Rule of Judges, Rule over Judges, Rule by Judges

Trump, the Law, and the Clash between Democracy and Juristocracy

Ursus Eijkelenberg

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There are numerous reasons why people feel anxious about the 2020 U.S. presidential election. One of the main sources of anxiety is the potential demise of democracy. Many genuinely fear the destruction of the democratic bedrock on which the political system is built. The incumbent president has not proven himself to be one of democracy's greatest advocates and during the current election race he has regularly hinted at using extra-democratic tools to retain power. Based on his rhetoric and his track record, he seems more than willing to use the tools at hand to manipulate the democratic game to his own advantage. In general, I believe, there are three main tricks the president can play on the democratic system, which can be used simultaneously and in combination, relating to *law*, to *order*, and to *external interference*. In this piece I focus on the most influential of those options: Trump's use of the *law*. It involves the president's firm grip on the judicial apparatus in general and the supreme judicial institution of the country in particular. Trump's utilisation of the Supreme Court can take multiple forms: *postpone*, *validate*, *invalidate*, and *empower*. These are ways in which the law and courts can impact the election, manipulate the democratic game, and extend Trump's political power beyond the 2020 presidential election. Judicial intervention has, however, a self-defeating potential in terms of legitimacy. Outlined here is the clash between democracy and juristocracy, and the potential it holds for a latent autocracy.

Love for Law

To Trump, justices are like trophies; prizes in a game where there are others to beat and records to break: "And I tell you something", Trump reflects while walking through his mental trophy room, "by the end of the first term I'll *have* approximately three hundred federal judges and court of appeals judges, *three hundred*, and hopefully three great Supreme Court justices; that's a record, the likes of which very few people …" Let's give credit where credit is due. It is true that Trump has appointed more federal appeals court judges to date than any recent president at the same point in their presidency, and almost a quarter of all active federal judges in the US are appointed by the current president. He is the President most prolific in the judicial game.

Much of his love for the judiciary is pushed by the Republican party — mainly the most reputable of his consiglieres, Senate Majority Leader Mitch McConnell. The Republicans' prioritisation of judicial appointments has been a key strategic concern for decades. It expresses the belief that having the overhand in the legal-judicial domain is crucial to ideological advancement and dominance. The specific focus on controlling the judicial apparatus is, moreover, an important indicator of the actual *locus* of power in the U.S. system of checks and balances. Yet the Republican's ideologically-driven fondness of the judicial branch does not necessarily correspond to that of its leader. In this unusual medley of party and president, party-aims and Trump's personal aims do not always overlap; they may even conflict. For Trump personally the reasons for his appreciation of the judiciary are threefold, the last of which is particularly important in democratic terms. First, on a psycho-emotional level, this president is all about *winning*. In his lifetime, the so-called "plaintiff in chief" has been involved in more than 3,500 lawsuits and according to a former federal Prosecutor and author of a book on Trump's litigious spirit,

the now president "sued at the drop of a hat. He sued for sport"[1] — we might question his loyalty to golf. To Trump, *having* judges means increasing the odds at winning one of his favourite games. Second, on a personal-business (and to a certain degree even an existential) level, the simple math of combining the amount of legal sues with the number of judicial appointments makes it highly probable that in the future one of Trump's legal cases will end up at one of *his* judges. Given the judges' life tenure, the Trump imperium might have Lady Justice on its side for at least the foreseeable future. Aside from business, Trump's concern with justices is existential: as soon as he loses his presidential immunity, Trump can expect to face a number of lawsuits, and Biden has already stated he would not use his executive powers to pardon Trump. Third, and most important, on the level of his personal political ambitions, the three Supreme Court judges can become "his golden nuggets" in the 2020 elections; from all the judges he has selected, the Supreme Court justices are the most valuable and valued, because much to his liking — and much to his likeness — they have the *last word.* Certainly, those are his most cherished trophies.

Supreme Friends

"How can we help you today, Sir?" Or to put it differently, what can the Supreme Court do for Trump? Where the Supreme Court legitimacy is based on the *appearance* of non-partisanship, impartiality and independence, Trump, the record-breaking and trophy-loving president, has in his first presidential term ungraciously removed the Court's apolitical veil. With the recent passing of Justice Bader Ginsburg and the rapid installation of the conservative Amy Coney Barrett, this problem has been amplified: the division of the Supreme Court no longer runs along ideological lines only (conservatives and progressives) but is now supplemented with a partisan division in which all progressive judges are Democratic appointees while all conservatives are appointed by a Republican president.[2] The ideology-party overlap magnifies the issue of political loyalty in judicial decision-making.

What could Trump ask from the court? The options are fourfold: *postpone*, *validate, invalidate*, or *empower*. For the first option, *postpone*, it might already be too late since the mail-in voting is long underway and has already broken all records. At the point of writing, early voting has seen ninety-one million Americans cast their ballot, surpassing two-thirds of all ballots cast in 2016. While Trump received a lot of stick for his handling of the coronavirus pandemic, there might have been an upside to the virus spiralling out of control — at least for him. Low turn-out numbers as a result of an unsafe environment would not only endanger the voters at the ballot box; a weakened foundation of democratic support would both poorly reflect the political preferences of a nation as well as undermine the position of the newly-elected president. In democratic terms, an election has limited legitimating value if the participation rates are extremely low. The idea of postponing the election on safety grounds was floated by Trump by the end of June ("Delay the Election until people can properly, securely and safely vote???") but found no traction, not even with his republican party-members. The fact that Trump was recently handed another golden nugget in the form of a third Supreme judge does not directly improve his chances at postponing the election. The process of setting the date of an election is laid out in Article II, clause 4 of the Constitution, which places this power in the hands of Congress, consisting of both the Republican-dominated Senate and the Democratic-controlled House of Representatives. The chances of a federal law being passed that could draw in the Supreme Court seems highly unlikely as it needs to pass both houses of Congress. The possibility of postponement, unless combined with an immediate and considerable emergency situation, is therefore not imminent.

To speak of emergencies is to come to the second legal option: *empower*. "I have the right to do a lot of thing that people don't even know about", boasted

[1] James D. Zirin authored the book 'Plaintiff in Chief: A Portrait of Donald Trump in 3,500 Lawsuits'. For an interview with the author, see here.
[2] R. L. Hasen, The Supreme Court May No Longer Have the Legitimacy to Resolve a Disputed Election, the Atlantic, February 3, 2020.

Trump recently in reference to his emergency powers. There are three legal sources the president can derive exceptional emergency powers from. One of those sources is visible, the other two 'invisible'. The visible part of the emergency arsenal relates to the Congressional statutes that provide the President with a wide range of unilaterally declarable emergency options. In case of a *self-declared* emergency, the president can make use of 123 statutory powers that extend his power and push back institutional constraints. Part of the invisible emergency powers, it is argued, are those inherent in the Constitution. The Constitution itself has no explicit emergency clause, nor does it make reference to emergencies in any of its provisions. Yet some scholars and former presidents share the idea that the Constitution contains far reaching emergency options, found either implicitly in the "commander in chief" clause or in the unspecified definition of "executive power." Moreover, in the rare instances that a president has tested the ambiguous boundaries of these constitutional powers — while ignoring Congress — the Supreme Court has not intervened.[3] The second and potentially more problematic part of the invisible emergency powers are the top-secret Presidential Emergency Action Documents. These undisclosed files contain classified presidential orders for worst-case scenarios. In the classified sketches of emergency action, information can be found on the extent to which the president believes and assumes his power to stretch during a national emergency, as well as how he intends to use it. While the PEADs are highly classified and have never been used, the limited information available indicates, according to expert Elizabeth Goitein, that, if used, both Congress and the Constitution could be sidelined.

The two most likely ways the Supreme Court can get involved relate to the election outcome. With the mail-in and absentee votes central to the 2020 election, a delayed result is expected. Faced with a delay, some fear Trump will claim victory on the basis of a partial counting of the votes. In doing this, he could use anything in his power — state judiciary and political institutions as well as the federal Supreme Court — to confirm the outcome. If the race is tight, the mail-in ballot delay provides sufficient time for a plethora of legal cases to be initiated that could make it to the federal level. In such case, the Supreme Court may, as it did in the notorious Bush v. Gore ruling in 2000, *validate* an uncertain or incomplete election result in favour of the Republican candidate — Trump will certainly expect the majority of the justices, especially *his* justices, lined up behind him. Based on the current polls, however, it is not expected to be a tight race. If Biden has a clear lead, some scholars[4] anticipate Trump supporters and Republicans to initiate numerous legal cases in key states, objecting the election process and claiming violations of the state electoral law. If any of such cases makes it to the federal level, the Supreme Court could be asked to *invalidate* the election result, either as a whole or critical parts of it. All in all, with the mail-in ballot delay, judicial action is to be expected, or as Trump himself predicts: "I think this will end up in the Supreme Court."

Till death do us part?

The 2020 election causes alarm for many reasons but central to the anxiety is the potential demise of democracy. I maintain that Trump has multiple tricks up his sleeve to influence the elections and manipulate the democratic system. One of those tricks is his use of the law. Judicial interference in elections has been increasing steadily since 2000[5)], and the reinforced grip of legal-judicial power on political-democratic activity necessitates the question whether the U.S. is in reality a juristocracy — not in relation to the courts' limitation of executive power, as Schmittians object to, but to its growing and far-reaching impulse to involve itself in election processes and outcomes. This year's election looks to become the epitome of that dynamic. Trump is confident the Supreme Court will be involved, and I have highlighted four ways in which this can transpire.

[3] E. Goitein, The Alarming Scope of the President's Emergency Powers, the Atlantic, January/February 2019.

[4] Professor John E. Finn, for example, forecasts lawsuits in several key states that could draw a decisive ruling from the Supreme Court. In, J. E. Finn, The case of Biden versus Trump – or how a judge could decide the presidential election, The Conversation, September 22, 2020.

For the Court, however, involvement carries a self-defeating potential. The party-ideology overlap splitting the bench combined with the politically sensitive cases under review impacts the standing not only of the Court's decisions but of the institution as such. That is, an election-deciding ruling by a highly politicised court in an extremely polarised political environment is detrimental to its legitimacy. Diminishing the legitimacy of the supreme judicial institution of the country — a critical check on other branches of government, including the executive power — is not necessarily an undesired outcome for President Trump. If he succeeds in drawing the Court to his side and bending the democratic system to his will by maximising the full potential of the law, he simultaneously feeds into the demise of the rule of law. For in case the Court supports Trump by legally intervening in the outcome of a legitimate democratic election, it reinforces the executive both directly and indirectly by (willingly or unwillingly) undermining its own legitimacy and position.

After the election battle has been pushed towards the legal branch, and the Supreme Court has made its final ruling, then, as the dust settles, Trump may have killed two birds with one stone. In case the legitimacy of the Supreme Court becomes questionable, the question of the Court's political loyalty could be reversed: when push comes to shove, how loyal will the President be to an enfeebled Court? We may only hope that after Trump's promised clash between democracy and juristocracy, the U.S. does not wake up living in a Schmittian's dream — or the nightmarish reality of autocracy.

ABOUT THE AUTHOR

Ursus Eijkelenberg
Ursus Eijkelenberg is doctoral researcher at the University of Manchester. His specialisation is in constitutional law, more specifically the relation between liberal constitutionalism and populism.

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