

LEGITIMACY, LEGALITY, LEGACY, AND THE LIFE OF DEMOCRACY

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The Trump Administration challenged notions of good governance. It challenged our expectation of majoritarian legitimacy to the extent only a minority of voters elected President Donald Trump in 2016.¹ It challenged our demands for reasoned decision-making insofar as the President sought to dismantle the administrative state and govern by fiat.² It challenged our expectation of checks and balances in the way it approached appointments and removals to accumulate power at the expense of congressional design.³ These challenges sound in different legal theories, but they all reflect shattered expectations of good governance. And yet, the most lasting legacy of the Trump Administration may have nothing to do with governing. It is hard to guess how historians will view this period, but I write and revise this essay in December 2020 and Spring 2021, having watched the most flamboyant, stunning, and blatant attempt to prostrate the United States' electoral system.⁴ This flagging has raised concerns about the continuing legitimacy of democracy.⁵ But this concern reflects a simplistic and mistaken view of democracy. In fact, democracy remains the solution—not

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1. *See* 2016 Presidential Election Results, N.Y. TIMES, <https://www.nytimes.com/elections/2016/results/president> (last updated Aug. 9, 2017) (showing the election results wherein Hillary Clinton lost the election with 48% of the popular vote and Donald Trump won with just 45.9%).

2. *See, e.g.*, Exec. Order No. 13843, 83 Fed. Reg. 32,755–56 (July 10, 2018) (altering the hiring rules and examinations of Administrative Law Judges); Exec. Order No. 13957, 85 Fed. Reg. 67631–32 (Oct. 26, 2020) (promulgating an executive order to alter the hiring process for federal employees with access to confidential information).

3. *E.g.*, Brief for Petitioner at 2, 4–5, 15, 19, 30, *Seila Law v. Con. Fin. Protection Bureau*, 140 S. Ct. 2183 (2020); Brief for Respondent at 45, *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

4. *See Where Republicans in Congress Stand on Trump's False Claim of Winning the Election*, WASH. POST <https://www.washingtonpost.com/graphics/2020/politics/congress-republicans-trump-election-claims/> (last updated Dec. 15, 2020) (reporting that Trump incorrectly claimed he won the presidential election, and that over 200 Republicans refused to acknowledge Joe Biden as the victor in the 2020 presidential election).

5. Henry Farrel, *Trump's Baseless Claims Damage American Democracy*, WASH. POST (Nov. 5, 2020), <https://www.washingtonpost.com/politics/2020/11/05/trumps-baseless-claims-damage-american-democracy/>; Sam Levine, 'Corrosive to Democracy': What Do Trump's Baseless Claims Really Mean? THE GUARDIAN (Nov. 13, 2020) <https://www.theguardian.com/us-news/2020/nov/13/trump-election-voter-fraud-claims-attack-democracy>; Jeet Heer, *Even a Clownish Coup Can Still Hurt Democracy*, THE NATION (Nov. 18, 2020), <https://www.thenation.com/article/politics/trump-coup-election-michigan/>; Michael Peel, *Trump's Attack on US Democracy Hurts Everyone*, FIN. TIMES (Nov. 19, 2020), <https://www.ft.com/content/4345612c-6826-40de-a9f2-a97e7e9725d0>.

the problem. The problem lies in the fact that elections alone do not make a democracy. The solution lies in the complexity of our constitutional arrangement, which despite staggeringly selfish attacks on the electoral process, maintains some stability.

It hardly needs repeating. President Trump all but promised that he would not accept defeat in the 2020 presidential election.⁶ On election night, before all the votes were counted, President Trump declared himself the winner.⁷ As the vote counting continued over the following days, the President and his followers at times demanded that vote counting should stop and at other times that it should continue. In places such as Michigan, where outstanding ballots significantly favored Joe Biden, the President or his supporters called for an end to counting.⁸ In places such as in Arizona, where there was more likelihood that uncounted ballots would favor President Trump, Donald Trump's supporters demanded that counting continue.⁹ By the end of the week it was clear that Joe Biden had amassed a significant majority of the national vote and had won key states necessary for a victory in the Electoral College.¹⁰ Yet President Trump and his allies declared that massive voter fraud had stolen the election.¹¹ Meanwhile, state and federal election officials insisted the election was fair and secure.¹² Christopher Krebs, then-Head of the Department of Homeland Security's Cyber and Infrastructure Security Agency—charged with election security—declared that the 2020 presidential election was secure and free

6. See Kevin Liptak, *A List of the Times Trump Has Said He Won't Accept the Election Results or Leave Office if He Loses*, CNN (Sep. 24, 2020), <https://www.cnn.com/2020/09/24/politics/trump-election-warnings-leaving-office/index.html> (detailing multiple occasions former President Trump claimed he would not cede the 2020 election or give up office).

7. Christina Wilkie, *Trump Tries to Claim Victory Even as Ballots Are Being Counted in Several States*, CNBC (Nov. 4, 2020), <https://www.cnbc.com/2020/11/04/trump-tries-to-claim-victory-even-as-ballots-are-being-counted-in-several-states-nbc-has-not-made-a-call.html>.

8. Bill Bostock, *Videos Show Trump Protestors Chanting 'Count Those Votes' and 'Stop the Count' Outside Separate Ballot-Counting Sites in Arizona and Michigan*, BUS. INSIDER (Nov. 5, 2020), <https://www.businessinsider.com/videos-trump-protesters-michigan-arizona-vote-count-2020-11>.

9. *Id.*

10. Jonathan Lemire et al., *Biden Defeats Trump for White House, Says 'Time to Heal'*, ASSOCIATED PRESS (Nov. 7, 2020), <https://apnews.com/article/joe-biden-wins-white-house-ap-fd58df73aa677acb74fce2a69adb71f9>.

11. Susan Milligan, *Trump Promotes Voter Fraud Claims in 45-Minute Video Address*, U.S. NEWS (Dec. 2, 2020), <https://www.usnews.com/news/elections/articles/2020-12-02/trump-promotes-voter-fraud-claims-in-unusual-45-minute-video-address>.

12. Eric Turner & Frank Bajak, *Repudiating Trump, Officials Says Election 'Most Secure'*, ASSOCIATED PRESS (Nov. 13, 2020), <https://apnews.com/article/top-officials-elections-most-secure-66f9361084ccbc461e3bbf42861057a5>; Arielle Mitropoulos & Will McDuffie, *State Officials Say They're Baffled, Offended by False Election Claims*, ABC NEWS (Nov. 17, 2020), <https://abcnews.go.com/Politics/state-officials-theyre-baffled-offended-false-election-claims/story?id=74243567>.

of significant fraud.¹³ President Trump fired Krebs within the week.¹⁴ Later, Attorney General William Barr, one of President Trump's most ardent supporters in the Executive Branch, likewise stated that he saw no evidence of widespread voter fraud after a Department of Justice investigation.¹⁵ The President pushed Barr out of the Administration shortly thereafter.¹⁶

Beyond the dueling public statements about election fraud, President Trump's legal team filed lawsuit after lawsuit seeking to prevent finalization of the election's results. They brought multiple suits in each of the battleground states—Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin—that President Trump lost but realistically hoped to win.¹⁷ In each suit, the President's lawyers failed to present adequate evidence of fraud or legal arguments for overturning the apparent results of the vote.¹⁸ President Trump and his legal team lost in nearly every case—upwards of 50—including at the United States Supreme Court.¹⁹ The State of Texas lead another suit against several other states in an effort to use the constitutional path of original Supreme Court jurisdiction to skip the lower courts, but within days the Supreme Court rejected that attempt as well.²⁰

Finally, driven by the volume and frequency of his public claims about a stolen election, and the foundering litigation strategy, President Trump pursued political and quasi-political options. Trump sought to prevent certification of votes by wooing Republican members of certification

13. Courtney Norris, *As Trump Continues to Push False Claims of Fraud Top Officials Say Election Was Most Secure in History*, PUB. BROAD. SERV. (Nov. 12, 2020), <https://www.pbs.org/newshour/politics/as-trump-continues-to-push-false-claims-of-fraud-top-officials-say-election-was-most-secure-in-history>.

14. Courtney Norris, *Trump's Firing of Top Election Security Official Unsettles Lawmakers*, PUB. BROAD. SERV. (Nov. 19, 2020), <https://www.pbs.org/newshour/politics/trumps-firing-of-top-election-security-official-unsettles-lawmakers>.

15. Katherine Faulders & Alexander Mallin, *Barr Had "Intense" Meeting with Trump After AG's Interview Undercutting Voter Fraud Claims: Sources*, ABC NEWS (Dec. 2, 2020), <https://abcnews.go.com/Politics/barr-intense-meeting-trump-ags-interview-undercutting-voter/story?id=74516139>.

16. See Allie Malloy et. al., *Attorney General William Barr Resigns*, CNN, <https://www.cnn.com/2020/12/14/politics/william-barr-out-as-attorney-general/index.html> (last updated Dec. 15, 2020).

17. Emily Bazelon, *Trump Is Not Doing Well with His Election Lawsuits. Here's a Rundown.*, N.Y. TIMES, <https://www.nytimes.com/2020/11/13/us/politics/trump-election-lawsuits.html> (last updated Nov. 25, 2020).

18. *Id.*

19. Adam Liptak, *Supreme Court Rejects Republican Challenge to Pennsylvania Vote*, N.Y. TIMES, <https://www.nytimes.com/2020/12/08/us/supreme-court-republican-challenge-pennsylvania-vote.html?action=click&module=Top%20Stories&pgtype=Homepage> (last updated Dec. 10, 2020).

20. *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020).

bodies.²¹ When that failed, the President begged Republican-controlled state legislatures to select electors to the Electoral College who would vote for him, despite the official vote tally in their state.²² That political strategy was dead on arrival.²³ Finally, in a move with more precedent, but never with success, President Trump hoped his allies in Congress would challenge the final certification of the Electoral College vote.²⁴ Persuading a member of each the House and Senate to participate in such a challenge was easy, but gathering a majority of Congress to support the challenge a longshot.²⁵ After both Senator Mitch McConnell, as the leader of the Senate Republicans, and Vice President Mike Pence, as the Senate's presiding officers, made clear that Congress would not overturn the results of the election, President Trump turned to mob violence.²⁶ Although people died while a mob attempted to overthrow Congress on behalf of President Trump, even political violence could not change the election results.²⁷

This four-ring circus of rhetorical, legal, political, and militant showmanship amounted to nothing in terms of overturning the election, but it will have lasting implications for public trust in government. For those who are sure their candidate won the election but was nonetheless denied the Presidency, the system failed both miserably and spectacularly. Putting aside the problem that these complaints are entirely meritless, governance does not rest on reality; it rests on belief, and there remains widespread belief that some conspiracy ripped leadership away from their preferred candidate and handed it an imposter.

21. Tom Hamburger et al., *Trump Invites Michigan Republican Leaders to Meet Him at White House as He Escalates Attempts to Overturn Election Results*, WASH. POST (Nov. 19, 2020), <https://www.washingtonpost.com/nation/2020/11/19/wayne-county-rescind-certifying-election/>.

22. See Deanna Paul, *Trump Campaign Wants States to Override Electoral Votes for Biden. Is That Possible?*, WALL ST. J. (Nov. 21, 2020), <https://www.wsj.com/articles/trump-campaign-wants-states-to-override-electoral-votes-for-biden-is-that-possible-11605973695> (“Trump campaign lawyers say Republican-controlled legislatures should use their legislative powers to set aside vote results favoring Mr. Biden and appoint electors to cast votes for Mr. Trump when the Electoral College meets on Dec. 14.”).

23. *Id.*

24. Kyle Cheney & Melanie Zanon, *How Trump's Allies Could Take One Last Shot to Overturn the Election*, POLITICO (Nov. 30, 2020), <https://www.politico.com/news/2020/11/30/republicans-overturn-electoral-college-441459>.

25. See *id.* (explaining how Senate Republicans do not have enough members who would be willing to challenge election results).

26. Ashley Parker, *Pence and McConnell Defy Trump—After Years of Subsistence*, WASH. POST (Jan. 6, 2021), https://www.washingtonpost.com/politics/pence-mcconnell-trump/2021/01/06/b7a5c1e-503b-11eb-bda4-615aaefd0555_story.html.

27. *Mob Attack, Incited by Trump, Delays Election Certification*, N.Y. TIMES, <https://www.nytimes.com/live/2021/01/06/us/electoral-vote> (last updated Jan. 20, 2021).

This imposter, President Biden, is illegitimate in the minds of these doubters because he did not actually earn a majority of support from the American people. The problem here is that even if the conspiracy theorists had all their facts right—and millions of fraudulent votes stole the election from President Trump—the constitutional system hints, but does not require, popular support for a president.²⁸ Each state can establish its own system for selecting electors to the Electoral College.²⁹ The Constitution does not require that electors vote for the presidential candidate who wins the most votes in a given state.³⁰ Regardless of how states select their electors and regardless of which candidate the Electoral College selects, Congress must certify the final tally and the law allows members of Congress to challenge that certification and trigger political debate.³¹ In short, elections are paramount. They are the unique spark that ignites democratic government, and they are essential to a functioning democracy. And yet, elections alone are not democracy.

Elections may be the engine of democracy, but governing needs more than an engine: it needs wheels to move forward. The political and judicial processes may be those wheels and in the case of the 2020 presidential election, even if a vast conspiracy stole President Trump's votes (it did not, of course), the legal and political components retain their own, non-majoritarian, validity. If this assertion, downplaying the role of majoritarianism in democracy, gives you pause, you are not alone. Enshrining majoritarian vote counting as the entirety of a democratic system is nothing new.

Certainly, majoritarianism provides impulse for policymaking, aggregating individual votes to create some picture of widespread policy preferences.³² And certainly the ability for voters to “throw the bums out” creates some degree of accountability between voters and elected officials, at least in theory. The theoretical basis for majoritarian supremacy is understandable. But it is not clear that the constitutional or practical basis is so overpowering. At least in the legal realm, the singular devotion to majoritarianism at the expense of other aspects of good governance began

28. U.S. CONST. art. II, § 1, cl. 2. *See also id.* amends. XII, XX.

29. U.S. CONST. art. II, § 1, cl. 2.

30. *Id.*

31. 3 U.S.C. § 15 (2021).

32. *See* Joshua Ulan Galperin, *The Death of Administrative Democracy*, 82 U. PITT. L. REV. 1, 56–57 (2020) [hereinafter Galperin, *The Death of Administrative Democracy*] (explaining how officials elected by majoritarian elections are given powers to appoint and monitor unelected officials, thereby at least theoretically building a government from the desires of the majority).

in earnest only about 60 years ago.³³ According to Professor Lisa Bressman, it was the publication of Alexander Bickel's book, *The Least Dangerous Branch*, that persuaded many to second-guess the role of unelected decisionmakers, particularly federal judges.³⁴ Bickel argued that judges are suspect because they serve lifetime appointments and have attenuated connections to voters.³⁵

From there, majoritarianism snowballed. Judges are unelected, but they are not the only ones. Save the President, the entirety of the Executive Branch is unelected according to pretty much every commentator and, importantly, the Supreme Court.³⁶ If majoritarianism is the *sine qua non* of legitimate governance, then, by volume at least, most of the federal government is illegitimate. As I will explain, the majority of the federal government is not illegitimate. But recognizing the reality that most of the government is indeed unelected, Congress has at times tried to impose majoritarianism on executive institutions other than the presidency. It has not worked.

At the start of the New Deal, the Great Depression forced Congress and the United States Department of Agriculture (USDA) to impose new regulation on farmers in order to stabilize the agricultural economy.³⁷ The general regulatory scheme involved paying farmers to reduce their production, thereby reducing supply and raising prices.³⁸ There were several practical challenges to this strategy. First, farmers had always seen themselves as fiercely independent and skeptical of government intervention.³⁹ Second, to the extent farmers were willing to accept the need for some collective economic program, USDA had, to this point, always been a research and education agency without the resources or experience to implement the regulations necessary to revive the farm economy.⁴⁰ Thus, to build support for the new regulations and implement these regulations effectively, Congress and USDA decided rules should not come down from Washington, but should instead come up from the farmers themselves.⁴¹ To

33. Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 479–80 (2003).

34. *Id.*

35. *Id.* at 480 (describing Bickel's view that judicial review writ-large is difficult to justify in a majoritarian democracy).

36. Galperin, *The Death of Administrative Democracy*, *supra* note 32, at 2.

37. Joshua Ulan Galperin, *The Life of Administrative Democracy*, 108 GEO. L.J. 1213, 1221–22 (2020) [hereinafter Galperin, *The Life of Administrative Democracy*].

38. *Id.* at 1222.

39. *Id.* at 1233.

40. *See id.* at 1222.

41. *See id.* at 1223 (noting that up until this point the lack of long-term connection between administrators and farmers created tension).

advance this strategy, they settled on something completely new: administrative elections.

Congress and the USDA established a system in which farmers would vote for other farmers to administer the new agricultural laws.⁴² These county agriculture committees were the first and only experiment in the United States with “administrative democracy” and they still exist today.⁴³ In almost every county in the country, farmers are eligible to vote for and serve on these administrative committees.⁴⁴ Congress and the USDA develop the outlines of policy and the local committees fill in the details.⁴⁵ In the early days, these elected committees were primarily responsible for running the supply management programs, which involved measuring crop acreage, setting production limits, confirming that farmers were staying within allotments, and delivering payments.⁴⁶ These responsibilities have waxed and waned over the years, but they have always included paradigmatic administrative policymaking and adjudication. For instance, today, elected committee responsibilities include jurisdiction-wide policymaking, such as setting a “final planting date,” which indicate a threshold date for planting crops.⁴⁷ If a farmer plants a crop after the committee-designated date, that farmer is not eligible for certain federal payments.⁴⁸ In addition, the elected committees are responsible for making individualized judgements about when farmers did plant various crops and other matters of farmer eligibility for federal programs.⁴⁹ These responsibilities are esoteric insofar as they are limited to local and on-the-ground farming practices, but they are also broadly important as they govern the ground floor of food policy in this country.

Especially given their foundational role, the fact that these farmer committees are elected is not a mere curiosity. There are nearly 8,000 elected farmers making policy on nearly 3,000 committees.⁵⁰ Each committee is composed of three to five elected members who must participate in some federal farm programs and operate a farm within the

42. *Id.*

43. *Id.* at 1217–18.

44. *Id.* at 1219–20 (explaining how these county agriculture committees serve as localized outposts of federal agencies, geographically divided according to county boundaries or smaller areas within a given county).

45. *Id.* at 1225–26.

46. *See id.* at 1222–23 (identifying the need for someone to enforce these programs so that the supply could be held at a lower level and the crop prices could therefore increase).

47. *Id.* at 1228.

48. *Id.*

49. *Id.*

50. *Id.* at 1216.

committee's jurisdiction.⁵¹ The voters are held to the same eligibility requirements.⁵² Elected committee members serve three-year terms and can serve up to three consecutive terms.⁵³ They are eligible to serve again after sitting out for at least one term.⁵⁴ Importantly, it is the elections and term-limits that define who serves and when they serve. Unlike every other officer in the Executive Branch, another government official does not appoint these elected farmers to their offices or have the power to remove them. Only the voters and term limits have that power, making this a unique example of majoritarian administration in a government where every other unit of the Executive Branch is responsive, in some combination, to Congress, the President, or high-level presidential appointees.⁵⁵

Rather than stimulating good farm governance, the unique electoral system has led to racial segregation, inept administration, and disinterest.⁵⁶ It is also unconstitutional.⁵⁷ As one might have expected from a pure majoritarian system, the majority has used its largely unconstrained electoral authority to maintain power. The committee system has disenfranchised Black farmers (in particular, though not exclusively) and to distribute information, money, and government support based on personal relationships and preferences rather than more apolitical and equitable considerations.⁵⁸ In the recent past, Congress has made a notable effort to reduce this discriminatory exertion of power, but the crux of that effort has limited the bare majoritarian structure of the committees by, for instance, allowing the Secretary of USDA to appoint representatives of underrepresented farmers to the otherwise elected committees. Beyond racism, analysts have, time and again, criticized the committees for simply

51. *Id.* at 1220.

52. *Id.*

53. *Id.*

54. *Id.*

55. In fact, USDA regulations purport to allow the Deputy Administrator of the Farm Service Agency to remove committee members for certain bad behavior after a trial-like process, but those regulations are likely invalid. Galperin, *The Death of Administrative Democracy*, *supra* note 32 at 26–27.

56. *Id.* at 1242.

57. See Galperin, *The Death of Administrative Democracy*, *supra* note 32, at 36–40 (arguing that Supreme Court doctrine around appointment and removal would invalidate the process for appointing and removing committee members because the committees are Officers of the United States, but they are not appointed according to the Appointments Clause nor removable by the President or a presidential appointee).

58. See Galperin, *The Life of Administrative Democracy*, *supra* note 37, at 1240–42 (describing how committee administrators were able to control which farmers received relevant information and resources—often, for example, directing funds to the landowners rather than the tenant farmers, who were mostly Black).

being bad at their jobs.⁵⁹ This should come as little surprise since elections are most likely to select for popularity rather than administrative skills. Of course, one could say the same thing about congressional or presidential elections, but Congress designs policy, which the president implements using a vast array of experts. Neither Congress nor the President is practically responsible for day-to-day operations. However, the incongruence of elections for selecting administrators may not be the only reason the farmer committees have done a poor job of implementing farm programs. Too few farmers have shown interest in serving on or voting for farmer committees, providing only a small pool of candidates from which to choose and an uncompetitive selection process. Voter turnout for these farmer elections ranges from around 4–15 percent.⁶⁰ In one instance, there were apparently more candidates than voters.⁶¹

Finally, the elected farmer committees are unconstitutional. The Constitution provides clear guidelines for appointment of officers of the United States. Depending on the exact role of the officers, the President may appoint with or without Senate confirmation, presidentially appointed agency heads may appoint, or Article III judges may appoint.⁶² The farmer committees are indeed officers because they carry out statutory duties with “significant discretion.”⁶³ But the committees are “appointed” by voters—not the president, department heads, or judges. This is plainly unconstitutional. Moreover, while the Constitution does not provide direct rules about removing officers from their posts, the Supreme Court has made clear the President, or somebody the President controls, must have the power to remove administrative officers.⁶⁴ The electoral scheme lodges removal power only in the farm voters—not the President or a presidential appointee. This is yet another constitutional weakness of the electoral system.

59. *See id.* at 1247–49 (noting that, although the farmers brought their agricultural knowledge and experience to the committees, most of the farmers were not similarly knowledgeable or skilled in administering a government program).

60. *Id.* at 1250.

61. *Id.* at 1250 n.308.

62. U.S. CONST. art. II, § 2, cl. 2.

63. *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2052 (2018) (quoting *Freytag v. C.I.R.*, 501 U.S. 868, 882 (1991)); accord Galperin, *The Death of Administrative Democracy*, *supra* note 32, at 39 (“Because the [farmer] committees’ authority goes well beyond the authority of other administrators that the Supreme Court has already ruled are ‘officers . . .’”).

64. *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 492 (2010) (citations omitted) (holding that the President must have removal authority over an administrator or over that administrator’s supervisor); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020) (citations omitted) (holding that when an agency has a single administrator at its head, the President must have unbound authority to remove that administrator).

The reasons for these failures and the constitutional frailty are complex, but they all stem, in part, from the mistaken belief that what makes a robust democracy is simply majoritarian leadership. To the contrary, robust democracy is only partly majoritarianism. In addition to elections, we should also demand opportunities for individual participation, transparent reason-giving, and careful deliberation. These are not vague preferences but constitutional ideals. Majoritarianism, as I have already described, is the electoral process of aggregating individual votes to drive decision-making or hold officials accountable. There is clearly a majoritarian demand in the Constitution. For instance, Article I provides that members of the House of Representative are chosen by a vote⁶⁵ and that the House and Senate operate by majority rule.⁶⁶ But this is not the full scope of constitutional decision-making. Individual participation is also central. The First Amendment, for example, provides a right of individuals to petition government regardless of their standing in a political minority or majority.⁶⁷ Article III creates a Judicial Branch that will hear individual complaints under the law without direct majoritarian influence.⁶⁸ The majoritarian aspect of democracy takes a sweeping survey to animate government, but the individual function protects classically liberal notions of independence even in a system with collective majoritarianism.

The majoritarian and individualist qualities of democracy account for the idea that each person has pre-political opinions on which they must be able to act in a just political system. Each of us can vote, petition, or sue to champion our preferences, but voting, petitioning, and suing are not ideal avenues for dynamic expression and generation of preferences. The second two democratic qualities—reason giving and deliberation—create opportunities for people to evaluate and spawn new preferences in a more collective governing enterprise. Reason giving means that decision-making is tethered to explanations rather than unadorned edict. Decisionmakers must explain their purpose. Constitutionally, mandatory reason giving is evident in, for instance, the Fourth Amendment's requirement that a search or seizure be based on reason or the Due Process Clauses' demands that accusations and reasons precede a deprivation of life, liberty, or property.⁶⁹ Finally, the democratic necessity of deliberation simply asserts that

65. U.S. CONST. art. I, § 2, cl. 1.

66. *See, e.g., id.* art. I, § 5, cl. 2 (providing for a two-thirds majority process for expelling members).

67. Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538, 1559 (2018).

68. U.S. CONST. art. III, § 1.

69. Galperin, *The Death of Administrative Democracy*, *supra* note 32, at 53.

coercive decisions flow from consideration and debate. Giving reasons alone is not sufficient. There must be an opportunity to reflect on and judge those reasons. The Sixth Amendment's procedures for criminal trials, including public hearings, right to witnesses, and, ultimately, a jury, are transparent processes to assure deliberation on evidence.⁷⁰ The larger structures of bicameralism and presentment are, in the words of Chief Justice Burger writing for a majority of the Supreme Court: "[An] unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process."⁷¹

While the 2020 election seems to have deeply damaged the democratic system—and without a doubt it has, to some, seriously undermined trust in the electoral system—the 2020 election, and the aftermath, are also evidence that a more robust democracy is at work and working somewhat well. In this frantic, obsessively scrutinized, and exhausting process, we have indeed seen all four democratic components: majoritarianism, individualism, reason giving, and deliberation. The election itself, of course, is vital majoritarianism. But it is not just voting for a president. In each state elected officials oversee aspects of voting.⁷² The Electors in the Electoral College participate in their own majoritarian vote when they actually cast their ballots for President.⁷³ The House and Senate use majoritarian processes to certify the Electoral College vote.⁷⁴ Even the polycentric constitutional structure, in some states, reinforces the role of majoritarianism. In Georgia, for example, the Governor and Secretary of State are independently elected to carry out distinct tasks among which are oversight and certification of the voting in that state.⁷⁵ President Trump's lawsuits represent a powerful tool for prosecuting individual demands. Some of these suits challenged that the vote counting did not fairly represent actual majoritarian preferences, but others, such as a lawsuit in Wisconsin, argued the law should forbid counting certain votes despite an admission that the votes did represent the actual will of voters.⁷⁶ In other words, the courts provided a forum for individual grievance in the face of majoritarian preference.

70. *Id.*; U.S. CONST. amend. XI.

71. *INS v. Chadha*, 462 U.S. 919, 959 (1983).

72. *See Roucho v. Common Cause*, 139 S. Ct. 2484, 2495 (2019) (quoting U.S. CONST. art. I, § 4, cl. 1) (discussing state legislatures powers in relation to congressional elections).

73. U.S. CONST. amend. XII.

74. 3 U.S.C. § 15 (2021).

75. *See* GA. CONST. art. II, § III, para. I (investing the Secretary of State with independent election oversight authority).

76. *See* Complaint at 25–27, *Trump v. Evers*, No. 2020AP1971-OA, 2020 LEXIS 191 (Wis. Dec. 3, 2020) (arguing that certain absentee votes should not be counted).

In the end, the pursuit of individualist justice through the court system failed due, in large part, to the democratic plea for reason giving. Courts require reasoning to justify judicial action and President Trump's lawyers were unable to muster any effective reasons (read: evidence) for changing the initial vote counts. Courts not only demand reasons, they also give reasons. Courts offered thorough explanations for their decisions and, in the rare instances of dissents favoring President Trump's claims, dissenting justices also explained their reasons.⁷⁷ Moreover, the congressional certification process requires express reasoning.⁷⁸ If a Representative and a Senator object to final certification, the law requires an objection in writing and that the writing state a clear reason for the objection. That reason is then the basis for a deliberative process.⁷⁹ After the House and Senate receive the reasoned objection the two chambers convene separately for each to debate the objection.⁸⁰ Throughout the electoral process, one understandably seen as a majoritarian, there is ample evidence of a robust and complete democracy beyond simple majoritarianism, with individualism, reason giving, and deliberation serving important roles. This is exactly as it should be.

But oh boy, this high theory about the meaning of democracy and how it is interwoven even through a difficult presidential election does not provide much satisfaction when it appears the nation is pulling apart at every seam. The vote count, state certifications, Electoral College vote, Supreme Court orders, this does not appear to change any minds or stem the literal flow of blood. The hatred, distrust, and inability to even communicate runs deep and may be this country's undoing. Things are bleak. Perhaps despair is in order. But this is no reason not to celebrate the systems that do, in fact, work. Systems that can maintain stability despite venomous rhetorical, legal, political, and physical attacks. Because our constitutional democracy derives power from several sources of legitimacy—majoritarianism, individualism, reason giving, and deliberation—venomous attacks are not enough to destroy it. There must be near consensus to do away with robust democracy. Today, there is surprisingly widespread objection to the way our democracy functions, but there is no consensus that it has failed. Indeed, the Trump Administration challenged notions of good governance from beginning to end, and in the end, challenged the very democratic basis of our government. People are not behaving as they should, but the system still is.

77. *Trump v. Evers*, No. 2020AP1971-OA, 2020 LEXIS 191, at 4 (Wis. Dec. 3, 2020).

78. 3 U.S.C. § 15.

79. *Id.*

80. *Id.*