Expansion of Corporative Free Speech and the On-Going Constitutional Crisis in the United States

Expansión de la libertad de expresión corporativa y la actual crisis constitucional de Estados Unidos

Expansão da liberdade de expressão corporativa e a atual crise constitucional nos Estados Unidos

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Abstract

This paper focuses on the constitutional-political turbulence that Donald J. Trump has been creating since he was elected president of the United States. On the one hand, we point out the mainstream of litigious and political issues as signals of an on-going constitutional crisis in the United States and its consequences, both in the national and international scenarios. On the other, we explain the indicators of the constitutional crisis within two levels of analysis. The first one considers Trump's multiple attacks against American constitutional liberties, while the second one studies the cases of Trump's policies against customary international law. The paper unveils empirical evidence of all the above-mentioned issues in order to explain the increasing constitutional litigation in District Courts and the Supreme Court of the United States. Therefore, the article puts the finger on the role of the judiciary as a key factor in blocking Trump's policies and his pervasive attacks on the American rule of law.

Keywords

Trump; constitutional crisis; democratic values; litigation; role of courts.

Resumen

Este artículo se centra en la turbulencia política-constitucional que Donald J. Trump ha venido generando desde que fue elegido presidente de Estados Unidos. Por un lado, nos referimos a los principales litigios y problemas políticos como señales de la actual crisis constitucional en Estados Unidos y sus consecuencias a nivel nacional e internacional. Por otro lado, explicamos los indicadores de la crisis constitucional en dos niveles de análisis. El primero considera los ataques de Trump contra las libertades constitucionales de los estadounidenses, mientras que el segundo estudia el debilitamiento del derecho internacional consuetudinario provocado por las políticas de Trump. El artículo revela evidencia empírica de todos los asuntos mencionados anteriormente para explicar el incremento de litigios ante los tribunales de distrito y la propia Corte Suprema de Estados Unidos. Por consiguiente, este trabajo señala que el rol del poder judicial será un factor clave para detener los ataques de Trump en contra del Estado de Derecho en Estados Unidos.

Palabras clave

Trump; crisis constitucional; valores democráticos; litigios; papel de los tribunales.

Resumo

Este artigo concentra-se na turbulência político-constitucional que Donald J. Trump vem gerando desde que foi eleito presidente dos Estados Unidos. Por um lado, nos referimos aos principais litígios e problemas políticos como sinais da atual crise constitucional nos Estados Unidos e suas consequências no nível nacional e internacional. Por outro lado, explicamos os indicadores da crise constitucional em dois níveis de análise. O primeiro considera os ataques de Trump às liberdades constitucionais dos americanos, enquanto o segundo estuda o enfraquecimento do direito internacional consuetudinário causado pelas políticas de Trump. O artigo revela evidências empíricas de todas as questões acima mencionadas para explicar o aumento de litígios perante os tribunais distritais e a própria Suprema Corte dos Estados Unidos. Portanto, este trabalho indica que o papel do judiciário será um fator-chave para deter os ataques de Trump contra o estado de direito nos Estados Unidos.

Palavras-chave

Trump; crise constitucional; valores democráticos; litígios; papel dos tribunais.

Summary: 1. Undertones of the Constitutional Crisis in the United States. 2. The Background: Constitutional Misinterpretation. 2.1 Electoral rules on campaign finance created/shaped by the Supreme Court of the United States. 3. Setting the Scene: A Long Path for an Improbable Impeachment. 4. Domestic Constitutional Litigation: Trump v. Minorities. 4.1 Ban on Muslim travelers (Hawaii v. United States). 4.2 Deferred action for childhood arrivals. 4.3. Trump v. domestic environmental laws and the Paris Agreement. 4.4 Children v. Climate change: Juliana. 5. Negative Impact on the International Rule of Law. 5.1 Withdrawals: Human Rights Council, Jerusalem Embassy and Iran nuclear deal. 5.2 Jerusalem Embassy. 5.3 Iran nuclear deal. 6. Conclusions. Bibliography.

Introduction

American democracy lays on its core values described in the 1776 Declaration of Independence and the 10 amendments ratified in 1791. There, we can find the very structural categories of civil liberties, government subjected to the law, stability of the administration, respect for international law, federalism, and harmony between states, equality and equal protection before the law, free elections, political rights, and judicial review. Such values have been in constant development since the early days of independence and—for two centuries—have been shaped and interpreted by the American Congress and the Supreme Court of the United States as cornerstones of American democracy. In 1913, Roosevelt warned of the importance of taking into account the public interest when issuing decisions in a democracy facing the emerging power of big business.[1] Nowadays, after witnessing how money allowed Trump to win the White House race, we can observe how most of the American constitutional values have been tense and at risk. The personality and free style of Trump's government has shadowed American politics and its role of leadership in the western world.

Taking into account the core values of American democracy, this paper depicts the jurisprudential background on electoral expenditure that allowed Trump to win the presidency. It also focuses on the main litigious and political-constitutional issues as signals of the on-going constitutional crisis in the United States and its consequences in the international scenario. The study is divided into two parts. The first part will unveil the doctrine created by the Supreme Court of the United States, which would *de facto* change the First Amendment, expanding the scope of civil rights in favor of corporations by allowing them to participate in electoral campaigns. Our assumption is that such doctrine facilitated Donald Trump's victory in 2016. The second part will explain the indicators of the American constitutional crisis within two levels of analysis. The first one considers Trump's multiple attacks against constitutional liberties, minority rights, children's rights, and the

1 Theodore Roosevelt, "The big stick and the square deal," in *An Autobiography,* New York, MacMillan, 1913.

increasing litigation of civil society against the president's anti-environmental policies. We left aside several conflicts on federal competences (created through constitutional directives[2]) between the central administration and big cities.[3] The second level entails some of the disruptive public policies from Trump's government against customary international law (e.g., moving the U.S. Embassy to Jerusalem, withdrawing from climate regulations, as well as the Iran nuclear deal and the United Nations Human Rights Council). This concern has been highlighted by Koh in terms of the tense relationship between the U.S. and international law in the future.[4]

The empirical evidence of all the above-mentioned issues demonstrates increasing levels of constitutional litigation in both District Courts and the U.S. Supreme Court. Therefore, the role of the judiciary will be a key factor in blocking Trump's policies and his pervasive attacks on constitutional liberties and the rule of law. The volatile climate under Trump's administration allows us to observe how an authoritarian executive power can create a set of constitutional tensions ending up in the arena of judicial review. Hence, the increasing level of constitutional litigation means pressure for the federal judiciary, as well as an unnecessary burden for the U.S. Supreme Court and other American democratic institutions.

1. Undertones of the Constitutional Crisis in the United States

Modern politics in the U.S. are changing enough to say that American constitutional values are becoming a "Trumpocracy" substantiated by fascist indicators.[5] In an age of global challenges and the need for multidimensional cooperation based on political leadership-collaboration, the rest of the world is legally, politically and environmentally concerned. The dangers of the global political turbulence created by Trump-populism[6] demand strong domestic and regional leadership based on internationalism and rational-constitutional solutions, rather than demagogic ste-

2 These problems also represent constitutional issues, such as discrimination, sanctuary laws, and federalism-anti-urbanism. "Cities such as Cleveland, New York, Detroit, Birmingham, El Paso, Austin, Miami, Charlotte, Greensboro, and others have been the main targets of their respective legislatures' preemptive legislation" (Richard C. Schragger, "The attack on american cities," *Texas Law Review* 96 (6), at https://texaslawreview.org/the-attack-on-american-cities/)

3 Sachargger argues that the attack on the cities is not simply a function of present-day polarized American politics. Anti-urbanism is instead deeply embedded in the structure of American federalism, as I have been arguing. The relative weakness of the American city has often puzzled observers, who note that the U.S. constitutional system is otherwise highly decentralized. Ibid.

4 Harold H. Koh states that "A looming question is whether the Trump Administration's many initiatives will permanently change the nature of America's relationship with international law and its institutions" (*The Trump Administrations Against International Law*, Series 5213, 2017, Faculty Scholarship, at http://digitalcommons.law.yale.edu/fss_papers/5213).

5 See this conceptualisation in David Frum, *Trumpocracy: The Corruption of the American Republic*, New York, Harper, 2018. The context of how Trump is eroding American democratic practices is explained by Madeleine Albright, *Fascism. A Warning*, New York, Harper, 2018.

6 Philip Alston, "The populist challenge to human rights," *Journal of Human Rights Practice* 9 (1) (2017), pp. 1-15.

reotypes along with backlashes against the United Nations (UN) and core values of international law.

Historically, there have been moments of constitutional crisis in the United States; after *Worcester v. Georgia* in 1832, the Supreme Court was unable to enforce the judgment that prohibited Georgia from expelling the Cherokee nation from its land. President Andrew Jackson refused to give effect to the judgment handed down by Marshall.[7] Similarly, in the aftermath of *Brown v. Board of Education*, a high school in Little Rock, Arkansas, accepted nine black students, but local authorities and the governor of Arkansas resisted ending segregation and tried to avoid the orders of *Cooper v. Aaron* (1958). In response, President Eisenhower sent army paratroopers to accompany black students to school in order to enforce the constitutional judgment. The crisis ended, and civil liberties prevailed on political and majoritarian (white people) viewpoints.

To label the type of crisis, we must take into account the categories of constitutional crisis and constitutional rot developed by Balkin. He argues that "a constitutional crisis occurs when a constitution is about to fail at its central task."[8] In his viewpoint, the types of constitutional crises are: disobedience of the constitution announced by politicians or military officials (including the announcement that they will no longer play by the constitutional rules), and the disobedience of judicial orders.[9] Additionally, he establishes that constitutional rot creates risks to democratic politics by playing political polarization, demonizing opposition; this may lead to deadlocks and a political system unable to govern effectively.[10] Both labels on these constitutional issues (crisis and rot) depend on questions of time: brief for crisis and slow process for rot.[11]

Under these theoretical assumptions, we argue that Trump exhibits actions and behaviors that fit in both issues of constitutional crisis and constitutional rot. Nonetheless, according to Balkin, after a year of Trump's administration, the United States was not yet in a constitutional crisis.[12]

Since the beginning of his term, to date, Trump has been polarizing his own country and the rest of the world with every decision he makes, with little or no care for the consequences of his policies towards most of the American families or against the values of international community. Therefore, in the background, the 2016 outcome exposed the weakness of the democratic/electoral rules in America and the pervasive influence of money in politics defeating free and fair elections, making more and more visible the pitfalls of American democracy.

7 Edwin A. Milles, "After John Marshall's Decision: Worcester v. Georgia and the Nullification Crisis," *Journal of Southern History* 4 (39) (1973), pp. 519-544.

8 Jack M. Balkin, "Constitutional crisis and constitutional rot," in Mark Tushnet *et al.* (eds.), *Constitutional Democracy in Crisis?*, 2018, Oxford, OUP, p. 14.

9 *Ibid*, p. 14.

10 *Ibid*, p. 19.

11 *Idem.*

12 *Ibid*, p. 28.

Although money in electoral campaigns is not new, and it had already been approved by legislative directives and jurisprudential approaches, from a pure constitutional perspective, we assume that the U.S. Supreme Court distorted the First Amendment as a core political-constitutional value, allowing exactly the same individual rights — related to democratic participation and freedom of speech — for individuals and corporations.

The signs of a constitutional crisis and politics tending to rot in the United States have been warned by both scholars and global media.[13] Before the 2016 elections, Fukuyama labeled U.S. democracy as partisan polarization, vetocracy, and the failure of the political class.[14] For Coates, the decline of American democracy is located in the structural failures of the constitution itself.[15] Perhaps, if we fully appreciate the long pathway towards corporative political intervention in terms of electoral expenses, we will understand how constitutional values and political rights were transformed by the Supreme Court into (insatiable) commercial rights. In fact, a recent study criticizes the jurisprudential decisions that have allowed corporations protect their interests behind the Constitution avoiding regulation of their business.[16]

Additionally, there are critics on inequality of electoral participation when corporations spend enormous amounts of money in campaigns.[17] Others frankly say that the electoral and political system have been corrupted by money,[18] because electoral reforms became a fallacy to moderate private money in campaigns.[19]

However, the constitutional recognition of corporative free speech has not just damaged American democracy from within. Since the very beginning of Trump's presidency, he has been issuing executive orders[20] and pushing for a deregulatory agenda on health and environmental issues, while leading a government without serious knowledge of public administration. In fact, his team has been constantly suffering chaos and betrayals. Alston points out that,

13 E.g. Simon Tisdall, "American democracy is in crisis, and not just because of Trump," *The Guardian*, at https://www.theguardian.com/commentisfree/2018/aug/07/american-democracy-crisis-trump-supreme-court; Zachary Wolf, "How to know when is a constitutional crisis," CNN, 2019, in https://edition.cnn.com/2019/05/08/politics/trump-constitutional-crisis/index.html

14 Francis Fukuyama, "American political Decay or Renewal? The Meaning of the 2016 Election," *Foreign Affairs* 95 (4) (2016), pp. 58-68.

15 Joseph Coates, "Democracy in America. A darkening future," *Technological forecasting & social change* 113 (A) (2016), pp. 4-6.

16 With an historical analysis departing from the Fourteen Amendment, see Adam Winkler, We the Corporations: How American Businesses Won Their Civil Rights, New York, Liveright Publishing Corporation, 2018. Within this line of reason see also Carol Anderson, *One Person No Vote. How Voter Suppression is Destroying Our Democracy,* London, Bloomsbury, 2018.

17 Robert E. Mutch, *Buying the vote. A history of the electoral campaign Reform*, Oxford, OUP, 2014.

18 Zephyr Teachout, *Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United*, Cambridge, Harvard University Press, 2014.

19 John Samples, *The Fallacy of Campaign Finance Reform, 2006*, Chicago, University of Chicago Press, 2017.

20 In 2017, Trump published 55 executive orders, 35 in 2018 and 25 as of June 2019, in https://www.federalregister.gov/presidential-documents/executive-orders, accessed June 29, 2019.

> almost every senior appointment he has made has been a person from the far right of the political spectrum. Many of his choices bring a total lack of expertise to the relevant portfolio, but they nonetheless are advocates of radical changes to existing policies.[21]

This radicalization of Trump's decisions has brought volatility to the central government ever since 2017, which persists to this day. Among many others, Trump has sacked essential figures such as the Secretary of State (Rex Tillerson), the Attorney General (Sally Yates), the National Security Adviser (Michael Flynn), the Federal Bureau of Investigation Director (James Comey), the Health and Human Services Secretary (Tom Price), and the White House Communications Director (Anthony Scaramuci). At the end of 2018, Nicky Haley resigned from her position as U.S. Ambassador in the United Nations General Assembly.[22] But the most significant personal problem for Trump could be his potential impeachment. His former Lawyer, Michael Cohen, pleaded guilty for tax evasion, illegal campaign contributions, false statement to Congress and false statements to financial institutions.[23]

From his first year of administration until spring 2019, Trump has been capturing the attention of legal scholars who labeled him as a "global constitutional breaching experiment".[24] Based on his abnormal behaviors, "Trumpism represents an attack on the three foundational features of the global constitution—democracy, human rights, and the rule of law, the ultimate effects of that attack are yet to be determined".[25] Two and a half years later, the attack has evolved into concrete actions and a regular basis of pervasive U.S. foreign policy (e.g., promoting a coup and supporting a new president in Venezuela in early 2019).

In the domestic scenario, we have witnessed a high level of aggression in U.S. federal agencies separating immigrant children (even toddlers) from their families, while putting their integrity and life in extreme danger. In the international sphere, the Paris Agreement withdrawal was considered a global risk in fighting climate change. Our assumption is that only constitutional justice could represent a barrier for Trump's aggressive policies, both in the domestic and international arenas.[26] However, federal courts and tribunals are also under Trump's pressure. His agencies have unleashed unprecedented levels of litigation against Obama's public policies. He began by appealing the program extending healthcare services

21 Philip Alston, *op. cit.*, p. 2.

22 See report "You're Hired! You're Fired! Yes, the Turnover at the Top of the Trump Administration Is … 'Unprecedented'," at https://www.nytimes.com/interactive/2018/03/16/us/politics/all-the-major-firings-and-resignations-in-trump-administration.html

23 See the Sentencing Memorandum, delivered in *United States of America v. Michael Cohen*, U.S. District Court Southern District of New York, 12, 07, 2018.

24 Jonathan Havercroft, *et al.*, "Editorial: Donald Trump as global constitutional breaching experiment," *Global Constitutionalism*, 7 (1) (2018), pp. 1-13.

25 *Ibid.*, p. 4.

26 Regarding immigrant children, a federal judge has ordered the reunification of those separated from their families as soon as possible. See *Ms. L v. ICE, Case No.: 18cv0428 DMS (MDD),* Order Granting Plaintiffs' Motion for Class wide Preliminary Injunction, June 26, 2018.

for those in margin of poverty and services on a universal basis (Obamacare[27]), but lost every single attempt to suppress the Affordable Care Act.

Another episode that pulled the strings of constitutional matters was the confirmation of Brett Kavanaugh to the Supreme Court. During the process, some scholars warned that "the insistence on moving forward at this juncture threatens great damage to our constitutional system of checks and balances. With this nomination, a president with increasing personal legal exposure has chosen a potential judge for his own legal proceedings".[28] As expected, the confirmation polarized an already fragmented country even more. Apart from the media pressure emphasizing on alleged sexual misconducts, gender violence, and the honor of a constitutional judge, we also witnessed the authoritarian position of the executive pushing the Senate to confirm his proposal in spite of Kavanaugh's lack of temperament and impartiality observed during the Senate hearings.[29] In sum, the undertones of an American constitutional crisis became loud noise.

Furthermore, another ingredient emerging from the political outcome of the 2016 presidential election has been the polarization from Trump's hate speech and bigotry politics, mostly with negative consequences, while putting both U.S. Constitutionalism and the international rule of law in continuous tension. Many journalists have documented and warned about the loss of control in the Trump administration; for instance, Bob Woodward has qualified Trump's government as a mess, anarchy, and disorder within the White House.[30]

In the domestic scenario, the president's inflammatory speech has not allowed dialogic solutions to reconcile antagonistic positions, such as the country's historic discrimination and the inclusion of all American people (native, racial, and many religious minorities) in the political life. Instead, the president's speech has been fueling racial discrimination against minorities, women, Muslims, Latinos, and so on. Moreover, he has been dismissing peaceful strategies[31] to prevent mass shootings,[32] favoring environments of harassment against children of "illegal aliens,"

27 Previously challenged in *King et Al v. Burwell*, 576 US (2015). Currently, in *New York v. United States Department of Labor*, the District Court of Colombia will revisit rules created by the Trump's administration to skirt the scope of the Affordable Care Act.

28 See Laurence H. Tribe, *et al.*, "Unresolved recusal issues require a pause in the Kavanaugh hearings," 2018, at https://www.brookings.edu/wp-content/uploads/2018/09/Unresolved-Recusal-Issues-Require-a-Pause-in-Kavanaugh-Hearings_FINAL.pdf

29 According to former Justice Paul Stevens's response, October 4, 2018. http://time.com/5416084/john-paul-stevens-brett-kavanaugh/. Finally, the Senate voted 50–48 in favor of Kavanaugh. Date of consultation November 20, 2018.

30 Bob Woodward, *Fear. Trump in the White House*, New York, Simon & Schuster, 2018.

31 Regarding the Pittsburgh Synagogue shooting, Donald J. Trump mentioned that, "If there was an armed guard inside the temple, they would have been able to stop him," at https://edition.cnn.com/2018/10/27/politics/trump-jba-death-penalty-pittsburgh/index.html

32 See "Until November 3 2018, there have been 27 mass shootings with a total of 12253 deaths," as noted in https://www.gunviolencearchive.org/reports/mass-shooting, accessed December 10, 2018.

and from the mainstream administration, contributing to create chaos within his own presidential squad.[33]

Regarding international politics, Trump's clash against international values in the United Nations (e.g., moving the U.S. embassy to Jerusalem, breaching United Nations Security Council Resolution 478,[34] with negative consequences on the peace-process in the Middle East) gives us an idea of the deep political and factual disintegration of the American democratic values: the rule of law, constitutionalism and even international governability.[35] This has been recently evidenced by the longest government shutdown in U.S. history (35 days), provoked by the president's capricious desire to build a new border wall with Mexico.[36] An additional factor that cannot be overlooked in order to understand the current polarization within the country is the president's hate speech against mainstream media in the United States, labeling all information against him or his administration as "fake news."[37]

2. The Background: Constitutional Misinterpretation

We sustain that the prelude for the crisis began with the constitutional tergiversation of free speech,[38] allowing corporations to impose their views holding political rights. Corporations in the United States have far more political rights than in any other part of the world (money and politics go hand in hand).[39] This has been evidenced by the enormous amounts of money raised by the two candidates from the major political parties running for the Oval Office, during the presidential campaign of 2016.[40] However, the history of the closeness/convenience between the political mainstream and corporations is not new at all. Since the early

33 In this sense Greg Miller, "The Apprentice. Trump, Russia and the Subversion of American Democracy," 2018; several incidents are narrated by Michael Wolff, *Fire and Fury: Inside the Trump White House*, New York, Henry Holt and Company, 2018.

34 See Resolution in Security Council, Res 478/80, August 1980.

35 See "Trump again threatens to shut down government," at https://www.washingtonpost.com/business/economy/trump-backs-down-from-threat-to-shut-down-government-at-end-of-month/2018/09/05/bfb5992c-b11f-11e8-a20b-5f4f84429666_story.html?utm_term=.a4e0afc9554c, accessed October 3, 2018.

36 For a complete report on this unprecedented shutdown, see "US Gov't Shutdown: How Long? Who is Affected? Why Did it Begin?," at https://www.aljazeera.com/news/2019/01/gov-shutdown-long-affected-190107150120233.html, accessed January 3, 2019.

37 On August 2018, "Hundreds of US news outlets [...] synchronized their editorials in an effort to hit back at Donald Trump, following his repeated attacks on the media," at https://www.independent.co.uk/news/world/americas/us-politics/trump-fake-news-media-350-editorials-us-president-a8493946.html, accessed October 22, 2018.

38 Gregory T. Gundlach *et al.*, "Corporate political action: The erosion of the political speech doctrine," *Journal of Business Research,* 20 (4), (1992), pp. 331-346.

39 As Calin Brown notes, "[m]oney and politics in the United States has become increasingly intertwined...," in "Grant to Trump: How court cases influenced campaign finance," at https://www.opensecrets.org/news/2017/10/grant-to-trump-how-court-cases-influenced-campaign-finance/, accessed September 6, 2018.

40 Bill Allison *et al.*, "Tracking the 2016 presidential money race," *Bloomberg,* September 12, 2016, at https://www.bloomberg.com/politics/graphics/2016-presidential-campaign-fundraising/, accessed September 6, 2018.

days of the U.S. Republic, rich businessmen had been economically involved in presidential elections to pursue their own agendas should their nominee become victorious.[41] Ultimately, this matter would reach new heights by means of the Supreme Court of the United States, when it paved the way through its jurisprudence towards unlimited electoral expenses coming from corporations in support of, or in opposition to, a candidate.[42] In procedural terms, corporations were officially allowed to spend as much money as they desired. In substantive terms, the First Amendment mutated into a political weapon for corporations/rich politicians to influence electoral results.

2.1 Electoral rules on campaign finance created/shaped by the Supreme Court of the United States

For 44 years now, the electoral rules for corporations have been shaped by the Supreme Court of the United States. In 1976, the Court issued its first landmark decision, *Buckley v. Valeo*,[43] in which for the very first time, it considered that "political money is speech, since 'virtually every means of communicating ideas in today's mass society require the expenditure of money'".[44] This tergiversation of freedom of speech would change the way in which American politics would develop subsequently. The plaintiffs claimed that the Federal Election Campaign Act (FECA) of 1971,[45] amended by Congress in 1974 to "(1) limit and require disclosure of contributions, (2) limit expenditures, and (3) mandate participation in a publically [*sic*] financed presidential election program—violated both First Amendment free speech protections and Fifth Amendment Due Process guarantees".[46]

The Supreme Court considered that contribution limits were necessary in order to prevent corruption, given that "candidates would feel indebted to big donors,"[47] but, concluded that "the limitations on campaign expenditures, on independent expenditures by individuals and groups, and on expenditures by a candidate from his personal funds are constitutionally infirm".[48] Therefore, restricting these contributions would allow a curtailment on free speech and association.[49] In other

41 As Michael Nelson writes: "Wealthy entrepreneurs who donated money to Ulysses Grant in the 1868 election included Jay Cooke, Cornelius Vanderbilt, A. T. Stewart, Henry Hilton and John Astor. As one historian wrote: 'Never before was a candidate placed under such great obligation to men of wealth as was Grant'" (Michael Nelson (ed.), *Guide to the Presidency and the Executive Branch*, 5th ed., vol. I, London, CQ Press, 2013, p. 289).

42 See "Grant to Trump: How court cases influenced campaign finance," at https://www.opensecrets.org/news/2017/10/grant-to-trump-how-court-cases-influenced-campaign-finance/, accessed September 6, 2018.

43 See *Buckley v. Valeo*, Case No.75-436, January 1976; Ralph Winter, "The history and theory of Buckley v. Valeo," *Journal of Law and Policy* 6 (1) (1997).

44 See Brian Cruikshank, "Campaign Finance and the Supreme Court," *NCSL-National Conference of State Legislatures'*, at http://www.ncsl.org/research/elections-and-campaigns/campaign-finance-and-the-supreme-court.aspx, accessed June 16, 2018.

45 See the "Federal Election Campaign Act," at https://www.opensecrets.org/resources/learn/glossary.php#Federal+Election+Campaign+Act

46 See n. 44.

47 See n. 39.

48 *Buckley v. Valeo*, Case No.75-436, January 1976, 143.

49 *Ibid.*, 24-25.

words, candidates would be able to spend unlimited amounts of money towards their campaigns.[50] Three decades later, this controversial decision would ultimately benefit Trump's presidency aspirations. It would also evidence what we consider a gradual drift from the nation towards "the tyranny of mere wealth, the tyranny of a plutocracy".[51]

Two years after *Buckley*, the Supreme Court rendered its sentence in *First National Bank of Boston v. Bellotti*.[52] It began when legislators for the state of Massachusetts barred the Bank and several other corporations "from donating to ballot initiatives that did not directly affect their business".[53] Subsequently, the corporations appealed to the Supreme Court, which delivered the opinion allowing "corporations to make contributions to ballot initiatives".[54] The Court also announced that, "the inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual".[55] In other words, corporations, associations and/or unions had "the same rights as individuals to express political views".[56]

A few decades passed and the problems on campaign finance law in the United States kept adding up.[57] Attempting to solve some of these issues, in 2002 Congress passed the Bipartisan Campaign Reform Act (BCRA),[58] aiming "to eliminate 'soft money'[59] donations and more tightly regulate independently funded ads".[60] The BCRA also prohibited corporations from funding "electioneering communications".[61] However, a year after the BCRA was enacted, a group of politicians and associations challenged the constitutionality of the Act in the case *McConnell v. FEC*.[62] The plaintiffs had also challenged

> that the definition of "public communications" as communications that support or attack a clearly identified federal candidate is unconstitutional, vague and overbroad; adding [...] that soft money contributions to state and local candidates for "public communications" do not corrupt or appear to corrupt federal candidates.[63]

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50 See n. 39.

51 As stated by Theodore Roosevelt: longing for a "real democracy" for the American people more than a century ago (Roosevelt, *op. cit.*).

52 See *First National Bank of Boston v. Bellotti*, Case No.76-1172, November 1978.

53 See n. 44.

54 *Ibid.*

55 See n. 52, 777 para. See also Tamara Piety, "Citizens United and the Threat to the Regulatory State," *Michigan Law Review First Impressions* 109 (2010), p. 17.

56 See n. 39.

57 See n. 39. See also *Federal Election Commission v. Furgatch*, Case No. 88-6047, March 9, 1989.

58 See The Bipartisan Camping Reform Act of 2001, also known as the McCain-Feingold Act.

59 See n. 39. As Calin Brown notes, "soft money encompasses the money donated to parties that support general political activities, such as voter registration drives."

60 *Idem.*

61 See "Making electioneering communications," at https://www.fec.gov/help-candidates-and-committees/making-disbursements-ssf-or-connected-organization/making-electioneering-communications/, accessed June 18, 2018.

62 *McConnell v. FEC*, Case No. 02-1674, December 10, 2003.

63 *Ibid.*, para. 9.

In a 5-to-4 decision, the Supreme Court determined that most of the BCRA's provisions were constitutional, adding that "there is substantial evidence to support Congress' determination that large soft-money contributions to national political parties give rise to corruption and the appearance of corruption".[64] The judges, however, determined that this was necessary to prevent corporations and unions from eluding the law. In that sense, Justices O'Connor and Stephens delivered the Court's opinion, establishing that "money, like water, will always find an outlet," while also upholding "BCRA's two principal, complementary features: the control of soft money and the regulation of electioneering communications".[65]

Four years afterwards, the U.S. Supreme Court would reverse the *McConnell* decision by means of the debatable case *FEC v. Wisconsin Right to Life*[66] (WRTL). Regarding the facts, WRTL "ran ads encouraging viewers to contact two U.S. Senators during the 2004 presidential election (...), but broke the BCRA's rules restricting political ads funded by corporations in the 60 day period before an election".[67] WRTL considered the BCRA unconstitutional and subsequently sued the Federal Election Commission (FEC). The U.S. Supreme Court decided that the law's ban on corporate electioneering communications was indeed unconstitutional. The Court held that the ads were genuine issue ads, "not express campaign speech" or its "functional equivalent".[68] As long as the ads left out campaign speech or "express advocacy,"[69] "then a group could easily spend limitless amounts without needing to disclose their donors or report political spending to the FEC".[70] This has motivated massive spending by the so-called "'dark money groups' (also known as 501(c)4s[71]) like political non-profits that are not legally obligated to disclose their contributions".[72] During the 2008 presidential election, dark money spending increased from 0 to around 25 million. Four years later, the amount rose to 141 million.[73]

However, the WRTL decision also evidenced the importance of the composition of the U.S. Supreme Court when deciding certain cases. In 2006, Justice Day O'Connor retired and was replaced by a conservative-leaning justice in Samuel

64 See n. 44; see also n. 39.

65 See n. 62, paras. 118-119.

66 *FEC v. Wisconsin Right to Life*, Case No. 06-969, June 25, 2007. See also, Mathew W. Modell "Protecting free speech in electioneering communications: FEC v. Wisconsin Right to Life," *North Carolina Journal of Law and Technology* 9 (30) (2007); Richard L. Hasen, "Beyond incoherence: The Roberts Court's Deregulatory turn in FEC v. Wisconsin Right to Life," *Minnesota Law Review* 92 (2008); A. Shireen, "FEC v. Wisconsin Right to... Petition?: A Comment on FEC v. Wisconsin Right to Life," *Stanford Law Review* 61 (2) (2008), pp. 443-458.

67 See n. 39.

68 See n. 66, p. 3.

69 Regarding the term "express advocacy," see, for example, *Buckley v. Valeo*, Case No. 75-436, January 30, 1976; *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986).

70 See n. 39.

71 See "Political Action Committee (PAC)', 'Dark Money Groups," at https://campaignlegal.org/update/pacs-super-pacs-dark-money-groups-whats-difference

72 See n. 39.

73 *Idem.*

Alito, "shifting the dynamic on the Court".[74] Brown, who cites Brendan Fisher, an attorney with the Campaign Legal Center, wrote that "between the *McConnell* and the *Wisconsin Right to Life* ruling, really nothing changed in terms of the statistics or practices of campaign finance, (…) all that changed was the makeup of the Court". Finally, having to agree with Fisher, "[this case] is a reminder that the ideology of the Court makes a significant impact".[75] Currently, the U.S. Supreme Court maintains a solid conservative majority with the two Trump-nominated justices, Neil Gorsuch and Brett Kavanaugh. Consequently, this majority will most likely lean the Court towards a predominantly conservative ideological trend in future decisions, which could put at risk historic landmark cases such as *Roe v. Wade*.

Citizens United v. FEC[76] worsened an already polluted campaign finance legislation in the U.S.; for many, a *status quo* attributed to the Supreme Court.[77] It all began when Citizens United, a conservative non-profit organization, tried airing a film they produced titled *Hillary: The Movie*, close to the 2008 Democratic presidential primaries. The film was considered an electioneering communication and deemed illegal under the BCRA, enforced by the FEC.[78] In 2010, the U.S. Supreme Court would deliver yet another surprising decision, resulting in a major change in campaign finance law. A 5-to-4 majority held that, under the First Amendment, corporate independent expenditure for political broadcasts in candidate elections cannot be restricted.[79] The Court struck down BCRA provisions prohibiting "corporations, unions and PACs[80] from making independent expenditures and election communications, as 'the government may not suppress political speech on the basis of the speaker's corporate identity'".[81] To put it briefly, since the U.S. Supreme Court reasoned that associations, corporations and unions were also covered under the First Amendment, they were now granted legal rights to use "unlimited sums of money on ads and other communications designed to support or oppose a candidate".[82] However, they were still barred from contributing directly to federal candidates, but were able to contribute unlimitedly to organizations such as Super PACs[83] and 501(c)4s supporting or opposing a candidate.[84]

Unsurprisingly, *Citizens United* has provoked disapproval among U.S. legal scholars. Piety, for example, considers that it "has been roundly criticised for its potential effect on elections and its display of judicial immodesty (or 'activism')".[85] The

74 *Idem.*
75 *Idem.*
76 *Citizens United v. FEC*, Case 08-205, January 2010.
77 See n. 39; Bradley A. Smith, "Campaign Finance and Free Speech: Finding the Radicalism in Citizens United v. FEC," *Harvard Journal of Law and Public Policy* 41 (2018), pp. 139-151; Piety, *op. cit.*, pp. 16-22.
78 See n. 44; See also n. 76, 2-4.
79 See n. 76, 57.
80 See n. 71. "A Political Action Committee (PAC)".
81 See n. 44.
82 *Idem.* See also n. 39.
83 See "Super PAC," at https://campaignlegal.org/update/pacs-super-pacs-dark-money-groups-whats-difference
84 See n. 44.
85 See n. 55; Piety, *op. cit.*, p. 16.

scholar also suggests the possibility of a "corrupted electoral process" — an argument rejected by the U.S. Supreme Court in this case —, while paradoxically reasoning that "multinational corporations are permitted to participate on the same terms as individual citizens".[86] This is a simple, yet problematic "rhetorical framing of corporations as 'citizens',"[87] whereas Smith considers that *Citizens United* "is the case that has people all over the country horribly upset and thinking this is a crime against the Constitution and the common man".[88]

One of the most recent cases regarding campaign finance laws decided by the U.S. Supreme Court is *McCutcheon v. FEC*.[89] However, it addressed direct contributions rather than outside spending.[90] The BCRA of 2002 had established two limits to campaign contributions: "The first, called base limits, restricts how much money a donor may contribute to a particular candidate or committee. [...] The second, called aggregate limits, restricts how much money a donor may contribute in total to all candidates or committees".[91] This last restriction affected McCutcheon's donation desires, and the case was ultimately heard by the Supreme Court.[92] He "argued that the aggregate cap on total giving violated his First Amendment rights by limiting his speech and the number of candidates with whom he could associate, without any compelling government rationale".[93] The U.S. Supreme Court in a once again very close 5-to-4 decision,[94] considered that the aggregate limits did little, if anything, to address the concerns that the BCRA was meant to address (the prevention of corruption), "while seriously restricting participation in the democratic process".[95] Therefore, the aggregate limits were invalid under the First Amendment.[96] As expressed by Calin Brown, "while base limits (the amount allowed to be donated to each candidate) were deemed constitutional, aggregate limits were ruled a violation of a person's freedom of speech".[97]

This decision has also sparked severe criticism from academia in the United States. It has been said that, "the Roberts Court has applied a blinded, highly abstract First Amendment doctrine that ignores the distortion of democratic responsiveness caused by big money in politics; current anti-majoritarian policy outcomes demonstrate the lack of meaningful representation experienced by the non-wealthy".[98]

86 *Ibid.*, pp. 21-22.
87 *Ibid.*, p. 22.
88 See n. 77; Smith, *op. cit.*, p. 141.
89 *McCutcheon v. FEC*, Case No. 12-536, April 2, 2014.
90 See n. 39.
91 See n. 89, 3.
92 Shaun McCutcheon, a successful engineer and small business owner from Alabama who wanted to contribute the symbolic amount of $1776 to a substantial number of candidates running for Congress (Brian Smith, "McCutcheon v. Federal Election Commission: An Unlikely Blockbuster," *New York University Journal of Law & Liberty* 9 (2015), pp. 48-49).
93 *Ibid.*, 49.
94 *Ibid.*, 53-54.
95 See n. 89, 3.
96 *Ibid.*
97 See n. 39.
98 Liz Kennedy and Seth Katsuya Endo, "The World According to, and After, McCutcheon v. FEC, and Why It Matters," *Valparaiso University Law Review* 49 (2) (2015), pp. 533-581.

Katsuya and Kennedy also evidence a "corruption of democracy," "because a democratic system of government is one in which elected officials are responsive to the views of each citizen considered as political equals".[99] Adding that, "to the extent that the First Amendment is understood to be in service to democracy, it cannot be read as permitting a small, wealthy minority to accrue political power deriving from their wealth—that, after all, is the definition of a plutocracy."[100]

And that is indeed what has become of the American democracy nowadays—an evident powerful minority of wealthy individuals and corporations, amassing political power over the average U.S. citizen. The U.S. Supreme Court, by way of its decisions, has evidently aggravated an already corrupted electoral system when corporations are able to participate on the same terms as individuals in a democratic state.

3. Setting the Scene: A Long Path for an Improbable Impeachment

There have been several proceedings and ongoing investigations aiming to hold Trump accountable for his alleged collusion with Russia and felonies committed during the White House race in 2016. Despite several individuals tied to Trump (e.g., Paul Manafort, Rick Gates, Michael Flynn, and so on) convicted by tax fraud, financial crimes, bank fraud, conspiracy, lying to the Federal Bureau of Investigation (FBI) and obstruction of justice, the House of Representatives has not been able to initiate an impeachment process.

One example of the corporative platform as key factor allowing Trump's victory in November 2016 is the incrimination of his legal adviser, Michael Cohen, for illegal payments to silence two women with whom Trump had extramarital affairs. In the Sentencing Memorandum that Cohen received, the U.S. Attorney highlighted the importance of corporations in such *iter criminis*:

> Between August 2016 and September 2016, Cohen agreed with Chairman-1 to assign the rights to the non-disclosure portion of Corporation-1's agreement with Woman-1 to Cohen for $125,000. Cohen then incorporated a shell entity called "Resolution Consultants LLC" to be used in the transaction [...] Cohen's commission of two campaign finance crimes on the eve of the 2016 election for President of the United States struck a blow to one of the core goals of the federal campaign finance laws: transparency [...].[101]

Along with this legal adviser's conviction, in September 2018, the president's former campaign chief, Paul Manafort, was convicted of financial and bank fraud.

99 *Ibid.*, p. 533.
100 *Idem.*
101 Sentencing Memorandum, *United States of America v. Michael Cohen*, U.S. District Court, Southern District of New York, July 2018.

Although the charges did not involve Trump directly, in November 2018, Justice Department Special Counsel Robert Mueller unveiled that Manafort lied to the FBI on payments that indirectly supported Trump's campaign.[102] We believe that the beginning of a formal inquiry in constitutional terms for a potential impeachment could be a matter of time. The prosecutors have collected enough material to substantiate that Trump committed federal crimes. The president's organization, campaign, foundation, inaugural committee and transition team are currently under criminal investigation. Furthermore, in January 2019, Democrats took control of the House of Representatives. The outcome could well be an intense fight, particularly coming from two fronts: move several bills on gun control to reduce violence, and the initiation of impeachment proceedings.

4. Domestic Constitutional Litigation: Trump v. Minorities

The current president of the United States does not seem to be aware of the power of constitutional justice and the importance of respect that should prevail *vis à vis* the executive power and the justices. In fact, during his campaign, he showed no consideration towards Ruth Bader Ginsburg when he mentioned her as saying "very dumb political statements".[103] Moreover, on what ought to be considered an attack on judicial independence, in November 2018, he referred to a federal judge who blocked his new asylum rules as an "Obama judge".[104]

4.1 Ban on Muslim travelers (Hawaii v. United States)

The constitutional history of the United States has been tied to racial discrimination and segregation. Whether by law or by constitutional interpretation, racial minorities have obtained rights in constitutional arenas. Since the times of the British colonies, pre and post-civil war in the nineteenth century, Leslie F. Goldstein has pointed out the legal and constitutional assumptions over who counted as white. Such cases involved not only south East Asians, but also Mexican-Americans, people of India, Afghans, Filipinos, Syrians, Lebanese, and Armenians.[105] Bearing this context in mind, children's rights in the U.S. have been an issue for a while.

102 United States District Court for the District of Columbia, *United States of America v. Paul J. Manafort, Jr.* crim. No. 17-201-1 (ABJ), filed July 2018.

103 Joan Biskupic, "Justice Ruth Bader Ginsburg calls Trump a 'Faker' he says she could resign," *CNN*, July 13, 2016, at https://edition.cnn.com/2016/07/12/politics/justice-ruth-bader-ginsburg-donald-trump-faker/index.html, accessed January 20, 2019.

104 William Cummings, "Us does have 'Obama judges': Trump responds to Supreme Court Justice Roberts' rebuke," *USA Today*, November 21, 2018, at https://www.usatoday.com/story/news/politics/2018/11/21/john-roberts-trump-statement/2080266002/, accessed January 27, 2019.

105 Leslie F. Goldstein, *The U.S. Supreme Court and Racial Minorities. Two Centuries of Judicial Review on Trial*, Cheltenham, Edward Elgar, 2017, p. 7. Overall, within a framework of prejudices, the U.S. Supreme Court has denied constitutional protection to freedom of religion, property and access to justice to American natives. See Walter R. Echo-Hawk, *In the Courts of the Conqueror. The 10 Worst Indian Law Cases Ever Decided,* Fulcrum, 2010.

However, in our present times, Trump's political pressure has put the rights of children with immigrant background in serious risk. In that sense, Trump has been governing by decree. Such broad discretion is a power exercised by the U.S. president to determine national security threats in case of uncertain menaces from abroad. As an example of this exercise, we have Trump's Proclamation No. 9645 (09/2019), in which he sought to improve vetting procedures for foreign nationals traveling to the United States, by identifying ongoing deficiencies in the information needed to assess whether nationals of particular countries with certain religious background represented a security threat. The "Presidential Proclamation" issue eventually reached the U.S. Supreme Court through the case *Hawaii v. United States*,[106] where the majority of the justices opted to protect the so-called "national security concerns," instead of religious liberty and a rational basis of freedom to travel and non-discrimination based on national origin. Dissenting, Justice Sotomayor argued that "the majority holds otherwise by ignoring the facts, misconstruing our legal precedent, and turning a blind eye to the pain and suffering the Proclamation inflicts upon countless families and individuals, many of whom are United States citizens".[107] Moreover, due to Trump's statements, Justices Sotomayor and Ginsburg highlighted the ideological basis of the Proclamation. In this regard, the ban "leaves undisturbed a policy first advertised openly and unequivocally as a 'total and complete shutdown of Muslims entering the United States' because the policy now masquerades behind a façade of national-security concerns".[108] Ultimately, the non-invalidating policy decision from the majority in the Court brought back an old constitutional decision: *Korematsu v. United States*.[109] Harold H. Koh pointed out the mistakes made in the constitutional interpretation of *Hawaii v. United States*. The first one was the lack of factual basis to justify the travel ban; the second was the absence of a "credible response to a *bona fide* security threat, and rested on ever-shifting, rather than consistent, rationales."[110]

In *Hawaii v. United States*, the Supreme Court liquidated a core content of the First Amendment, as well as the freedom to travel for Muslims under blurred assumptions and no genuine facts. Justice Sotomayor highlighted that the Court's *stare decisis* completely ignores that the State "may not adopt programs or practices... which aid or oppose any religion. This prohibition is absolute".[111] Undeniably, at a first glance we could perceive the materialization of Trump's hate speech towards Muslims and other minorities.

106 *Trump v. Hawaii*, 17-965, 585 US (2018).
107 *Trump v. Hawaii*, 17-965, 585 US (2018), *Dissenting Opinion*, Justice Sotomayor, joined by Justice Ginsburg.
108 *Idem*.
109 *Korematsu v. United States*, 323 US 314 (1944), in which restrictions of rights against a single racial minority were labeled as suspected category but justified, due to the military necessity and the state of war with Japan in WWII.
110 Harold Hongju Koh, Symposium: Trump v. Hawaii—Korematsu's ghost and national-security masquerades, at http://www.scotusblog.com/2018/06/symposium-trump-v-hawaii-korematsus-ghost-and-national-security-masquerades/
111 Justice Sotomayor cited a wide range of cases that protect freedom of religion in the prohibition to favor any particular doctrine or religion. See *Trump v. Hawaii*, 17-965, 585 US (2018), *Dissenting Opinion*, Justice Sotomayor, with whom Justice Ginsburg joins, pp. 2-4.

4.2 Deferred action for childhood arrivals

Historically, descendants of Hispanic immigrants have faced exclusion and unlawful treatment in the U.S. It was only until 1982, in *Plyler v. Doe,*[112] that the constitutional interpretation stressed the necessity to include the children of illegal immigrants in the country's education system. In *Plyler v. Doe*, Justice Powell put the finger on the sore spot reasoning that

> "it hardly can be argued rationally that anyone benefits from the creation within our borders of a subclass of illiterate persons, many of whom will remain in the State, adding to the problems and costs of both State and National Governments attendant upon unemployment, welfare, and crime."[113]

Within this teleology, 30 years later Obama's administration would create a program named Deferred Action for Childhood Arrivals (DACA), to provide protection from removal and work authorization to approximately 700,000 unauthorized individuals (known as dreamers) who were brought to the country[114] before their sixteenth birthday, as of June 2012.

However, trying to maintain promises made during his presidential campaign, Trump has been actively working to end the Obama-era program. In September 2017, Trump's administration announced a gradual winding down of the program. The "dreamers" would no longer have their two-year status renewed when it expired; in other words, "all participants would lose protections within two years".[115] Immediately, human rights organizations challenged the decision based on its racial background only seeking to diminish children's rights, especially those from Hispanic descent.

Since then, several courts have been ruling both in favor and against the president's administration stance on the program. On January 9, 2018, a federal court from California ordered the federal government, "to maintain the DACA program on a nationwide basis on the same terms and conditions as were in effect before the rescission on September 5, 2017".[116] However, in March 2018, another federal court upheld the administration's rescission of DACA, but prohibited the government from using information on DACA applications for purposes of immigration enforcement.[117]

112 Michael A. Olivas, *No undocumented child left behind: Plyler v. Doe and the Education of Undocumented Schoolchildren (Citizenship and Migration in the Americas)*, New York, New York University Press, 2012.

113 *Plyler v. Doe,* Case No. 80-1538, June 15, 1982.

114 Sara Pierce, Jessica Bolter, and Andrew Selee, *US Immigration Policy Under Trump: Deep Changes and Lasting Impacts*, Washington, Migration Policy Institute, 2018, p. 9.

115 *Idem.* See "Attorney General Sessions Delivers Remarks on DACA," at https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-daca, accessed November 30, 2018.

116 *The Regents of the University of California and Janet Napolitano, in her official capacity as President of the University of California, v. U.S. Department of Homeland Security and Kirsten Nielsen*, No. C 17-05211, Dismissal and Granting Provisional Relief, January 9, 2018.

117 See n. 114. See also, *CASA de Maryland, et al. v. Dept. of Homeland Security, et al.*, Civil No. RWT-17-2942, March 5, 2018.

Nevertheless, in April 2018, a fourth federal judge from the District of Columbia ordered the United States Citizenship and Immigration Services (USCIS) to continue accepting DACA applications, even if they came from new applicants, "unless DHS can offer a fuller explanation of the program's unlawfulness and unconstitutionality".[118] On August 3, 2018, the district court reaffirmed its conclusion considering that the Department of Homeland Security's (DHS) September 2017 decision to rescind DACA was "arbitrary and capricious," additionally stating that

> the Court did not hold in its prior opinion, and it does not hold today, that DHS lacks the statutory or constitutional authority to rescind the DACA program. Rather, the Court simply holds that if DHS wishes to rescind the program—or to take any other action, for that matter—it must give a rational explanation for its decision.[119]

Finally, and to worsen an already complicated legal landscape, in May 2018, Texas and six other states sued the federal government, claiming that the creation of DACA in 2012 had been unlawful and unconstitutional.[120]

A possible solution for this challenging scenario, as some experts have advised, could well come from the U.S. Congress and its legislative functions. However, lawmakers have been working for many months now and have not yet agreed to pass legislation providing "legal status and/or a path to citizenship to DACA recipients and other unauthorized immigrants brought to the country as children..."[121] Ultimately, by way of the numerous lawsuits in federal courts regarding the DACA program, this matter will eventually reach a now predominantly conservative Supreme Court, particularly after the most recent and controversial appointment of Justice Kavanaugh by Trump. Undoubtedly, and to say the least, this is uncomforting for both DACA supporters and the hundreds of thousands of "dreamers" who have now endured years of uncertainty in the United States.

4.3 Trump v. domestic environmental laws and the Paris Agreement

Since his presidential campaign, Trump has expressed aversion towards environmental protection and has labeled climate change as a hoax. The battle of Trump against the environment began as soon as he took office, pressing all the federal government agencies to overturn laws and policies that regulate climate change[122] gas and toxic emissions, air pollution regarding refineries, industries,

118 See n. 114, 9-10.

119 *National Association for the Advancement of Colored People, et al., Plaintiffs, v. Donald J. Trump, et al.* Civil Action No. 17-1907, August 3, 2018.

120 See n. 114, 10. See also, *Texas et al. v. United States et al.*, No. 1:18-cv-00068, Motion for Preliminary Injunction and Memorandum in Support, May 2, 2018.

121 See n. 114, 10.

122 See, for example, the order to withdraw all domestic policies to combat climate change and the working groups on the issue, "The Interagency Working Group on Social Cost of Greenhouse Gases (IWG), which was convened by the Council of Economic Advisers and the OMB Director, shall be disbanded, and the following documents issued by the IWG shall be withdrawn as no longer representative of

power plants and releasing industrial waters into public waterways. Up until November 20, 2018, the Center for Biological Diversity has highlighted 95 lawsuits issued all over the country against several federal agencies (such as the Secretary of the Interior, the United States Environmental Protection Agency, U.S. Fish and Wildlife Service) for their failure to protect endangered species and for allowing projects to carry on without a prior environmental review.[123] On late 2018, a federal judge halted one of Trump's projects that is causing environmental damage on indigenous lands. The federal judge from Montana granted injunctive relief against federal defendants and TransCanada on the XL Pipeline. In this decision, the judge barred preconstruction activities for Keystone Pipeline until the environmental review was complete.[124] It would seem as though Trump's lawyers really do not care so much about legality and constitutional directives. Additionally, without statutory competence or authority, Trump has been trying to dismantle the regulatory framework of administrative agencies and "fostering an atmosphere of uncertainty"[125] in detriment of environmental measures for products (pesticides), health (medical substances, tobacco uses), and energy (plant safety, methane emissions). In response to this, non-governmental organizations (NGOs) have lodged lawsuits against all these arbitrary and capricious suspensions and lack of regulations. So far, the outcome for Trump's litigators has not been favorable, at least in the proceedings listed in Table 1:[126]

Table 1. Proceedings with an unfavorable outcome

Case	Court/District
Clean Air Council v. Pruitt	862 F.3d 1 (D.C. Cir. 2017).
American Lung Association v. EPA	No. 17-1172 (D.C. Cir.)
Natural Resources Defense Council (NRDC), et al. v. EPA	No. 17-1157 (D.C. Cir.).
Becerra v. U.S. Department of Interior	276 F. Supp. 3d 953 (N.D. Cal. 2017).
California v. U.S. Bureau of Land Management, 277 F. Supp. 3d 1106	appeal dropped (9th Cir. No. 17-17456, N.D. Cal. 2017),
Pineros y Campesinos Unidos del Noroeste v. Pruitt	293 F. Supp. 3d 1062 (N.D. Cal. 2018).
Natural Resources Defense Council, Inc. v. Perry	302 F. Supp. 3d 1094 (N.D. Cal. 2018).
Clean Water Action v. Pruitt, No. 17-0817, 2018 WL 1865919 (D. D.C. 2018)	Appeal docketed (D.C. Cir. No. 18-5149).

governmental policy." Presidential Executive Order on Promoting Energy Independence and Economic Growth, March 28, 2017, at https://www.whitehouse.gov/presidential-actions/presidential-executive-order-promoting-energy-independence-economic-growth/, accessed September 20, 2018.

123 See detailed information on each lawsuit in the Center for Biological Diversity at https://www.biologicaldiversity.org/campaigns/trump_lawsuits/index.html, accessed September 20, 2018.

124 See *Indigenous Environmental Network v. United States Department of State, et al., Defendants and TransCanada Keystone Pipeline,* Order Filed November 8, 2018.

125 Bethany A. Davis Noll and Alec Dawson, *Deregulation Run Amok. Trump Era. Regulatory Suspension and the Rule of Law,* New York, Institute for Policy Integrity, 2018, p. 2.

126 Policy Integrity, *Roundup: Trump-Era Deregulation in the Courts. Updated on December 10, 2018*, at https://policyintegrity.org/documents/Deregulation_Roundup.pdf

Case	Court/District
Natural Resources Def. Council v. National Highway Traffic Safety Administration	894 F.3d 95 (2d Cir. 2018).
Clean Air Council v. Pruitt	862 F.3d 1 (D.C. Cir. 2017).
American Lung Association v. EPA	No. 17-1172 (D.C. Cir.)

Source: Own elaboration.

On the one hand, Trump's efforts to create administrative chaos for federal and local agencies are the main indicator of the disruptive activity ordered by the Oval Office in order to favor an increase of unregulated industrial and commercial activities, in spite of previous rules issued to prevent such effects. On the other hand, by avoiding regulations, Trump rewrites the law and modifies the Constitution by decree, weakening the structure and day-to-day work of institutions and federal agencies.

4.4 Children v. Climate change: Juliana

Juliana et al. v. United States started against the Obama administration in 2015. In the litigation arena, under the expansive interpretation of 14th Amendment, children and NGOs have been suing the federal government for its failure (through their actions and omissions) to protect their life and liberty; for violating their fundamental constitutional rights and their human dignity.[127] After several months of pressure and barriers from the government lawyers, in late 2017, the Ninth Circuit allowed the case of *Juliana et al. v. United States* to go forward. However, throughout 2018 and 2019, Trump's administration has filed motion after motion to avoid trial (petitions to stay, and three writs for mandamus before the U.S. Supreme Court); so far, all have been denied. Trump's legal team has argued that the case does not have constitutional grounds under Article III of the American Constitution by saying that: "a quick look at the climate change issues and actions pending before Congress and the Executive Branch"—including the Green New Deal, carbon tax legislation, and the replacement for the Clean Power Plan—"confirms that Plaintiffs have petitioned the wrong branch".[128] Nonetheless, the fact of the matter is that this climate lawsuit is unprecedented in the United States, and could join the constitutional approach of several lawsuits and judgments that courts are issuing in many parts of the world in pursuit of the noble task of rescuing humanity from the calamity of global warming.[129] If we take into account that the United States is one of the largest emitters of greenhouse gases, this landmark lawsuit could provide new constitutional directives against legislative omissions, lack of protection for new generations and instigate a more decisive response to save humanity.

127 This case began in the Obama era. See, *Juliana et al. v. United States*, U.S. District Court of Oregon (6:15-cv-01517-TC, Eugene division), Opinion and Order, November 10, 2016.

128 *Juliana et al. v. United States*, Case: 18-73014, D.C. No. 6:15-cv-01517-AA, District of Oregon, Eugene division, March 24, 2019, *Briefing Completed, Oral Argument Scheduled for June 4.*

129 E.g. in Colombia, *STC4360-2018* (April 4, 2018), *Urgenda v. Kingdom of the Netherlands*, C/09/456689/HA ZA 13-1396, The Hague Court of Appeal, October 9, 2018.

5. Negative Impact on the International Rule of Law

Trump continuously denies climate change. In 2017, against all the customary law tradition forged since 1972 through the United Nations Conference on the Human Environment in Stockholm,[130] arguing the supposed disadvantages for the United States, Trump ordered the withdrawal from the Paris Agreement.[131] For Harold Koh,

> that notification would then take another year to take legal effect, meaning that Trump cannot legally withdraw the U.S. from the Agreement until November 4, 2020, the day after the next U.S. presidential election. Until then, Trump's withdrawal announcement has no more legal meaning than one of his tweets.[132]

Although his order has no legal effects in international legal procedures, Trump is rolling back significant domestic legislation challenging the Paris Agreement directives. In contrast, New York, California, Washington, and 600 major cities have formed a coalition to reduce greenhouse gas emissions and uphold the Paris Agreement.[133] In times of the Anthropocene, it is fundamental to legally bind countries with the aim of producing regional public policies within a structural framework but Trump and their team dismissed climate change allowing corporations to emit green house. If we connect Trump's backlash against climate change and the gross problems it is causing everywhere, we can understand the danger and the ignorance of the president of the U.S.

5.1 Withdrawals: Human Rights Council, Jerusalem Embassy, and Iran nuclear deal

Unquestionably, a strong commitment and respect towards human rights has been absent in Trump's administration. Many of the president's words, actions and omissions during his two years in the Oval Office have evidenced his complete disinterest in this imperative matter. As expressed by Elsina Wainwright, "this is a major departure from previous presidencies, both Republican and Democrat. Since President Carter, human rights and democracy promotion have been a constant, if selectively pursued, part of U.S. foreign policy".[134] And although many believed that this country had an important role to play regarding the promotion of human rights and democracy across the globe, under Trump's isolationist philosophy, these ideals have completely vanished.

130 For instance, the United Nations Framework Convention on Climate Change (1992); the conferences on climate from the Kyoto Protocol (1997); the Bali Action Plan (2007); Copenhagen (2009); Cancun (2010); Durham (2011); the Doha Conference (2012); the Warsaw Conference (2013); the Paris Agreement (2015), the Marrakech Conference (2016); and the Bonn Conference (2017).

131 See https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/

132 Koh, *op. cit.*, p. 436.

133 *Ibid.*, p. 437.

134 Elsina Wainwright, *Human Rights and the Trump Administration*, Sydney, United States Studies Centre at the University of Sydney, 2018, p. 1.

To demonstrate the above-mentioned U.S. stance, the president's administration recently withdrew from the UN Human Rights Council, arguing—among other issues—dubious human rights records from many of its member countries, as well as "the council's continued and well documented bias against Israel".[135] The announcement was made on June 19, 2018, through a joint statement by the Secretary of State, Mike Pompeo, and the then-U.S. Ambassador to the United Nations, Nikki Haley.[136] In Pompeo's tough words, the Council had "become an exercise in shameless hypocrisy—with many of the world's worst human rights abuses going ignored, and some of the world's most serious offenders sitting on the council itself".[137] Though this withdrawal might not come as a surprise to some, a year before, at the Graduate Institute of Geneva, Ambassador Haley gave a speech were she described the country's malcontent towards the Council and the need for deep reforms within it. She had mentioned back then, "if it fails to change, then we must pursue the advancement of human rights outside of the Council".[138]

However, the fact that the United States is turning its back on the Council allows other countries such as China and Russia to become greater threats for democracy and human rights not only domestically, but also on a global scale.[139] Some countries such as Australia encouraged the United States not to withdraw its membership from the Council, reasoning that the needed reforms could have been more effectively promoted and defended from within it[140]—a view that the authors of this investigation completely agree on.

5.2 Jerusalem Embassy

Another highly controversial decision made by the Trump presidency was the recognition of Jerusalem as Israel's capital and the relocation of its Embassy from Tel Aviv to the Holy City. Such a declaration spurred international condemnation and criticism due to the enormously debatable move by the administration.[141]

135 See "Remarks on the UN Human Rights Council-Mike Pompeo and Nikki Haley," U.S. Department of State, Washington D.C., June 19, 2018, at https://www.state.gov/secretary/remarks/2018/06/283341.htm, accessed November 20, 2018.

136 On October 9, 2018, Nikki Haley announced she was resigning as U.S. Ambassador to the UN, but would leave her post by January 2019. See, for example, "Read Nikki Haley's Resignation Letter to Trump," CNN-Politics, October 10, 2018, at https://edition.cnn.com/2018/10/09/politics/nikki-haley-resignation-letter/index.html, accessed November 22, 2018.

137 See n. 134.

138 See Ambassador Nikki Haley's Remarks at the Graduate Institute of Geneva on "A Place for Conscience: The Future of the United States in the Human Rights Council," United States Mission to the United Nations, Geneva Switzerland, June 6, 2017. Remarks available at https://usun.state.gov/remarks/7828, accessed November 20, 2018.

139 See n. 134, 2.

140 *Idem.*

141 See for example, Jim Zanotti, *Israel: Background and U.S. Relations in Brief*, Washington, Congressional Research Service, Library of Congress, 2019, pp. 7-8, at https://fas.org/sgp/crs/mideast/R44245.pdf; "Trump and the Palestinians: A Timeline. From Jerusalem's Recognition as Israeli Capital to Closure of PLO Mission, a list of US Moves Since Trump Took Office," *Al Jazeera News*, September 18, 2018, at https://www.aljazeera.com/news/2018/09/trump-palestinians-timeline-180910164949522.html. Additionally, for an academic perspective on the matter in the realm of international law, see Victor Kattan, "Why US Recognition of Jerusalem Could be Contrary to International Law," *Journal of Palestine Studies* 47 (3) (2018), pp. 72-92.

This act “represented a departure from the decades-long U.S. executive branch practice of not recognizing Israeli sovereignty over Jerusalem or any part of it”.[142] The announcement took place on December 6, 2017, by means of a Presidential Proclamation[143] signed after a speech at the White House.[144] In his statement, Trump justified his stance by citing the Jerusalem Embassy Act of 1995,[145] which remained dormant for more than 20 years, since every previous president had “exercised the law’s waiver, refusing to move the U.S. embassy to Jerusalem or to recognize Jerusalem as Israel’s capital city”.[146]

Trump had also mentioned in his statement at the White House, that his announcement would mark “the beginning of a new approach to conflict between Israel and the Palestinians”.[147] In contrast, the reality is that the situation in the Middle East has worsened an already critical ordeal. The Israeli-Palestinian peace process has become much more intricate and tensions have risen in the last months,[148] influencing Trump’s administration to retaliate against the Palestinians who have been suffering from a series of measures in the form of economic aid cuts throughout this year.[149]

Finally, amid violence and bloodshed in the region, an interim Embassy opened its doors in Jerusalem on May 14, 2018.[150] This is a symbolic date for both Palestinians and Israelis: The Palestinians commemorated 70 years since the Nakba or “catastrophe,” consisting of an ethnic cleansing of Palestinian towns and cities by Zionist paramilitaries in 1948; paradoxically, the Israelis celebrated their 70th anniversary as State.[151] Just recently, on October 18, 2018, Secretary of State Pompeo announced the merging of the U.S. Embassy in Jerusalem and the U.S. Consulate General in Jerusalem into a single diplomatic mission, while also emphasizing on the administration’s strong commitment “to achieving a lasting and comprehensive peace that offers a brighter future to Israel and the Palestinians”.[152]

142 International Business Publications, *Israel Government System Handbook: Strategic Information and Developments*, Washington D.C., November 2018, p. 72.

143 See Presidential Proclamation “Recognizing Jerusalem as the Capital of the State of Israel and Relocating the United States Embassy to Israel to Jerusalem,” Proclamation 9683 of December 6, 2017, at https://www.gpo.gov/fdsys/pkg/FR-2017-12-11/pdf/2017-26832.pdf, accessed November 20, 2018.

144 *Statement by President Trump on Jerusalem*, Washington D.C., The White House, December 6, 2017, at https://www.whitehouse.gov/briefings-statements/statement-president-trump-jerusalem/, accessed November 24, 2018.

145 Jerusalem Embassy Act of 1995 (P.L. 104-45), S. 1322 (104th), November 8, 1995.

146 See n. 144.

147 *Idem.*

148 See n. 141, 8-13.

149 See n. 141, 8-10. See also “Trump and the Palestinians: A Timeline.”

150 *Idem.*

151 *Idem.*

152 See the remarks by Secretary of State Michael Pompeo “On the Merging of U.S. Embassy Jerusalem and U.S. Consulate General Jerusalem,” U.S. Department of State, Press Statement, October 18, 2018, at https://www.state.gov/secretary/remarks/2018/10/286731.htm, accessed November 27, 2018.

5.3 Iran nuclear deal

On July 14, 2015, Iran, along with the six powerful nations that had been negotiating with Tehran about its nuclear program since 2006 (i.e., France, United Kingdom, the United States, Russia, China, and Germany, also known as the P5+1), agreed on a Joint Comprehensive Plan of Action (JCPOA).[153] The JCPOA required restrictions to insure that Iran's nuclear program would "be used for purely peaceful purposes in exchange for a broad lifting of U.S., European Union (EU), and United Nations (U.N.) sanctions on Iran".[154] On January 16, 2016, the agreement was implemented after meeting Iran's nuclear requirements, in addition to U.N. Security Council Resolution 2231 endorsing the JCPOA. Both the Obama and (thereafter) Trump administrations certified that Iran abided by its JCPOA commitments.[155]

However, on yet another debatable move by the Trump administration—and after much criticism towards the JCPOA accord[156]—the president decided, on May 8, 2018, to withdraw from the deal and re-impose sanctions lifted or waived from the agreement.[157] Among many other things, Trump argued that the JCPOA contained "disastrous flaws" that only benefited Iran's malign influence in the region.[158] On August 6, 2018, by way of Executive Order 13846, the president re-imposed certain sanctions with respect to Iran.[159] On the other hand, on July 16, Iran instituted proceedings against the United States before the International Court of Justice (ICJ).[160] It alleged violations of the Treaty of Amity, Economic Relations and Consular Rights (1955) between the two states,[161] relating "to the decision of the U.S. to 're-impose in full effect and enforce' sanctions and restrictive measures [...] in connection with the JCPOA...,"[162] while also requesting the court to indicate provisional measures.[163]

153 See the summary in Paul Kerr and Kenneth Katzman, *Iran Nuclear Agreement and U.S. Exit*, Washington, Congressional Research Service, Library of Congress, 2018._

154 *Idem.*

155 *Idem.*

156 *Ibid.*, pp. 22-24.

157 *Ibid.*, pp. 24. See also, Presidential Memoranda, "2Ceasing U.S. Participation in the JCPOA and Taking Additional Action to Counter Iran's Malign Influence and Deny Iran all Paths to a Nuclear Weapon," Washington D.C., The White House, May 8, 2018, at https://www.whitehouse.gov/presidential-actions/ceasing-u-s-participation-jcpoa-taking-additional-action-counter-irans-malign-influence-deny-iran-paths-nuclear-weapon/; "President Trump Withdraws the United States from the Iran Deal and Announces the Reimposition of Sanctions," *American Journal of International Law*, 112 (3) (2018), pp. 514-522.

158 See "Presidential Memoranda," *cit.*

159 Federal Register, Presidential order "Reimposing Certain Sanctions with Respect to Iran," Presidential Documents, Executive Order 13846 of August 6, 2018, at https://www.treasury.gov/resource-center/sanctions/Programs/Documents/08062018_iran_eo.pdf

160 See the latest developments from the International Court of Justice, "Alleged Violations of the 1955 Treaty of Amity, Economic Relations and Consular Rights (*Islamic Republic of Iran v. United States of America*)," at https://www.icj-cij.org/en/case/175, accessed November 22, 2018.

161 See the Treaty of Amity, Economic Relations and Consular Rights of 1955, signed in Tehran on August 15, 1955.

162 See the ICJ's press release on "Iran institutes proceedings against the United States with regard to a dispute concerning alleged violations of the Treaty of Amity, Economic Relations and Consular Rights between Iran and the United States and requests the Court to indicate provisional measures," No. 2018/34, July 17, 2018, p. 1, at https://www.icj-cij.org/files/case-related/175/175-20180717-PRE-01-00-EN.pdf, accessed December 3, 2018.

163 *Ibid.*, pp. 1-2.

On October 3, 2018, the ICJ issued its unanimous order establishing certain provisional measures—specifically, the lifting of sanctions on Iran's importation of goods and services necessary for the safety of civil aviation and humanitarian goods, until a final decision on the merits is reached by the court.[164] Along with the order, Judge Cançado Trindade presented an extensive and eloquent separate opinion where, among other issues, he underlined three significant points regarding the handling

> of the *cas d'espèce*, namely: a) international peace: treaties as living instruments, in the progressive development of international law; b) provisional measures: the existence of the Court's *prima facie* jurisdiction; and c) the prevalence of the imperative of the realization of justice over the invocation of "national security interests".[165]

Finally, by order dated October 10, 2018, the court fixed April 10, 2109 and October 10, 2019, as respective time-limits for the filing of a Memorial by Iran and a Counter-Memorial by the United States.[166]

6. Conclusions

There are evident signs of the American constitutional crisis. In terms of constitutional root, an essential factor was the constitutional mutation of the First amendment provoked by the U.S. Supreme Court. From the moment corporations obtained the "constitutional right" to spend unlimited amounts of money in electoral campaigns, the judiciary created a category of political rights that are non-existent in the U.S. Constitution. Therefore, by the voice of the Supreme Court, the unequal distribution of political participation in favor of certain political actors weakened the right of individuals who are not able to spend money in campaigns. Trump is the consequence of such misinterpretation of free speech as a constitutional right.

Therefore, other signals of the current constitutional rot pointed by Balkin can be found in the way that Trump conducts his foreign policy against international law. However, after two and a half years of Trump's administration, we have seen notorious symptoms and increasing levels of constitutional crisis. Thirty-five days of government shutdown had been unprecedented in U.S. politics. If such deadlock suffered by American families—due to the suspension of work in federal agencies—between December 2018 and January 2019 is not considered a crisis,

164 See ICJ's "Alleged Violations of the 1955 Treaty of Amity, Economic Relations and Consular Rights (*Islamic Republic of Iran v. United States of America*)," Request for the Indication of Provisional Measures, Order, October 3, 2018, p. 28, at https://www.icj-cij.org/files/case-related/175/175-20181003-ORD-01-00-EN.pdf, accessed December 3, 2018.

165 See the Separate Opinion of Judge CançAdo Trindade in the case "Alleged Violations of the 1955 Treaty of Amity, Economic Relations and Consular Rights (*Islamic Republic of Iran v. United States of America*)," 2, at https://www.icj-cij.org/files/case-related/175/175-20181003-ORD-01-01-EN.pdf, accessed December 3, 2018.

166 See press release regarding the Fixing of Time-Limit for the Filing of the Initial Pleadings in the case, "Alleged Violations of the 1955 Treaty of Amity, Economic Relations and Consular Rights (*Islamic Republic of Iran v. United States of America*)," No. 2018/53, October 16, 2018, at https://www.icj-cij.org/files/case-related/175/175-20181016-PRE-01-00-EN.pdf, accessed December 5, 2018.

what else could we expect? If the head of an executive branch cannot respect and understand issues of public interest (constitutional liberties and customary law), his constitutional disobedience is irrefutable. In the current scenario, Trump not only lacks constitutional and political morality but the instability of his government has also been creating tension among political actors/institutions and putting the functionality of the Constitution in its essential values in risk: creating international tensions and degrading international law (the most recent example has been his breach of international law regarding Venezuela and his continuous attempts of war with Iran). Trump and his decisions more genuinely represent an autocratic regime (issuing all sorts of executive orders) than the dialogical routes of a democracy. Hence, when the head of the executive branch does not understand his own role in a constitutional democracy and portrays himself with political and legal superiority over the Congress and the Supreme Court, constitutional directives fade away into capricious politics.

In the international arena, Trump has been creating unprecedented tension in places where the problems were already difficult enough. The examples of Jerusalem, the Iran nuclear deal and the withdrawal from the Paris Agreement demonstrate a total refusal to contribute to a peaceful and sustainable world. Ultimately, in order to end this constitutional crisis, only the work of civil society and the power of judges could avoid the total miscarriages of a failed democracy and prevent increasing levels of a constitutional crisis in the United States.

Bibliography

Albright, Madeleine, *Fascism: A Warning*, New York, Harper, 2018.

Allison, Bill *et al.*, "Tracking the 2016 presidential money race," *Bloomberg*, December 9, 2016, at https://www.bloomberg.com/politics/graphics/2016-presidential-campaign-fundraising/

Alston, Philip, "The populist challenge to human rights," *Journal of Human Rights Practice* 9 (1), 2017, p. 2. DOI: https://doi.org/10.1093/jhuman/hux007

Anderson, Carol, *One Person No Vote. How Voter Suppression is Destroying Our Democracy,* London, Bloomsbury, 2018.

Balkin, Jack M., "Constitutional crisis and constitutional rot," in Mark Tushnet *et al.*, *Constitutional Democracy in Crisis?* Oxford, OUP, 2018.

Barday, Shireen A., "FEC v. Wisconsin Right to... Petition?: A Comment on FEC v. Wisconsin Right to Life," *Stanford Law Review* 61 (2) (2008).

Biskupic, Joan, "Justice Ruth Bader Ginsburg calls Trump a 'Faker' he says she could resign," *CNN*, July 13, 2016, at https://edition.cnn.com/2016/07/12/politics/justice-ruth-bader-ginsburg-donald-trump-faker/index.html

Briffault, Richard, "The Challenge of a New Preemption," *Stan Law Review* 70 (2018), pp. 1195-2027, 1998-1999. At https://www.stanfordlawreview.org/print/article/the-challenge-of-the-new-preemption/

Coates, Joseph, "Democracy in America. A darkening future," *Technological Forecasting & Social Change* 113 (A) (2016). DOI: https://doi.org/10.1016/j.techfore.2016.10.029

Davis Noll, Bethany A., and Alec Dawson, *Deregulation Run Amok. Trump Era. Regulatory Suspension and the Rule of Law,* New York, Institute for Policy Integrity, November 2018, 2.

Echo-Hawk, Walter R., *In the Courts of the Conqueror. The 10 Worst Indian Law Cases Ever Decided,* Fulcrum, 2010.

Frum, David, *Trumpocracy: The Corruption of the American Republic*, New York, Harper, 2018.

Fukuyama, Francis, "American political decay or renewal? The meaning of the 2016 election," *Foreign Affairs* 95 (4) (2016), pp. 58-68. At https://www.foreignaffairs.com/articles/united-states/2016-06-13/american-political-decay-or-renewal

Galbraith, Jean (ed.), "Contemporary practice of the United States relating to international law, 'President Trump withdraws the United States from the Iran deal and announces the reimposition of sanctions'," *American Journal of International Law*, 112 (3) (2018), pp. 514-522.

Goldstein, Leslie F., *The U.S. Supreme Court and Racial Minorities. Two Centuries of Judicial Review on Trial*, Cheltenham, Edward Elgar, 2017, p. 7.

Gundlach Gregory T., *et al.*, "Corporate political action: The erosion of the political speech doctrine," *Journal of Business Research* 20 (4) (1992), pp. 331-346. DOI: https://doi.org/10.1016/0148-2963(92)90038-D

Hasen, Richard L., "Beyond Incoherence: The Roberts Court's Deregulatory turn in FEC v. Wisconsin Right to Life," *Minnesota Law Review* 92 (2008). At https://ssrn.com/abstract=1003922

Havercroft, Jonathan, *et al.*, "Editorial: Donald Trump as global constitutional breaching experiment," *Global Constitutionalism* 7 (1), (2018), pp. 1-13. DOI: https://doi.org/10.1017/S2045381718000035

Kattan, Victor, "Why US recognition of Jerusalem could be contrary to international law," *Journal of Palestine Studies* 47 (3), (2018), pp. 72-92. DOI: http://doi.org/10.1525/jps.2018.47.3.72

Kelly, Caroline *et al.*, "Trump says Pittsburgh synagogue should have had armed guards," *CNN*, October 27, 2018, at https://www.cnn.com/2018/10/27/politics/trump-jba-death-penalty-pittsburgh/index.html

Kennedy, Liz and Seth Katsuya Endo, "The world according to, and after, McCutcheon v. FEC, and Why It Matters," *Valparaiso University Law Review*, 49 (2) (2015), p. 533. At https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2510940

Miller, Greg, "The Apprentice. Trump, Russia and the Subversion of American Democracy," 2018.

Milles, Edwin A., "After John Marshall's Decision: Worcester v. Georgia and the Nullification Crisis," *Journal of Southern History* 4 (39) (1973), pp. 519-544. DOI: http://doi.org/10.2307/2205966

Modell, Mathew W., "Protecting Free Speech in Electioneering Communications: FEC v. Wisconsin Right to Life," *North Carolina Journal of Law and Technology* 9 (2007). At http://ncjolt.org/protecting-free-speech-in-electioneering-communications-fec-v-wisconsin-right-to-life/

Mutch, Robert E., *Buying the vote. A history of the electoral campaign Reform*, Oxford, OUP, 2014.

Nelson, Michael (ed.), *Guide to the Presidency and the Executive Branch* (5th ed.), vol. I, London, CQ Press, 2013.

Olivas, Michael A., "No undocumented child left behind: Plyler v. Doe and the education of undocumented schoolchildren (Citizenship and Migration in the Americas)," New York, New York University Press, 2012.

Pierce, Sarah, Jessica Bolter, and Andrew Selee, "US immigration policy under Trump: Deep changes and lasting impacts," *Migration Policy Institute* 9 (2018). At https://www.migrationpolicy.org/research/us-immigration-policy-trump-deep-changes-impacts

Piety, Tamara R., "Citizens United and the Threat to the Regulatory State," *Michigan Law Review First Impressions* 109 (2010). At https://ssrn.com/abstract=1633639

Reilly, Katie, Justice Paul Stevens's response, *TIME*, 2018. https://time.com/5416084/jonio-paul-stevens-brett-kavanaugh/, accessed May 19, 2019.

Roosevelt, T., "The big stick and the square deal," *Theodore Roosevelt: An Autobiography,* New York, MacMillan, 1913.

Samples, John, *The fallacy of campaign finance reform, 2006*, Chicago, University of Chicago Press, 2017.

Schragger, Richard C., "The attack on American cities," *Texas Law Review* 96, (6), at https://texaslawreview.org/the-attack-on-american-cities

Smith, Bradley A., "Campaign finance and free speech: Finding the radicalism in Citizens United v. FEC," *Harvard Journal of Law and Public Policy* 41 (2018). At http://www.harvard-jlpp.com/wp-content/uploads/sites/21/2018/01/Smith_FINAL.pdf

Smith, Bradley A., "McCutcheon v. Federal Election Commission: An Unlikely Blockbuster," *New York University Journal of Law & Liberty* 9 (2015), pp. 48-49. At https://heinonline.org/HOL/LandingPage?handle=hein.journals/nyujlawlb9&div=6&id=&page=

Teachout, Zephyr, *Corruption in America: From Benjamin Franklin's snuff box to citizens united*, Harvard University Press, 2014.

Tisdall, Simon, "American democracy is in crisis, and not just because of Trump," *The Guardian*, 2018, at https://www.theguardian.com/commentisfree/2018/aug/07/american-democracy-crisis-trump-supreme-court, accessed May 19, 2019.

Tribe, Laurence H., *et al.*, "Unresolved recusal issues require a pause in the Kavanaugh hearings," 2018, at https://www.brookings.edu/wp-content/uploads/2018/09/Unresolved-Recusal-Issues-Require-a-Pause-in-Kavanaugh-Hearings_FINAL.pdf

Wainwright, Elsina, *Human Rights and the Trump Administration*, Sydney, United States Studies Centre at the University of Sydney, 2018, at https://assets.ussc.edu.au/view/99/a5/a4/97/c5/30/bc/fc/9a/cf/41/c3/28/e6/be/cc/original/959a3d253927020b0ed1a1bd671e65306f29b4f4/Human-rights-and-the-Trump-administration.pdf

Winkler, Adam, We the Corporations: How American Businesses Won Their Civil Rights, London, Liveright Publishing Corporation, 2018.

Winter, Ralph K., "The history and theory of Buckley v. Valeo," *Journal of Law and Policy* 6 (1) (1997). At https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1416&context=jlp

Wolf, Zachary, "How to know when there is a constitutional crisis," CNN, May 8, 2019, at https://edition.cnn.com/2019/05/08/politics/trump-constitutional-crisis/index.html, accessed May 19, 2019.

Wolff, Michael, *Fire and Fury: Inside the Trump White House*, New York, Henry Holt and Company, 2018.

Woodward, Bob, *Fear. Trump in the White House,* New York, Simon & Schuster, 2018.

Jurisprudence and cases

U.S. Supreme Court

Buckley v. Valeo, 424 US (1) (1974).

Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U. S. 520, 532 (1993).

Citizens United v. FEC, Case No. 08-205, January 21, 2010.

Edwards v. Aguillard, 482 U. S. 578, 593 (1987).

FEC v. Wisconsin Right to Life, Case No. 06-969, June 25, 2007.

Federal Election Commission v. Furgatch, Case No. 88-6047, March 9, 1989.

Federal Election Commission v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986).

First National Bank of Boston v. Bellotti, Case No.76-1172, November 9, 1978.

King et Al v. Burwell, 576 US (2015).

Korematsu v. United States, 323 US 314 (1944).

Larson v. Valente, 456 U. S. 228, 244 (1982).

McConnell v. FEC, Case No. 02-1674, December 10, 2003.

Plyler v. Doe, Case No. 80-1538, June 15, 1982.

Texas et al. v. United States et al., No. 1:18-cv-00068, Motion for Preliminary Injunction and Memorandum in Support, May 2, 2018.

Trump v. Hawaii, 17-965, 585 US (2018).

Trump v. Hawaii, 17-965, 585 US (2018), *Dissenting Opinion*, Justice Sotomayor, with whom Justice Ginsburg joins.

District Courts

Sentencing Memorandum, *United States of America v. Michael Cohen*, US District Court Southern District of New York, December 07, 2018.

United States District Court for the District of Columbia, *United States of America v. Paul J. Manafort, Jr.* crim. No. 17-201-1 (ABJ) Filed December 7, 2018.

Casa de Maryland, et al. v. Dept. of Homeland Security, et al., Civil No. RWT-17-2942, March 5, 2018.

Ms. L v. ICE, Case No. 18cv0428 DMS (MDD), Order Granting Plaintiffs' Motion For Classwide Preliminary Injunction, June 26, 2018.

Indigenous Environmental Network v. United States Department of State, et al., Defendants and TransCanada Keystone Pipeline, Order Filed November 8, 2018.

Juliana et al. v. United States, US. District Court of Oregon (6:15-cv-01517-TC, Eugene division), Opinion and Order, November 10, 2016.

National Association for the Advancement of Colored People, et al., Plaintiffs, v. Donald J. Trump, et al. Civil Action No. 17-1907, August 3, 2018.

The Regents of the University of California and Janet Napolitano, in her official capacity as President of the University of California, v. U.S. Department of Homeland Security and Kirsten Nielsen, No. C 17-05211, Dismissal and Granting Provisional Relief, January 9, 2018.

Other courts

International Court of Justice, Press release No. 2018/34, July 17, 2018, at https://www.icj-cij.org/files/case-related/175/175-20180717-PRE-01-00-EN.pdf.

International Court of Justice, "Alleged Violations of the 1955 Treaty of Amity, Economic Relations and Consular Rights (*Islamic Republic of Iran v. United States of America*)".

International Court of Justice, Request for the Indication of Provisional Measures, Order, October 3, 2018, at https://www.icj-cij.org/files/case-related/175/175-20181003-ORD-01-00-EN.pdf.

Colombia, Supreme Court, *STC4360-2018* (April 4, 2018).

The Netherlands, *Urgenda vs Kingdom of the Netherlands*, C/09/456689/HA ZA 13-1396, The Hague Court of Appeal, October 9, 2018.

Digital Sources

Federal Election Campaign Act, at https://www.opensecrets.org/resources/learn/glossary.php#Federal+Election+Campaign+Act

Al Jazeera News, "Trump and the palestinians: A timeline. From Jerusalem's recognition as Israeli capital to closure of PLO Mission, a list of US moves since Trump took office," September 18, 2018, at https://www.aljazeera.com/news/2018/09/trump-palestinians-timeline-180910164949522.html.

Al Jazeera, "US Gov't Shutdown: How Long? Who is Affected? Why Did it Begin?," Al-Jazeera & News Agencies, 2019, at <https://www.aljazeera.com/news/2019/01/gov-shutdown-long-affected-190107150120233.html, accessed May 19, 2019

Brown, Calin "Making electioneering communications", at https://www.fec.gov/help-candidates-and-committees/making-disbursements-ssf-or-connected-organization/making-electioneering-communications/>

Brown, Calin, "Grant to Trump: How court cases influenced campaign finance," Open Secrets, 2017, at https://www.opensecrets.org/news/2017/10/grant-to-trump-how-court-cases-influenced-campaign-finance/, accessed May 19, 2019.

Campaign illegal, "Political Action Committee (PAC)," "Dark Money Groups," at https://campaignlegal.org/update/pacs-super-pacs-dark-money-groups-whats-difference

Campaign illegal, "Super PAC", at https://campaignlegal.org/update/pacs-super-pacs-dark-money-groups-whats-difference

CNN, "Read Nikki Haley's Resignation Letter to Trump," CNN-Politics, October 10, 2018, at https://edition.cnn.com/2018/10/09/politics/nikki-haley-resignation-letter/index.html.

CNN, "Justice Ruth Bader Ginsburg calls Trump a 'faker,' he says she should resign", at https://edition.cnn.com/2016/07/12/politics/justice-ruth-bader-ginsburg-donald-trump-faker/index.html.

Congress of the US, Jerusalem Embassy Act of 1995 (P.L. 104-45), S. 1322 (104th), November 8, 1995. https://www.congress.gov/104/plaws/publ45/PLAW-104publ45.pdf

Cruikshank, "Campaign Finance and the Supreme Court," *NCSL-National Conference of State Legislatures', 2015,* at <http://www.ncsl.org/research/elections-and-campaigns/campaign-finance-and-the-supreme-court.aspx>, accessed May 19, 2019.

Department of State, "Remarks on the UN Human Rights Council-Mike Pompeo and Nikki Haley", U.S. Department of State, Washington D.C., June 19, 2018, at https://www.state.gov/secretary/remarks/2018/06/283341.htm

Department of State, Ambassador Nikki Haley's "Remarks at the Graduate Institute of Geneva on 'A Place for Conscience: the Future of the United States in the Human Rights Council," United States Mission to the United Nations, Geneva, Switzerland, June 6, 2017, at https://usun.state.gov/remarks/7828

Department of State, Michael Pompeo "On the Merging of U.S. Embassy Jerusalem and U.S. Consulate General Jerusalem," U.S. Department of State, Press Statement, October 18, 2018, at https://www.state.gov/secretary/remarks/2018/10/286731.htm.

Executive orders, at https://www.federalregister.gov/presidential-documents/executive-orders/donald-trump/2018

Federal Register, at https://www.federalregister.gov/presidential-documents/executive-orders, accessed June 29, 2019.

Forrest, Adam & Jon Sharman 'Trump vs news media: 350 organizations condemn US president in coordinated fightback', 2018, at https://www.independent.co.uk/news/world/americas/us-politics/trump-fake-news-media-350-editorials-us-president-a8493946.html, accessed May 19, 2019.

Government Publishing Office US, Presidential Proclamation "Recognizing Jerusalem as the Capital of the State of Israel and Relocating the United States Embassy to Israel to Jerusalem," Proclamation 9683 of December 6, 2017, at https://www.gpo.gov/fdsys/pkg/FR-2017-12-11/pdf/2017-26832.pdf

Gun Violence Archive, "Until November 3 2018, there have been 27 mass shootings with a total of 12253 deaths' as noted at https://www.gunviolencearchive.org/reports/mass-shooting

https://edition.cnn.com/2016/07/12/politics/justice-ruth-bader-ginsburg-donald-trump-faker/index.html

Kerr, Paul & Katzman, "Iran Nuclear Agreement and U.S. Exit", Congressional Research Service, Library of Congress, 2018), at https://fas.org/sgp/crs/nuke/R43333.pdf

Koh, Harold H., Symposium: Trump v. Hawaii — Korematsu's ghost and national-security masquerades, at http://www.scotusblog.com/2018/06/symposium-trump-v-hawaii-korematsus-ghost-and-national-security-masquerades/

Lu, Denise & Karen Yourish Report "You're Hired! You're Fired! Yes, the Turnover at the Top of the Trump Administration", *The New York Times*, 2018, at https://www.nytimes.com/interactive/2018/03/16/us/politics/all-the-major-firings-and-resignations-in-trump-administration.html

New York v. United States Department of Labor, at https://edition.cnn.com/2018/10/27/politics/trump-jba-death-penalty-pittsburgh/index.html, accessed May 19, 2019.

Presidential order "Reimposing Certain Sanctions with Respect to Iran," Executive Order 13846 of August 6, 2018, at https://www.treasury.gov/resource-center/sanctions/Programs/Documents/08062018_iran_eo.pdf.

Roundup: Trump-Era Deregulation in the Courts. Updated December 10, 2018, at https://policyintegrity.org/documents/Deregulation_Roundup.pdf

The US Department of Justice, "Attorney General Sessions Delivers Remarks on DACA," at https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-daca

The White House, "Presidential Executive Order on Promoting Energy Independence and Economic Growth," March 28, 2017, at https://www.whitehouse.gov/presidential-actions/presidential-executive-order-promoting-energy-independence-economic-growth/

The White House, "Statement by President Trump on Jerusalem," The White House, Washington D.C., December 6, 2017, at https://www.whitehouse.gov/briefings-statements/statement-president-trump-jerusalem/.

The White House, Presidential Memoranda "Ceasing U.S. Participation in the JCPOA and Taking Additional Action to Counter Iran's Malign Influence and Deny Iran all Paths to a Nuclear Weapon," Washington D.C., May 8, 2018, at https://www.whitehouse.gov/presidential-actions/ceasing-u-s-participation-jcpoa-taking-additional-action-counter-irans-malign-influence-deny-iran-paths-nuclear-weapon/

Trump Lawsuit Tracker: *164. One Hundred and Thirty Center Suits Filed Against Trump Since His Administration's Inception,* at https://www.biologicaldiversity.org/campaigns/trump_lawsuits/index.html

United Nations, Framework Convention on Climate Change, https://unfccc.int/resource/docs/convkp/conveng.pdf

United Nations, Resolution in Security Council, Res 478/80, August 20, 1980.

USA Today, US does have 'Obama judges': Trump responds to Supreme Court Justice John Roberts' rebuke, at https://www.usatoday.com/story/news/politics/2018/11/21/john-roberts-trump-statement/2080266002/

Werner, Erica & Damian Paletta "Trump again threatens to shut down government," *Washington Post*, 2018, at https://www.washingtonpost.com/business/economy/trump-backs-down-from-threat-to-shut-down-government-at-end-of-month/2018/09/05/bfb5992c-b11f-11e8-a20b-5f4f84429666_story.html, accessed May 19, 2019.

White House, "Statement by President Trump on the Paris Climate Accord", at https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/

Zanotti, Jim, "Israel: Background and U.S. relations in brief," Congressional Research Service, Library of Congress, 2018, pp. 7-8, at https://fas.org/sgp/crs/mideast/R44245.pdf