Verfassungsblog
ON MATTERS CONSTITUTIONAL

… yet there is method in't

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Dear friends of Verfassungsblog,

The President of the United States is a crackpot. This diagnosis seems to be consensus in the part of the public sphere that I overlook after the baffling White House event this week generally called, for lack of a better word, "press conference". Unhinged, insane, bat-shit crazy: many commentators, in their bewilderment, sought refuge in psychiatric terms to explain what had happened, and a palpable sense of shock and disbelief was on display not just among Donald Trump's alleged "fake news" enemies, but even on Fox News.

I am in no position to make a statement about Trump's state of mind. My suspicion: though this be madness, yet there is method in't.

One of the most befuddling moments was when a CNN reporter asked Trump about the leaked informations on the stepped-down security adviser Michael Flynn's Russian contacts. How, the reporter asked, can a leak be real and at the same time news reports about it be fake? Which is it? Is the information true or false? They cannot be both, right?

True or false, tertium non datur: The reporter seemed to have played a card which cannot be trumped (no pun intended): logic. Not a problem for the Donald, though. The public, he said calmly, does not know what is true and what is false. But he does. "I know when you are telling the truth and when you are not."

To lie is to call true what is false or vice versa. Trump is doing that on a regular basis, and that is bad enough. To claim that an assertion can be both true and false at the same time is a whole different ballgame, though. That denies the condition of the possibility of an argument about true or false in the first place. Then, true and false becomes a matter of decision: I decide what is true and what is false.

Is there a method in't? I am afraid there is.

What Trump is doing could perhaps be compared to some extent to what Kaczyński's people have done to the Polish constitution: they created a law that is at the same time constitutional and unconstitutional. If you root for the rule of law, you will find this unbearable. If you root for the rule of yourself, though, this is not a bad idea at all. Internal contradiction of that sort is good. It digs a cavity into the mesh of the constitution. It generates uncertainty about what power is allowed to do. It gives you room to set up a stage on which you can display all your decisionist energy, to the delight of your thrilled followers.

Isn't Trump getting away rather too easily if he is pathologized? Is that man just sick? Or is he actually a tyrant, or a tyrant-to-be, in the plain, classical sense?

Constitutional chaos

If Trump were a nut case, the 25th Amendment to the US Constitution would come into play. It provides for a procedure whereby a President "unfit" for office is replaced by the vice president if the Congress ultimately so decides. MARK TUSHNET has written a short blog post on this, which I have translated into German for Verfassungsblog: The 25th Amendment, in his views, could also be applied to "demonstrations of sustained and serious failures of temperament", i.e. Trump – provided the Republican establishment musters the courage to face the wrath of Trump's supporters, helped on by the prospect of a President Pence who delivers everything they crave with a lot less trouble.

As for Poland, MARCIN MATCZAK reports on the ever stranger fruits the constitutional schemes of Kaczyński's PiS Party are bearing. A civil court now has to decide whether the new PiS-nominated President of the Constitutional Tribunal has been lawfully elected. Which is doubtful on several accounts. If the Warsaw Court of Appeals were to share these doubts, that

could perhaps open a door to some degree of substitute constitutional review by civil courts taking the place of the neutralized Constitutional Tribunal.

In Germany a new head of state was elected last Sunday. Much of the public applause, though, went to the No. 2 in the ranks of state officials, to Parliamentary Speaker Norbert Lammert whose speech was widely understood as an elegantly placed punch in the face of both Trump and the far-right AfD party. Can this speech be reconciled with his constitutionally required neutrality as an election supervisor? SEBASTIAN LEUSCHNER, all political sympathy aside, has some doubts.

Turkey's constitution will, according to the will of its President, be soon thoroughly overhauled if the announced referendum goes his way, the benefits of which, in terms of power, will go mostly to the President himself. It would be wrong, though, to perceive this move as a mere change of system from parliamentary to presidential democracy, warns SILVIA VON STEINSDORFF: the result, according to her analysis, would be a constitution that just would not work very well.

In Romania, on the other hand, a malicious corruption-stricken government keeps facing mass protests of an epic scale. There too, the President plays a powerful role, albeit as an opponent of the government. He, too, calls for a referendum, but this one will be about anti-corruption legislation. BIANCA SELEJAN-GUTAN keeps us up to date and tells us what this is all about.

Finally: Brexit. The Tory majority in the UK House of Commons has refused to assure EU citizens who live and work in the UK that they will be safe after Brexit, instead preferring to use them as a bargaining chip in the negotiations with Brussels. RUVI ZIEGLER finds these tactics despicable and now hopes for the House of Lords.

Elsewhere

First, about Trump:

- ERIC POSNER is no fan of mental-disorder talk about Trump, either. He wonders instead what price the "Praetorian Guard" in the intelligence community might ask one day in return for their persistent defiance of Trump. On the whole, he thinks it is unlikely that Trump will make it to the end of his term unless his people strip him of his Twitter device and lock him into a closet.
- KEN GUDE sees good reasons to appoint a Special Prosecutor to investigate Trump's contacts with Russia.
- RYAN GOODMAN has interviewed eleven leading US constitutional law professors about their views about Trump aide Stephen Miller's incendiary statements about the judiciary (Trump's immigration policies "will not be questioned!").
- KEITH WHITTINGTON traces the similarities and differences between Trump and former US presidents who sought quarrels with the judiciary, and concludes that Trump is not so much following the line of Andrew Jackson's as Richard Nixon's.
- QUINTA JURECIC calms her nerves with the thought that Trumps chief strategist and Dark Lord in the White House Steve Bannon is just a pathetic internet troll after all, and
- JACK GOLDSMITH does the same with the thesis that, with all the leaking by subversive intelligence agents and the soaring subscription numbers of the New York Times, Trump's presidency might rather be too weak than too strong.
- Relevant not just for travelers to the US: ORIN KERR tries to answer the question whether a US citizen can be forced to surrender his mobile phone passcode when he enters the United States. His cautious answer: possibly. (With respect to foreigners the answer would unfortunately be less ambiguous, I suppose).

On matters non-Trump:

- VIOLETA MORENO-LAX plunges into the depths of the epochal opinion by ECJ Attorney General Paolo Mengozzi, according to which Syrian refugees have to obtain a visa in order to be able to apply for asylum without being forced into trafficking,

- DILETTA TEGA delves into the debate about the widely noted Taricco decision by the Italian Constitutional Court calling for greater respect for national constitutional traditions by the ECJ,
- JULIANO ZAIDEN BENVINDO warns against the increasing politicization of the Brazilian Supreme Court in increasingly precarious political times,
- ELENA SIMINA TĂNĂSESCU analyzes the persistent protests in Romania against the government attempts to decriminalize corruption,
- IRYNA MARCHUK considers the relationship between Russia and the European Court of Human Rights irreparably damaged after the Yukos decision of the Russian Constitutional Court,
- JONATHAN McCULLY draws our attention to an ECtHR judgment regarding the rights of parliamentary correspondents,
- TOBIAS LOCK and TOM GERALD DALY look into the ways Brexit will affect human rights protection in the UK,
- JEAN-PHILIPPE DEROSIER finds neither politically nor juridically valid reasons why the scandal-ridden conservative presidential candidate François Fillon should withdraw from the election,
- ROSELINE LETTERON observes that the Court of Cassation in France is taking steps towards a proportionality control of criminal judgments,
- DENIS BARANGER reports on the debate in France on making regular visits to jihadist websites a crime, and the role of Parliament in this.

Next week, we will see a new attempt by the Trump administration to issue an executive order on immigration, this time legally proof. The Strasbourg Court of Human Rights will hand down a Grand Chamber judgment on preventive house arrest for criminals in Italy. I will travel to Karlsruhe for the annual press conference of the Federal Constitutional Court, and I am very excited about the opportunity to talk at length with Justice Peter Müller, the judge-rapporteur in the NPD ban proceedings. The interview, if all goes to plan, will appear next week on Verfassungsblog.

All the best, and take care,
Max Steinbeis

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