

When history is written, US courts may be singled out for protecting nation's election integrity

Ashutosh Varshney writes: When the history of this period is written, America's courts might be singled out as the institution that protected the nation's election integrity.

[Ashutosh Varshney](#)

That coups take place in developing countries has been an article of faith of political scholarship since the 1960s. What happened in Washington on January 6 was a striking refutation of this conventional wisdom.

It was not a classic coup because the military was not involved. But it was an executive coup, in that President Donald Trump, the head of the executive, incited a mob of supporters — many thousand strong, with a substantial proportion belonging to vigilante groups — to “show the kind of pride and boldness” that would force the two Houses of Congress to overturn the election, which he lost on November 3.

Lacking an independent election commission, the US has a complicated electoral administration system. Legally, states decide who will be president. After people cast their votes, states certify election outcomes, forming an electoral college, whose vote is finally accepted by US legislators on January 6. The vice-president presides over this politically ceremonial but legally necessary step, the last one before a president can be inaugurated on January 20. Mike Pence, Trump's vice-president, refused to overturn the election,

infuriating his boss. A huge majority of Republican senators also expressed unwillingness to comply. In the end, the coup failed and Biden was ratified. And as these lines are being written, Trump seems to have recognised — publicly — that the violence has hurt him.

Why do scholars believe that developing countries have coups, but richer democracies do not? Two arguments are often advanced. First, in poorer countries the institutions of oversight, being much weaker, crumble under the onslaughts of mighty politicians. Second, politics in developing countries can have an all-or-nothing quality. The government has such control over the economy and society that once out of power, losses can be huge and imprisonment may not be too far. That generates a political tendency to stay in power at all costs. In richer democracies, opportunities beyond the government are plentiful. An electoral loss does not rob life of all enhancements. Company boards, memoirs, consulting and speaking, legal practices and business openings can fetch millions. The government does not have a decisive control over all sectors of society.

P B Mehta writes | [US might recoil from Capitol siege. But its democracy will remain riven by internal conflicts](#)

Trump's motivations remain open to speculation. Of the two main hypotheses, one is ideological, another personal. His commitment to a political order that restores white supremacy has been repeatedly noted. Many in the mob were carrying Confederate flags. Since the Civil War (1861-65), these flags, representing those southern states that broke away to preserve slavery, have stood for white supremacy and Black subjugation.

A second hypothesis is that once out of power, Trump fears prosecution for crimes. In addition to the potentially criminal charges of tax fraud, there are questions about corruption, abuse of power, and violation of campaign finance

laws. Ironically, inciting a mob to pressure the legislature, aimed at solving an immediate problem, might now lead to the most serious charge of all: Abetting an insurrection.

Nancy Pelosi, Democratic Speaker of the House of Representatives, and Chuck Schumer, who will soon take over the leadership of a Democratic-majority Senate, have already called for the invocation of the 25th Constitutional Amendment. If supported by a majority of the cabinet, the amendment allows the vice president to unseat the president. In case the amendment is not invoked, say Pelosi and Schumer, they would like to impeach Trump, even if less than two weeks remain in his term. That will, in all likelihood, disqualify him from running again in the 2024 elections. This is important because a self-pardon might well save Trump from criminal prosecution, at least for federal crimes, though many legal scholars have serious doubts about the constitutionality of self-pardon.

A coup like this would be inconceivable in a parliamentary democracy. Presidential democracies are more vulnerable to coups because the executive and the legislature are independently elected and, if run by different parties, they can be arch rivals at the polity's heart. In parliamentary systems, the two are intertwined and a parliamentary majority is the prime minister's source of power, making deadly executive-parliament clashes unlikely. Prime ministers don't send mobs, vigilantes or armies to attack parliaments; brazen presidents do.

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In the end, of course, the coup failed. So how might one understand the failure? The proximate reason is simply that with no military support coming, the mob failed to occupy the Capitol building for more than a few hours. That is

why, without the military's involvement, coups rarely succeed. And in richer democracies, the armed forces tend not to help the leader in electoral disputes.

But the deeper question is: Why did most Republican politicians in the US Congress, while initially quiet, not support Trump in the end? Here, the role of two institutions is noteworthy.

First, given the state-centric nature of US presidential elections, the behaviour of state officials in swing states is critical. Two of the five swing states — Arizona and Georgia — have Republican governments. Yet their officials did not bow to the wishes of Trump. A leaked tape of Trump's phone call to Georgia's Secretary of State, revealed that to flip the state won by Biden, Trump asked the secretary to "find 11,780 votes". Despite being a Republican, Secretary Brad Raffensperger declined, instead doing the right thing. Legal propriety defeated partisanship.

But the most important role has been played by America's courts. Trump's campaign filed more than 60 legal challenges — from the state courts to federal courts, all the way up to the US Supreme Court. Trump lost all cases but one. The victory was very small, but the defeats were huge. Many of the judges in federal courts were appointed by Trump, who often boasted that if necessary, his judicial appointees would win him the day. But instead of displaying personal loyalty, they applied the law, tossing out the evidence of election fraud as legally flimsy. In the end, it became impossible for most Republicans to go against so many court judgments. Courts defined the permissible limits of politics.

When the history of this period is written, America's courts might be singled out as the institution that protected the nation's election integrity. But it also says something larger about the role of the judiciary in preserving democracy

as a system. If independent and unafraid, courts can clip the wings of marauding politicians.

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