

## Will Trump cause a constitutional crisis?

In this essay, we will explore whether the United States of America is likely to experience a constitutional crisis under the presidency of Donald Trump. Recent events, such as the executive order to repeal the 14<sup>th</sup> amendment, have shown that the president is willing to ignore constitutional principles and court orders. To better understand the current events and whether the US is likely to experience a constitutional crisis, we will set out what leads to a constitutional crisis and then look at how it can be resolved, politically and legally. We will then apply this background to Donald Trump's orders, exceeding his executive powers, to determine whether we must fear a constitutional crisis.

### What is a constitutional crisis?

A constitutional crisis occurs if the constitution of a country can no longer serve its functions of safeguarding the rule of law and governing the relationship between the executive, legislature, and judiciary. It can occur if there is a conflict between the branches of government that cannot be resolved within the rules provided by the constitution.

But is it not the case that a conflict between the executive, legislature, and judiciary is part of a constitutional democracy? That is true, as a functioning democracy relies on a system of checks and balances to prevent one institution from exercising total control.

Parliament politically scrutinises the Government. If the Government goes beyond its legal powers or introduces politically unfeasible bills, Parliament is the first to hold the Government accountable.

The courts judicially scrutinise the Government. Whilst the courts cannot and do not question parliamentary proceedings, as this is an issue for political scrutiny, political actors going beyond their legal powers can be challenged in the courts.

This form of scrutiny in the shape of checks and balances encourages a dialogic relationship between the three branches of the state.

However, this dialogue can get out of balance if one of the parties refuses to follow constitutional principles to resolve conflict. It can occur, for instance, if a president fails to follow the law of the constitution. In this case, there may be insurmountable challenges for the judiciary as they lack enforcement power. Furthermore, challenges to the president's decision-making may also be dismissed under the political question doctrine, a principle of US constitutional law, grounded in the separation of powers, declaring political disputes non-justiciable.

The US Supreme Court set out six criteria in *Baker v Carr* for identifying whether a constitutional issue is justiciable:

1. A **constitutional commitment** allocated to a political department.
2. A **lack of judicial standards** for resolving the dispute.

3. There is a need for an “**initial policy determination** of a kind clearly for nonjudicial discretion”.
4. It is **impossible** for a court to **independently resolve** the dispute without violating the principle of separation of powers.
5. There is an “unusual need for unquestioning adherence to a political decision already made”.
6. There is a possibility of **embarrassment** of the parties involved in the dispute.

If a case meets the criteria in *Baker v Carr*, the dispute must be resolved politically.

If a case does not fall within the criteria set out by *Baker v Carr*, it is considered justiciable. The courts are especially keen to review whether executive action exceeds constitutional limits as upholding constitutional rights is the backbone of any functioning democracy.

Resolving a dispute politically or judicially implies that the parties involved are willing to cooperate. If, for instance, the president fails to engage in a political dialogue or does not follow a court order, the constitution may fail to fulfil its functions of safeguarding a separation of powers and guaranteeing the maintenance of the rule of law.

### **What are the effects of a constitutional crisis?**

The effects of constitutional crises can be divided into five categories: legal, political, social, economic, and institutional.

Firstly, a constitutional crisis has implications for the legal system. If the constitutional boundaries can no longer be enforced, this erodes the rule of law and the legal system as a whole. However, it also signals to legislators that greater protection of constitutional values is needed.

Politically, the president’s actions will face great backlash from Congress, which may commence an impeachment procedure against the president. A successful impeachment procedure, requiring the approval of two thirds of Congress, would lead to the removal of the president. However, this can be difficult if the president has enough support in Congress, as was the case in Trump’s first term in 2020, where he was acquitted by the Senate in two impeachment proceedings for abusing his executive power and obstructing Congress.

A constitutional crisis also has social consequences. The public may not only lose trust in Government legitimacy but also protest against the unlawful action. This can provide an opportunity for the legislature to further safeguard constitutional rights in new legislation.

Economically, a constitutional crisis is detrimental as it can destabilise markets as investors lose trust in Government. If the crisis leads to Government dysfunction, even essential services may be disrupted, leading to further political and economic instability.

Lastly, a constitutional crisis may lead to long-term institutional changes as in future. If change is wanted in favour of protecting constitutional values, the crisis can lead to

amendments of the constitution in favour of strengthening checks and balances. Otherwise, a shift in power towards one branch of government is likely.

### **Is Trump likely to cause a constitutional crisis by his actions?**

Recently, there have been many actions by Donald Trump that violate the US constitution.

It is important to note here that the US Supreme Court judges are nominated by the US President and then the Senate provides advice and consent to their appointment. This appointment procedure has produced a partisan court. This can be seen, for instance in the Supreme Court ruling in *Trump v United States*, where it held that presidents have broad immunity from criminal prosecution for actions within their constitutional authority. The effect of the ruling was that in the election subversion case, in which criminal proceedings were brought against Trump for conspiring to overturn the 2020 election results, the immunity ruling narrowed the scope of prosecution. The Supreme Court referred the case back to the trial judge to interpret the ruling that the courts cannot examine the President's actions within his constitutional authority but can bring personal claims against him.

Following Trump's re-election in 2024, a motion to dismiss the case, citing the Department of Justice's policy of not prosecuting presidents, was approved and the charges dismissed. This case produced a troublesome result as the law could not ensure that Trump was prosecuted or banned from running for a second term in office. The result shows that the US president seems to be above the law and that he has created a great imbalance within the separation of powers.

I will now look at two recent events, in which a Trump order has challenged the constitution and where the president decided not to follow a court order; firstly, signing the executive order to end the application of the 14<sup>th</sup> amendment to the US constitution and secondly, Trump's use of the Alien Enemies Act to deport alleged Venezuelan gang members to a prison in El Salvador.

In January of this year, Trump signed an executive order which aims to repeal the application of the 14<sup>th</sup> amendment to the US Constitution, which grants automatic citizenship rights for almost anyone born on US territory. Usually, such an amendment to the constitution would require a two-thirds vote in both Houses of Representatives, which it would be unlikely to achieve with the current make-up of the Houses. Lower courts have challenged the President's executive order and declared it to be unconstitutional. At the time of writing, Trump has appealed to the Supreme Court and is waiting for their judgment. The way the Supreme Court deals with the case will determine whether the Apex court can fulfil its function as a bipartisan court or whether it will favour Trump's administration. Doing so would clearly undermine the court's legitimacy as the order seems to clearly violate the rule of law and set an alarming precedent for further challenges to executive action.

In March of this year, Trump ignored a court order blocking the White House's plan to deport alleged Venezuelan gang members. Trump had based the deportation order on the Alien Enemies Act 1798, a wartime authority allowing the US president to detain or deport natives and citizens of an enemy nation, including those with a visa or residence permit to lawfully reside in the US. The Act has been invoked in major conflict to incarcerate enemy aliens and confiscate property. Its past application has been controversial, as no due process or evidence of wrongdoing is needed and judicial review is excluded. In World War II, the act was used to detain Japanese and Japanese Americans living in the US without evidence of action threatening national security. Furthermore, the validity of the authorisation to use force in the aftermath of the 2001 terrorist attacks remains unresolved.

Invoking the Alien Enemies Act 1789 is especially controversial as it violates the Fifth Amendment of the US constitution, which protects the right to a grand jury, except during wartime. Outside wartime, invoking the 1789 Act, appears to be a way to circumvent judicial review and undermine the judicial branch.

The examples show that the fear is imminent that the US may soon face a constitutional crisis and move towards being an autocracy. It is now for the opposition and society, but also democratic forces worldwide to stop this process from happening!

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