments include Charles L. Black, *Impeachment: A Handbook* (New Haven: Yale University Press, 1974), and Laurence H. Tribe, "Defining High Crimes and Misdemeanors: Basic Principles," *George Washington Law Review* 67 (1998): 712.
[4] *Federalist* #51 (1789).
[5] Jed Rakoff, *Don't Count on the Courts,* New York Review of Books, April 5, 2018
[6] Steven Calabresi & Kevin Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105(6) Harvard Law Review 1165 (1992).

theory, all executive power in the constitution is vested in the hands of the president, implying, at the extreme, that the president could hire and fire everyone in the executive branch, and direct prosecutors to attack his political enemies. In my view, the danger of this theory to democracy is self-evident. [7] Supporters argue that the only remedy for presidential accountability is losing elections and impeachment—but again, this was designed in an era before parties rendered the separation of powers much weaker than originally thought. Furthermore, the original constitution had no limit on the number of terms a president could serve. If the founders really intended that the only mechanism for accountability was elections, then what would they think of a president who never had to stand for election again? What mechanism exists to keep that person from becoming a dictator? One might not worry if electoral integrity was strong in the United States. But it is not.

Of particular concern in the United States is electoral administration, which is committed by the constitution to the state legislatures. Again, this choice was made before political parties emerged, so the founders did not realize they were giving the power to partisan bodies. As it turns out, this was a grave mistake, as the state legislatures routinely seek to lock in power for their own side by drawing districts to favor one party over the other. Elected secretaries of state run election administration; on the Republican side, they frequently seek to restrict particular groups from voting, by purging voter roles. The courts have also been willing to bless this,[8] while at the same time not being willing to scrutinize partisan gerrymanders.

If nonpartisan electoral administration is at risk, so is the quality of democracy. At the same time, the institutions of American government—including the investigative machinery of prosecutors, federalism, and the grassroots organizing power that has been a defining feature of the country since Tocqueville noted it nearly 200 years ago—are all intact. In short, I expect American democracy to lumber on, whatever the ultimate fate of Donald Trump's presidency.

Conclusion

The Donald Trump presidency has been an exciting time for constitutional law professors, who have the opportunity to consider issues that they never would have thought would be relevant. In this sense, we are a bit like the media. President Trump has attacked the media viciously, saying that it is "fake news", but most media companies are making more money than ever. Similarly, many professors are disturbed by President Trump's authoritarian rhetoric and style, but we have a wealth of new issues to consider.

More broadly the administration invites us to consider the structural problems in the United States Constitution. At 228 years old, we respect it and treasure it, but it may not be very well suited for the problems we face today. We should be thinking about how to restructure and protect our constitutional democracy, if it survives. In a forthcoming book, *How to Save a Constitutional Democracy,* my colleague Aziz Huq and I do precisely that. Many of our proposals can be achieved without amending the Constitution. But it is not clear if the opportunity will arise.

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[7] For critics of the unitary executive, see Larry Lessig and Cass Sunstein, *The President and the Administration,* 94 COLUMBIA LAW REVIEW (1994) (noting that separation of powers was never pure).

[8] Adam Liptak, *Supreme Court Upholds Ohio's Purge of Voting Rolls,* NY Times, June 11, 2018 https://www.nytimes.com/2018/06/11/us/politics/supreme-court-upholds-ohios-purge-of-voting-rolls.html