



Restoring the Guardrails of Democracy: A Libertarian View

By Walter Olson

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Third post in the symposium on the National Constitution Center "Restoring the Guardrails of Democracy" project. Walter Olson presents the Team Libertarian Report.

The events leading up to Inauguration Day 2021 posed a stress test for America's republican institutions, and we need to be ready should more such tests follow. In particular, proposals to overhaul the nation's electoral institutions should be judged in the light of the lessons of that brush with constitutional extremity. Reforms that shore up what we now can see as critical weaknesses deserve high priority; reforms irrelevant to these dangers might well go to the back burner, if not be set aside for now; and proposals that would actually create new risks of constitutional crisis are unlikely to be right for the moment.

Thus argues my contribution to the [Team Libertarian paper](#) (which you can also read [on SSRN](#)) on elections and the democratic succession of power. Later in this post I'll summarize the other two sections, written by contributors Clark Neily and Ilya Somin.

Many institutions performed well under the stress of the weeks leading up to the 2021 transfer of power, including the courts, the state governments, nearly all local election authorities, the Electoral College and its participants, and most of the U.S. Senate as well as the Vice President. Key cabinet departments also pushed back against improper suggestions from the rogue White House.

Ironically or not, the institutions that proved wobbly under stress, White House aside, included one of those with the strongest claim on majoritarian legitimacy: the U.S. House of Representatives, in which 139 of 435 members, an outright majority of the 212-member Republican caucus, voted to support spurious challenges to Biden's electoral slates. Behind these was an unlovely fact: a majority of the GOP base had in fact been willing to tag along with Trump's claims of a stolen election, and the House, as the assembly most in touch with public passions, reflected this. While elite misconduct can endanger the democratic succession of power, so can populist anger and mass delusion.

I won't try to summarize each and every one of our prescriptions, but here are some highlights:

- [Electoral Count Act reform](#) should confine each actor to its proper role after a presidential election, clear up ambiguous and confusing terms in the present law, and keep partisans from using the process to re-litigate the underlying election.

- Congress should move to constrain the executive branch's resort to dangerous emergency powers. The law should make clear (or even clearer than now) that presidents do not have unbounded discretion to invoke the Insurrection Act, seize voting machines without a court order, declare martial law when civil order has not broken down, or in other ways use peremptory executive power to overturn or block an election.
- Counter distrust with a credibility agenda, recognizing that in an age of distrust systems need to be both secure against fraud and bad practice, and visibly so. Examples: improve methods of keeping voter registration rolls accurate and up-to-date; strengthen audits. States should facilitate and where appropriate mandate reporting of substantially complete returns on election night, to counter the viral popularity of "overnight steal" claims.
- Look for ways to incentivize losing candidates to concede. Former President Trump has set the worst example in crying fraud after losing a contest, but he has not been the only offender.
- Watch out for proposals to gather ever greater election say over election administration to Washington, D.C., which would provide a single attractive target for bad actors to pressure or subvert. We should be wary of what economist Steven Landsburg calls "centralizing the power to decide who will yield power."
- Avoid innovations that invite succession crises. One example: the ill-thought-out National Popular Vote Compact, in which states pledge to cast their electoral votes for the national popular vote winner even though no way is offered to secure an authoritative tabulation of that vote so that it can be agreed who won.
- Turn down the temperature and stop delegitimizing key institutions. Both sides need to listen on this. It's one thing to decry worsening polarization as if it were all the other team's fault. It's another to resist the partisan temptation to delegitimize the existing institutions and machinery of our republic – whether the Supreme Court, the U.S. Senate, or local election administrators -- because they don't yield the short-term results you want.

I think classical liberals and libertarians can play a constructive role in a conversation about guardrails given our particular attachment to the rule of law, constitutionalism, checks and balances, and limitations on government power in general. By instinct, we understand and fear how a government is likely to start behaving once its top officials know that voters cannot turn them out of office.

I'll turn now to summarizing the other two sections of the report, by Cato colleague Clark Neily on the role of the jury and Volokh Conspirator (and George Mason lawprof) Ilya Somin on the benefits of choice between governments.

The right to trial by jury was often hailed as the palladium of Anglo-American liberties; it's enshrined in the Sixth and Seventh Amendments, and relates closely to other Constitutional provisions on criminal procedure. As the Founders knew, oppressive regimes have used criminal law and prosecution throughout history to target enemies and exert social control, and they meant for the citizen jury to serve as a key guardrail against that abuse.

Yet, says Clark Neily, America has allowed the institution of the jury to decay to a point of near extinction in favor of an informal and opaque administrative system of plea bargaining. That is bad news for criminal justice, and may bear some relation to America's extraordinarily high rates of incarceration. And it also erodes a line of defense that will be critically needed should American political life take a turn toward the authoritarian and government administrators intensify use of

criminalization and prosecution as a purposeful tool against opposition. In heedlessly allowing this institution to decay, we also lose an important instrument of popular voice in government; earlier generations understood that jury service was an important means by which the public participated directly in the public business.

Ilya Somin champions a fundamental human right that deserves a place alongside the ballot box and the jury box as protectors of liberty: the right to exit.

When people choose which jurisdiction to live in within a federal system, they vote, in effect, with their feet. In fact, for most individual citizens, this is by far the most powerful way they can alter the laws and policies they live under. It almost never happens that they can make such a change by casting a vote (notwithstanding the one-vote margin just seen in an election in my county) nor are they likely to influence enough neighbors to change the outcome of even a single election for a single office.

Because foot voters can make a genuine change in their conditions of governance by moving residence, they have at least some incentive to inform themselves carefully about the differences – an incentive that ballot voters, alas, often lack.

The possibility of exit, Somin argues, operates as a crucial check on the tendency of political institutions to overreach themselves. In America, it is closely tied to principles of federalism and decentralization that are important to the country's hopes for preserving political stability despite sharp differences in local culture. Although not every issue can be handled at a local level, decentralization of policy makes it more likely that the varied populations of New York, Arkansas, Vermont and Utah can each live under a set of policies relatively well suited to the preferences of each group. Despite worries in some quarters about ideological sorting, Somin sees reasons to think that polarization might also decline if we wisely lowered the stakes of national Red-Blue politics by curtailing the policy ambitions of the federal government.

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