Donald Trump's Post-9/11 Presidency and the Legacy of Carl Schmitt

Quinta Jurecic

10.03.2022 doi: 10.17176/20220311-001234-0

In February, the Washington, D.C. news outlet Politico reported that before leaving office, President Donald Trump had "seriously considered issuing a blanket pardon for all participants in the Jan. 6 riot" to prevent them from being prosecuted — to the point of asking an advisor whether it would be possible to grant clemency to everyone holding up a Trump sign during the attack on the U.S. Capitol. Trump's advisors, according to Politico, counseled him against it. The president left office without attempting that particular expression of the chief executive's constitutional power to forgive.

The anecdote is vintage Trump, both menacing and absurd. It's also deeply telling as a reflection of how Trump conceptualized and exercised presidential authority, and of the unique nature of the danger he posed to democracy—and still poses, both as a potential frontrunner in the 2024 U.S. presidential election and as a figure of continuing influence within America's Republican Party and around the world. I use the word *unique* advisedly. Trump is, and was, threatening to democracy in large part because of the specifics of his approach to power. Evaluating the lasting effect of his presidency on the liberal democratic order requires understanding to what extent Trump's would-be successors have adopted that approach, and to what extent it remains particular to him.

Trump's Schmittian Presidency?

Shortly before Trump's inauguration in 2016, I suggested that the president-elect might prove to be a chief executive in the mode of Carl Schmitt. Studies of the jurist came into fashion in the years after the 9/11 attacks as scholars turned to Schmitt's writings on the state of exception to make sense of the aggressive American response to the suddenly all-eclipsing threat of terror. There's a serious argument to be had over whether the actions of the early Bush administration — for example, establishing Guantánamo Bay as a space where detainees could be held long-term outside the reach of normal legal protections — constitute a sovereign effort to "decide[] on the exception," drawing near the hole Schmitt locates at the heart of law, or perhaps something else ugly but more consistent with constitutional democracy. Trump, though, represented something different. If the early Bush years were characterized by legal interpretations that pushed the edges of executive and sovereign power, Trump's vision of the presidency was that of a man who had no interest in legal interpretation whatsoever. As he later said of the portion of the Constitution that spells out the details of presidential power, "I have an Article II, which allows me to do whatever I want."

This was Schmittian in the sense that it spoke to a vision of power without constraint, created by and embedded within the constitutional order but not beholden to it. This vision, I'd argue, persisted throughout Trump's presidency in his many abuses of presidential authority. His use of the pardon power, in particular, is telling. The American Constitution provides the president with the vast and unregulated authority to "grant Reprieves and Pardons for Offenses against the United States" — a power that, in its monarchical origins, has conceptual echoes in Schmitt's concept of the exception as a manifestation of sovereign ability to step outside the regular strictures of law. Trump seemed to delight in the pardon power as a space where he could act largely unchecked. According to one White House official, at a certain point in his presidency it became his "favorite thing." As with his proposal to pardon the insurrectionists after Jan. 6, his gifts of clemency to associates prose-

cuted as a result of investigations into Trump's conduct are a striking example of how Trump used this power to undermine the rule of law.

Consider, too, Trump's reported offer to pardon law enforcement officials for illegally forcing out asylum seekers at the U.S.-Mexico border. Again and again, the president used language portraying the border as a physical space of exception and Schmittian emergency outside the normal structures of law — a space that, if breached, threatened the existence of the American state itself, and whose protection therefore requires muscular and immediate action unconstrained by law. Arguably, the Trump administration's inhumane treatment of people crossing the border echoes Giorgio Agamben's concept of "bare life," the individual under the sovereign's control but not protected by or from that sovereign power.

Early in the pandemic, Agamben declared the efforts of governments seeking to respond to the coronavirus crisis to be a form of Schmittian tyranny, a means of reducing the masked citizenry to bare life. This argument was silly in March 2020, and it's silly now: the vast majority of officials implementing these restrictions, and people observing them, have been all too eager to cast them aside and return to some measure of "normal" life. But Agamben's fever dream is also telling as an account of what Trump did *not* do. Rather than leveraging the pandemic as a means of exercising aggressive power — like Hungarian Prime Minister Viktor Orbán, the darling of many of Trump's own acolytes on the American far right — Trump instead engaged in what David Pozen and Kim Lane Scheppele term "executive underreach." In other words, he proudly did nothing, or almost nothing. He denied that the coronavirus was a threat; he undermined his own administration's efforts to respond to the growing crisis; he encouraged his supporters to resist public health measures put in place by state and local authorities.

William Scheuerman has argued that Trump's catastrophic failure to lift a finger in response to the coronavirus complicates any characterization of the 45th president as a Schmittian. Rather than an advocate of the powerful state envisioned by Schmitt, in Scheuerman's view, Trump is ultimately a neoliberal more interested in dismantling state capacity than responding to real or imagined crises. It's certainly true that the Trump administration was stocked with conservatives eager to unravel the American administrative state. But I think this argument underestimates the role of sheer laziness in Trump's style of governance.

The example of the proposed pardons for January 6 rioters is instructive here. Trump reportedly floated the idea of mass pardons for those who sought to overthrow the government on his behalf. But people around him told him not to, and ultimately he didn't. His instincts echo in Schmitt, but he is ultimately not a person of particularly strong will. He liked the pardon power precisely because it allowed him to play at ultimate authority without having to jump through all the hoops created by the machinery of the modern American executive branch. Responding to the pandemic would have been hard, so he pretended it didn't exist. This fundamental pliability is also among the reasons that Trump's many efforts to overturn the 2020 election and hold onto power fell through. Enough people said no, and eventually he both gave up and ran out of time.

Republican Heirs

This is not a reassuring story, despite the efforts of commentators on the American right to frame it as one. For one thing, Trump seems to be positioning himself to run again in 2024 — and if he does, he will almost certainly receive the Republican nomination for the presidency. For another, there's no guarantee that the next person in Trump's position will be quite so pliable.

Trump's many would-be heirs in the Republican Party are currently struggling to position themselves as either his national successor or as challengers from the right, standard-bearers of a Trumpism without Trump. This crop of politicians has been deeply influenced by the former president in style and substance. But they don't seem to be Schmittians in Trump's mold.

The most striking thing about these acolytes is how poorly they channel the man himself. Senators Ted Cruz, Tom Cotton, and Josh Hawley — all hard-right legislators who have molded themselves more and more in the image of Trump — come off as awkward try-hards reading from the script set by Trump and yet, as the New York Times describes, "struggling to elicit the same emotional response." They're typical politicians, however exaggerated their professed commitments, unlike Trump, whose appeal to his supporters and lack of care for the Constitution flowed from his self-presentation as something other than a politician.

This doesn't mean, of course, that the would-be Trump successors might not try to push the boundaries of sovereign power just as Trump did. But they are more constrained by political calculation. And this limitation is particularly crucial because it undercuts what writer John Ganz has called the "fascist structure" of Trumpism, the mystical connection of the charismatic leader with a pure, idealized, sovereign American people — even though these Americans are only a small and unrepresentative subset of the nation as a whole. They are the same people who, in the revanchist narrative, rose up to defend their country and their leader on January 6. Trump's embodiment of that connection is part of what I have in mind when I describe him as a Schmittian by instinct. He channels the energy and authority of the absolutely sovereign people, whose sovereignty has not been and cannot be diluted by legal structures, including the mechanics of an election that didn't turn out as they'd like. It's one of the many complexities of Trump's presidency that his actions were guided far more by self-interest than by any desire to actually serve even the minority of citizens who elected him and from whom he derived his legitimacy.

Trump's heirs lack this instinct. But they are still dangerous. The Republican politician with the best odds of succeeding Trump is perhaps Florida Governor Ron DeSantis, who boosted his national profile during the pandemic by refusing to take aggressive action to contain the virus and feeding anti-vaccine sentiment. In this, he is a model of the anti-government sentiment that Scheuerman identifies as having undercut Trump's Schmittian instincts: someone whose political appeal derives from his performance of hostility toward the state, trumpeting legislation that prohibits private employers from requiring covid vaccines and schools from requiring masks during the pandemic.

Necropolitics

This isn't a state of exception as Agamben feared, an expression of Foucauldian biopolitics. Rather, it's *necropolitics*. As the philosopher Achille Mbembe writes in his essay of the same title, drawing on Schmitt and Agamben, "the ultimate expression of sovereignty resides, to a large degree, in the power and the capacity to dictate who may live and who must die." In the attitudes of politicians like Trump and DeSantis toward the coronavirus, this expression emerges as a dismissal of the lives of the vulnerable — essential workers, who can't stay at home to avoid the virus; disabled people, whose health conditions place them at particular risk; Black Americans and other members of communities whose historical mistreatment has resulted in health inequities driving disproportionately high rates of covid infection and death. The transformation into bare life is not equally distributed but focused on particular groups of people at the mercy of the sovereign's power to identify, in Mbembe's words, "who matters and who does not, who is *disposable* and who is not" (emphasis in original).

One way to read Trump's obsession with immigration and the U.S.-Mexico border is as a form of necropolitics, a way of locating the state of exception in the space of the frontier. The hostility toward cities in Trumpist politics, expressed most vividly in Trump's violent deployment of law enforcement against protestors demonstrating for racial justice in the cities of Washington, D.C. and Portland, Oregon, is arguably a further extension of this approach.

The Republicans shaping themselves in Trump's image have adopted this aspect of his politics even outside their approach to pandemic response. DeSantis has signed "anti-riot" legislation that would — among other things — provide legal protections to drivers who hit protestors with their cars. During the

racial justice protests of spring 2020, Tom Cotton called for the federal government to deploy the military in an "overwhelming show of force" to respond to "anarchy" in the nation's cities. As leaders on the American right try to employ the rhetoric of culture war as a means to electoral victory, there's no reason to think that this necropolitics will vanish anytime soon.

This style of politics does not undercut the American constitutional order in the way that a true Schmittian approach would. It does, though, work against efforts to affirm the dignity and the voice of those whom that order has long excluded. In that sense, it is arguably an expansion of the post-9/11 necropolitics that swallowed up Muslims in America, among others, and limited the protections offered to them by the law in the name of security. While Trump's heirs may not want, or be able, to push the limits of law in the manner of the former president, there will still be the problem of a right-wing minority now fired up and eager to leverage violence against those who they feel are not truly citizens or sovereign. The welcoming on the right of the January 6 insurrection, even after conservatives sought to crush the 2020 protests, shows the natural endpoint of this reasoning.

ABOUT THE AUTHOR

Quinta Jurecic

Quinta Jurecic is a senior editor at Lawfare and a fellow at the Brookings Institution.Quinta Jurecic is a senior editor at Lawfare and a fellow at the Brookings Institution.

SUGGESTED CITATION

Jurecic, Quinta: Donald Trump's Post-9/11 Presidency and the Legacy of Carl Schmitt, Verfassungsblog, 10.03.2022, doi: 10.17176/20220311-001234-0.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20220311-001234-0.