

American Democracy Nears a Crisis

By Don Sutherland

As the United States celebrated the 248th anniversary of its declaration of independence from Great Britain on Thursday, American democracy was nearing a crisis. Amidst ongoing institutional decay, a former President who attempted to pull off a self-coup to try to retain power following his electoral defeat loomed bigger than the U.S. legal system. The legal system had gone through the motions with little to show. A U.S. Supreme Court ruling seemingly ratified his preeminence over the rule of law. This is a perilous moment in American history.

It is difficult to identify the precise timing of an inflection point where one era ends and another begins. But when that point is reached, dramatic change can come at a dizzying speed. What follows can be unrecognizable against what it replaces. The outcome can be irreversible for years, decades, or much longer.

California attorney Shouan Zhoobin Riahi, whose parents fled Iran at the collapse of the Shah's government, explained, "One thing my parents... always told me is that they were surprised with the speed and ferocity with which it happened. Things that seemed impossible one day were simply happening the next." The title of Alexei Yurchak's book on the collapse of the Soviet Union, *Everything Was Forever, Until It Was No More*, captures the rapidity and magnitude of change that follows once an inflection point is crossed.

On July 1, the nation moved closer to the dark inflection point that stands between continued republican government and the onset of illiberal, if not, authoritarian rule. The U.S. Supreme Court, which had previously displaced the textual reading of statute with a concocted "Great Controversies Doctrine" to limit the EPA's regulatory authority, displaced the textual reading of the U.S. Constitution itself. It constructed a degree of immunity that put the President above and beyond the rule of law even as the U.S. Constitution contains no such language and the Framers who experienced life under tyrannical rule expressed no such intent.

The precedent established by the Court's ruling in *Trump v. United States* can potentially serve as a 21st Century-equivalent to Germany's 1933 "Enabling Act." It moved the President beyond accountability from the Judiciary and Legislative Branches by conferring upon him "absolute immunity" for his "official acts."

Now, if Congress or the courts object, the President might simply declare that their voices are irrelevant by citing authority rooted in his "absolute immunity" for "official acts." How far a future President might take that newfound authority remains to be seen. A future President could even expand the scope of "official acts" invoking the authority he was granted in the ruling. As such, Presidential power could grow in the fashion of a malignant tumor until the nation's constitutional framework, its separation of powers, and its "checks and balances" succumb.

Former President Trump could extend his term perhaps by reinterpreting the 22nd Amendment, punish political opponents, or dramatically alter the composition of the federal government. And

if he is impeached and convicted, he could simply ignore the outcome on the basis that he was acting in his “official” capacity.

In her dissenting opinion, Associate Justice Sonia Sotomayor provided a master civics lecture on the consequences of the Court’s ruling. She wrote:

Today’s decision to grant former Presidents criminal immunity reshapes the institution of the Presidency. It makes a mockery of the principle, foundational to our Constitution and system of Government, that no man is above the law...

The omission in the text of the Constitution is worth noting... for at least three reasons.

First, the Framers clearly knew how to provide for immunity from prosecution. They did provide a narrow immunity for legislators in the Speech or Debate Clause... They did not extend the same or similar immunity to Presidents.

Second, “some state constitutions at the time of the Framing specifically provided ‘express criminal immunities’ to sitting governors.” The Framers chose not to include similar language in the Constitution to immunize the President. If the Framers “had wanted to create some constitutional privilege to shield the President . . . from criminal indictment,” they could have done so...

Third, insofar as the Constitution does speak to this question, it actually contemplates some form of criminal liability for former Presidents...

Nothing in our history, however, supports the majority’s entirely novel immunity from criminal prosecution for official acts...

In every use of official power, the President is now a king above the law...

Never in the history of our Republic has a President had reason to believe that he would be immune from criminal prosecution if he used the trappings of his office to violate the criminal law. Moving forward, however, all former Presidents will be cloaked in such immunity. If the occupant of that office misuses official power for personal gain, the criminal law that the rest of us must abide will not provide a backstop.

Destruction of the American constitutional republic can still be averted. Today, the voters, alone, are left with the consequential task of preserving the nation that was born on July 4, 1776. On November 5, the American people will still possess the ability to choose their nation’s destiny. That choice might well largely, if not altogether, cease to exist should the former President, armed with the Supreme Court’s ruling on immunity, regain power.