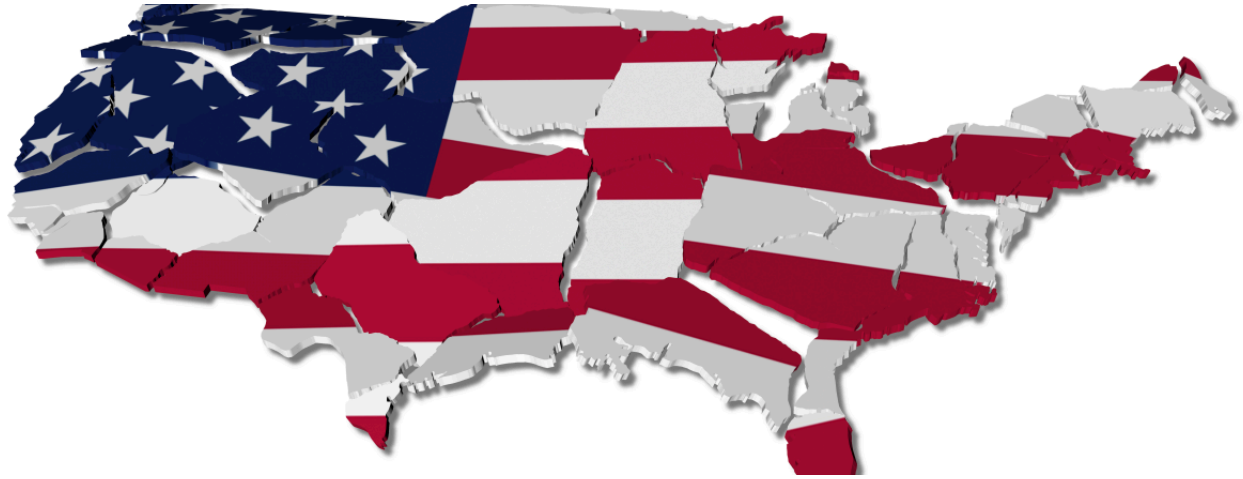


Yes, Trump Is (Still) Engaged in an Attempted Coup; and Yes, It Might Lead to a Constitutional Crisis and a Breaking Point



World leaders, the media, most of the public, and even a few Republicans are now matter-of-factly saying that the post-election insanity being inflicted upon us by Donald Trump and his enablers is simply the dying gasp of a narcissistic sore loser. Perhaps that is true, but there are some very bad signs that suggest that we must be vigilant and not assume that the danger has passed.

I have been writing for years that Trump's rise to power represented an existential threat to the rule of law in this country, or what [I called](#) four years ago a potential "extinction event for American constitutional democracy." I have even written down some ideas about what life would be like in a post-constitutional America ([here](#) and [here](#)). The results of the 2020 election are, therefore, quite welcome. Trump and the Republicans' panicked efforts to set those results aside, however, are simply shocking even as they are unsurprising.

There are many ways for national leaders to commit coups to try to hold onto power, and we should be clear that Trump has already tried and failed more than once to become a dictatorial strongman. In this column, I will first discuss what a coup is, then explain the ways that Trump has failed in his attempts thus far, and finally warn about how this could still end in a constitutional crisis that Trump creates and exploits to stay in power.

This is not a prediction but a warning. If we want the United States to continue to be a constitutional republic, we cannot assume that Joe Biden's election victory assures his inauguration on January 20, 2021. Not without a lot more work by those who care about this country.

There Are Many Kinds of Coups

One of the most frustrating aspects of writing about an extreme specimen like Trump is that many people are loath to describe his extremism accurately. Some combination of personal modesty ("I don't like to use over-the-top language.") and motivated disbelief ("Oh, come on, he's not *that* bad!") leads people to understate what is happening.

News organizations eventually started to call Trump's lies lies, but they are still more prone to use euphemistic terms like "unsupported assertions" or "claims without evidence" than to simply call Trump a liar. Similarly, we are peppered with descriptions of Trump's "racially charged comments"

or his “controversial language that many view as bigoted” rather than calling him the White supremacist that he is.

Thus it is not surprising that calling this an attempted coup d’etat causes some people to reach for the smelling salts. To be fair, there are meaningful distinctions that can be made by modifying the word coup, as I discuss below. But even so, one political scientist insisted in a *Washington Post* [op-ed](#) that what Trump and the Republicans have been attempting “do[es] not constitute a coup.” Why not? “Because Trump is attempting to remain in power, rather than remove someone else from it[,] his efforts come closer to what scholars call an attempt at a ‘self-coup’—or, using the Spanish term, an autogolpe—in which a head of state attempts to remain in power past his or her term in office.”

So it is not a coup because it is a self-coup? Does that not still make it a coup? Are defensive linemen in football not linemen? Are pale ales not ales? Are general elections not elections? Yes, there are reasons for the modifiers, but that does not make what Trump is doing not a coup attempt.

The most addlebrained response that I have seen thus far, however, arrived via email to complain about my [most recent Verdict column](#):

Your article uses the terms “coup” or “coup d’etat” seven separate times. Unless you mean a military coup, this kind of hyperbole is inflammatory and irresponsible. I repeat, irresponsible.

Particularly now, there is no need to whip up the opposition to Trump with this scary prospect. I realize that you didn’t actually speak of any armed conflict. But that, of course, is what the term “coup” conjures, as I’m sure you understand very well.

This is not to mention the overriding fact that our country is already polarized beyond recognition, and perhaps irretrievably so. Language of the sort you’ve chosen for this article doesn’t help.

The writer added that he is “a lifelong liberal from Massachusetts and a career (38 year) public defender” and ended with this: “Please tone it down.”

While concern trolling is always annoying and invariably disingenuous, this particular example of it was both simply naïve and dishonest. When something very bad is happening or is about to happen, we do ourselves no favors by being understated. When someone yells, “Hit the deck!” our response should not be, “*Rude!*”

In any case, Dictionary.com [provides](#) this definition of *coup d’etat*: “a sudden and decisive action in politics, especially one resulting in a change of government illegally *or* by force” (emphasis added). Trump is trying to stay in power illegally (changing the post-January 20 government from the one that the people chose back to himself). This is a coup attempt.

And even if one is fixated only on violence, as I noted in my *Verdict* column last week, there is reason to believe that Trump might yet resort to force, either by installing loyalists in the Pentagon ([ahem](#)) or by activating a heavily armed group of eager domestic paramilitary groups who are [currently](#) “standing back and standing by.”

There are reasons that we use modifiers to describe different types of coups. There are military coups, bloody coups, bloodless coups, silent coups, people’s coups, aborted coups, and so on. And, as above, self-coups. They are all properly described as coups. For those who are interested in a clear explanation of the various types of coups—especially the nuances that arise when a government commits a coup to stay in power—Dean Falvy’s [July 23 Verdict column](#), in which he coined the term “selfie coup,” is by far the best that I have seen.

But whatever one thinks about the Marquis of Queensberry rules of word choice in the midst of an attempted coup, the point is that this is an existential political crisis, and Donald Trump is trying to hold onto power by whatever means necessary. Joe Biden and Kamala Harris won the election and

should take office in 62 days, but Trump is trying to prevent that from happening. Again, this is the very essence of an attempted coup.

We should be clear that Trump has already tried and failed to seize and maintain power illegally. For example, he railed at his most loyal yes-man, Attorney General William Barr, because Trump wanted Barr to arrest his political opponents—a classic move by autocrats who attempt to seize power illegally. Trump also tried to use the Postal Service to prevent legal votes from being delivered and counted.

Lest we forget, Trump also tried to get Ukraine to invent compromising political dirt to use against Joe Biden. That led to impeachment and a sham trial with no conviction, but it fortunately did stop Trump from successfully extorting a foreign government to help him steal our election.

Currently, Trump is in the midst of another failing effort to hold onto his power, as he pursues dozens of baseless lawsuits designed to try to overturn election results in key states. From my position as a law professor, I find it incredibly gratifying to see how well our legal system can work, with independent judges applying the law fairly to the facts—or, in these cases, to the lack of facts. Indeed, if we do come out of this with our legal system intact, we can all be proud that the conventional anti-lawyer wisdom turns out to be quite false that “anyone can sue anyone and win, no matter how frivolous the claim.”

Trump has also fired his own cybersecurity expert for daring to declare that the election was well run and fair. Again, this is what people do when they are planning to seize power illegally.

The Threats Yet to Come

We should thus be happy that Trump’s attempts to subvert the election have all failed thus far. As I discussed in my column last week, however, we should not be lulled into complacency by the utter failure of one of Trump’s strategies. Other legal strategies are, unfortunately, on deck.

In particular, the “legislatures-only” gambit would have Trump’s supporters rely on what they will dishonestly claim is unambiguous [constitutional text](#): “Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors” This does not require Rudolph Giuliani spreading fertilizer in the driveway of a landscaping store, or having him [embarrass himself](#) in federal court in Pennsylvania. It instead requires that state legislatures attempt to say after the fact that they will use their inherent constitutional power to say that the “manner” of choosing electors is for the legislature itself to appoint them, even though there has been an election.

As I wrote last week, the legal arguments against this pseudo-literalist interpretation of Article II are incredibly strong. Even so, at least some Supreme Court justices [seem to be quite open](#) to overruling precedent and allowing such a power grab (aka coup) to go forward.

To be clear, a majority of the Court would have to say not only that legislatures can act alone but that they can change the rules even after an election. The Court ought to reject that second possibility even more easily than the first, but there is no telling how this Court will rule on either issue.

The good news is that Trump’s parade of losses in the silly cases thus far actually makes it more difficult for legislatures to justify doing any of this. In that sense, Trump would probably have been better off tweeting and holding shouting sessions in front of reporters to gin up anger among his base without actually testing any of the claims in court.

Interestingly, I predicted in the months before the election that Republicans would go along with Trump’s coup attempt in part because many of them would have lost their own elections. Even though that turned out not to be true (with Republicans gaining House seats and thus far holding the

Senate), however, they are still almost all-in on allowing Trump to rage about the election being stolen and fraudulent, at the very least.

In any case, the other good news is that this gambit would only work if it involved lawless moves by several states, not just one. With Trump's team already having failed to get Georgia's Republican Secretary of State to back down, and with Michigan now set to certify Biden's comfortable win in the [Great Lake State](#), it would appear that Biden is set to win 306 electoral votes to Trump's 232. What needs to happen for Trump and the Republicans to pull off a bloodless coup?

Both Arizona and Georgia not only have Republican legislatures but Republican governors as well, meaning that they could try to appoint Trump's slates of electors without testing the "legislatures only" part of this Hail Mary strategy. They would still face the problem of trying to change the rules after everyone knows that Biden won under the existing rules, but again, they might try, and at least five of the Court's six Republican-appointed justices might go along.

Even so, that would result in Arizona's eleven electoral votes and Georgia's sixteen electoral votes swinging to Trump, leaving him at 259. He would have to get at least one of the states with Democratic governors and Republican legislators to go for the Hail Mary. Interestingly, flipping Wisconsin's ten votes would create a 269-269 tie, which is the only situation in which the election would be determined (under the Twelfth Amendment) in the House of Representatives.

If, on the other hand, Wisconsin's Republicans tried to appoint a Trump slate of electors to compete with the slate of Biden electors that Wisconsin's governor would try to appoint, the more likely outcome would be that neither slate would be recognized. As I recently explained in [a piece](#) co-authored with Professors Michael Dorf and Laurence Tribe, this would result in Biden winning the election, because a candidate needs only to win a majority of the electors *appointed*. In that column, we discussed an example with Pennsylvania's electors in play, but in the example here, Wisconsin's ten allotted votes would go to neither candidate, such that Biden would win by a vote of 269-259.

This means that Trump needs three states, at least one of which has a Democratic governor, to *successfully* appoint electors in defiance of their states' voters in order to pull off this Hail Mary play. Could he do it? The longer this goes on, the more agitated his supporters become, and the more pressure is put on Republicans to go along with anything and everything necessary to assist in Trump's coup. Waiting for Trump to calm down—even as his rage continues unabated—only makes this more likely.

Again, I am not predicting even that Arizona or Georgia would go along with this, nor am I certain that the Supreme Court would do such a large amount of heavy lifting, especially because what Trump would ask them to do is so nakedly outrageous. It would be a constitutional crisis of the first order, and thus far it seems that many Republicans do not have the stomach for it. But that could change.

Even if this is Trump's last gasp at a bloodless coup, however, he can—and certainly seems inclined to—try to move to less savory alternatives. It is certainly true, as the Biden campaign [has said](#), that "[t]he United States government is perfectly capable of escorting trespassers out of the White House." And that is exactly the right tone to take, in their position.

Neither the Secret Service nor members of the military or other law enforcement will (other than some rogue actors) carry out illegal orders, including orders from someone who is not the legitimate President of the United States. Al Gore, for example, could try to walk into the White House and tell the guards to arrest the kitchen staff, but no one would listen to him. They would, however, arrest Gore.

The problem is that it might not be possible to know who is the rightful President, meaning that the Secret Service would not know who is the trespasser. The last gasp of Trump's series of coup attempts would thus involve doing everything possible to muddy the waters and argue that even mere uncertainty about the outcome of the election would entitle Trump to stay.

My central point in this column, however, is quite simple. Trump's losses are piling up, making it tempting to think that he has become an ineffectual loser with no cards left to play. That is a dangerously complacent idea, however, because Trump has shown that he will try anything to illegitimately seize power—to commit a coup against the legitimately elected incoming President of the United States.

One can hope that his losing streak will continue, but hope is not a plan. People must make it clear that any avenues by which Trump might try to stay in power are illegitimate—and then we will hold on tight and hope that enough people in responsible positions listen to reason, allowing us to keep our democracy intact for at least a few more years.