

Constitutional Retrogression in the United States

By Don Sutherland

In their lengthy essay, “How to Lose a Constitutional Democracy,” Aziz Huq and Tom Ginsburg described the phenomenon of “constitutional retrogression.” Unlike a rapid collapse into authoritarianism, a “constitutional retrogression” is a “more subtle, incremental erosion to three institutional predicates of democracy occurring simultaneously: competitive elections; rights of political speech and association; and the administrative and adjudicative rule of law.”

They described the set formula for bringing about such an outcome as follows:

First, run a populist platform, in which the majority is portrayed as victims and the old order elitist...

Next, find ways to undermine opponents in state institutions, such as the judiciary or military. Perhaps use the courts to repress criticism via libel suits or the like. The electoral machinery is critical to ensure that future competition is limited... Ensure that the free media is intimidated, or diluted, so as not to provide an independent check. The effect of these measures is cumulative’ even if one alone is insufficient to raise concerns about constitutional retrogression, when sufficiently numerous they should be viewed with alarm.

Donald Trump ran on and continues to pursue a narrow right-wing populist agenda cloaked as conservatism. However, that agenda is divorced both from the basic tenets that had long defined traditional American conservatism and it is at odds with the nation’s Founding ideals. He has continually misled the public and assailed the news media. He has increasingly purged Inspectors General and other professional federal staff—most recently the U.S. Attorney from the Southern District of New York—in order to erode constraints on his decision-making and render the federal administrative structure captive to his whims. He has attacked the Supreme Court whenever decisions, anchored either in the Constitution or in statute, have set back his illiberal policy aims. He authorized the use of force against protesters who were peacefully seeking justice and civil rights in Washington D.C.’s Lafayette Square on June 8 so that he could stage a photo op outside St. John’s Church. He has regularly sought to discredit the 21st century civil rights movement. He has demonized immigrants. He has used racist terms to describe the COVID-19 virus.

Recognizing and fearing that his increasingly narrow base—largely white males who have not earned a college degree—may be insufficient to carry his populist movement to victory in November, he is now seeking to thwart initiatives aimed at facilitating voter turnout. He is already pushing false narratives of ‘massive voter fraud’ to undermine public confidence in the legitimacy of any outcome but his re-election.

Throughout his tenure, with only a handful of exceptions, Republican Members of the House and Senate have been complicit. Many have been enthusiastic cheerleaders. From

the sidelines, sympathetic propagandists from Talk Radio and Fox have furthered and amplified Trump's misleading, divisive and dangerous messaging.

This is where the nation finds itself in June 2020.