

ScoMo loses the next election but decides to do a Trump. What happens next?

Australian democracy has enough structural weaknesses that it's not hard to imagine what's happening in the US happening here too.



Among Donald Trump's many achievements is the re-normalisation of actual Nazis as legitimised participants in the civic debate. There they are, marching, flag-waving, race-baiting and punching on. The irony — that a thing called Antifa even needs to exist today — was lost long ago.

Hitler, it is often noted, rose to power and completed all of his work without ever breaking a law. The Nazi Party participated in democratic elections, he was invited to become chancellor by president Hindenburg, the Reichstag passed an emergency decree and every Fuhrer Directive he made after that was, in strict legal terms, valid. His crimes against humanity weren't even recognised by international law as such until after he'd lost the war.

Trump also acquired power democratically. He has no intention of surrendering it, and I've already explained one possible means by which [he might lawfully keep it](#). The US constitution's fatal flaw is its failure to deliver power in accordance with Lincoln's command: America's government is not, under the law, made by the people.

What about Australia? Let's say we had a government one day which, having been elected to office by the usual means, was as unconvinced as Trump is that it should ever give it up? Could it peacefully manipulate its way to perpetual power?

Let's remind ourselves of a few key aspects of Australia's system of government established by our constitution. Like the US, it ensures that parliament will be directly elected by the people, and that parliament is the supreme law-making body. Supreme, that is, subject to one qualification: no law

becomes a law until the Queen, through her agent the governor-general, says so. This bit isn't just convention, it's written: "The Queen may disallow any law."

Also written is that the Queen is our executive government. The governor-general appoints the ministers (who must be MPs), and can sack them at will. The federal executive council, which is the ministry, has under the constitution only an advisory role.

Not written anywhere in the constitution is the prime minister. Nor are the concepts of cabinet government, political parties, any suggestion that the party with the most seats in the House of Representatives will be invited to form government, nor any vesting of executive power in anyone below the Queen.

All of those things are done by convention. As Sir John Kerr demonstrated, those conventions are only as good as the will of officeholders to abide by them. Kerr, before dismissing the Whitlam government and dissolving parliament, had conspired secretly with the opposition leader, the High Court chief justice and Buckingham Palace. None of that was conventional. But it wasn't illegal either.

Australia's constitutional arrangements are more robust than America's, for two key reasons: the person who sits at the head of executive government and the armed forces isn't elected and keeps their powers in reserve, unlike the US president; and our High Court is not politicised like the US Supreme Court.

The High Court is the constitutional gate-keeper. Success in a bloodless coup requires keeping it contentedly acquiescent. The other key factor is control of parliament, proofed against losing the majority of seats at an election.

The ace-in-the-hole is the governor-general, who would need to be convinced to break with the convention that government is the automatic prize from having the most seats in the House of Representatives.

Practically speaking, parliament would need to be neutered so far as possible. It is a noisome place, antithetical to the requirements of benevolent dictatorship. Shutting it up (or rather, down) is not as hard as it sounds.

Boris Johnson had a go at just such a thing in 2019, when he got the Queen to prorogue UK's parliament for long enough to prevent it from blocking Brexit. The House of Lords intervened, ruling Johnson's advice to her majesty invalid and therefore her prorogation order as well. However, as you'd expect with Boris, the plan was sound but he just cocked up its execution.

This year, our parliament was suspended for many months because of COVID-19. Nobody bothered challenging that, or the fact that the government effectively replaced parliament's functions with a combination of the so-called national cabinet made up of the prime minister and state premiers, and the weirdly secretive non-government post-COVID commission that supposedly reports straight to cabinet.

The point is that what is required for the plot to have a chance of succeeding is a crisis. National emergencies trigger all sorts of unexpected legal uncertainties. There is a heap of legislation, such as the *Biosecurity Act* and the constantly expanding call-out-the-army law, which gives the executive government absolutely extraordinary powers in times of supposed danger.

In addition, on top of the carefully listed law-making powers the constitution gives to the Commonwealth, the High Court has always recognised that there is another set of powers pencilled in the margins, which can be wielded quite freely if things get existential (for example, if we're invaded). Human rights, which our law doesn't protect anyway, can go right out the window very quickly with the imprimatur of the courts.

Think not? Read some of the High Court's judgments on four topics: the Commonwealth's so-far unlimited power to detain asylum seekers at its leisure; the power of our governments to continue to imprison convicted criminals after they've served their sentences; or to imprison people on the threat that they might commit a serious crime; or to detain children as young as 14 on suspicion of terrorist activity.

Recall that Hitler's accession to power came at the ballot box (the Nazis didn't win a majority, but the plurality at the 1932 elections). Shortly after, the Reichstag burned and president Hindenburg approved a decree suspending civil liberties. A month later, he signed a law giving Hitler emergency powers and the rest is you know what.

Would the internet and social media make that kind of fake emergency harder to pull off these days? Or easier? Look to the US again — half its population is well on the way to being convinced, in the face of no evidence whatsoever, that the presidential election was, in fact, rigged. That's thanks to the ubiquity of access to information, not despite it.

Imagine the prime minister finds a trigger, like a cybersecurity or bio-warfare threat, that is so serious he can't tell us much about it. He declares a national emergency, invokes the laws that suppress civil liberties (remember the BLM marches during COVID?), suspends habeas corpus, calls out the military, takes control of major media outlets and quarantines the internet (not difficult, ask China). The cause is safety and security. Parliament is unable to meet, for the same reason.

The governor-general is highly unlikely to attempt to intervene in any of that, up to the point where the constitution mandates an election within three years of the last one (it gives no leeway for that not to happen). So we go to the polls. If the government's majority is lost, then the governor-general has to be persuaded that the nation's survival requires that the incumbent government continue in power nevertheless.

That's not a million miles from what Kerr decided to do when he sacked the government that still held the majority of seats, and invited the minority opposition to take its place. In the national interest.

If the governor-general went that way, having come around to the view that the executive government needs to stay in the hands he or she considered most safe and ignoring the preference of the voters, then what? Parliament could pass laws to take power back from the now-minority government; but they're not laws unless the governor-general signs them. So parliament is neutered.

In such a scenario, the High Court would be neutered too, because the governor-general's actions would be within the power given to him or her by the constitution. To get around that, the court would have to find some limitation on the governor-general's exercise of reserve powers, as the House of Lords did in the Brexit case.

But that's an extremely narrow precedent, and our High Court is not renowned for its adventurousness. More importantly, it has declined to arrest the slow spread of executive power in Australia for decades.

Could this happen in Australia? I see no reason why not. Will it? Probably not; but did anyone predict that the Republican Party would go as far as it has to undermine the greatest democracy on earth?

It's not fanciful to suggest that we should be identifying the structural weaknesses in our own democracy before less benign spirits decide to do so in earnest.

Will Australian democracy ever go the way of the US? Let us know your thoughts by writing to letters@crikey.com.au. Please include your full name to be considered for publication in Crikey's Your Say section

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