

CONVERSATIONS

WITH BILL KRISTOL

Conversations with Bill Kristol

Guest: Jack Goldsmith, Professor of Law, Harvard University
Assistant Attorney General, Office of Legal Counsel (2003–2004)

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Table of Contents

I: On the State of Our Institutions 0:15 – 48:43

KRISTOL: Hi, I'm Bill Kristol. Welcome to CONVERSATIONS. I'm very pleased to be joined today by Jack Goldsmith, professor of Law at Harvard Law School, served as Assistant Attorney General for the Office of Legal Counsel – a very important job in the Justice Department in the George W. Bush administration. A distinguished scholar, law professor, commentator on things. Tweeter – most important.

GOLDSMITH: I tweet, yes.

KRISTOL: Major contributor to the [Lawfare](#) blog, which is an excellent resource people should go to.

GOLDSMITH: Thank you.

KRISTOL: And commenter on the Trump administration and on the moment we're in. So, let's talk about the moment we're in. You wrote something right after the election, I think – you were anti-Trump and are. You sort of tried to tell people, "I'm unhappy, but don't – We're right to be unhappy, but we shouldn't be too alarmed." Is that fair?

GOLDSMITH: Yeah, that's fair. I wrote just after the election a lot of my normally sober colleagues, I thought, were overreacting to Trump. I would describe it as "libertarian panic," because I thought they thought he was going to be basically fulfilling a lot of his campaign pledges, which was to violate many laws. I mean, he pledged on the campaign to do a lot of unlawful things. And they thought it was just going to happen, as if the executive could just – the president could just come in and start ordering illegal action and it would happen. And I wrote and predicted that he wouldn't be able to engage in unlawful action. It would be very hard to do so because there are enormous legal checks on the presidency, checks to keep him within legal bounds.

But then I speculated that there are a lot of other things that he could do that would be terrible within his lawful discretion, and I think that's proven to be true.

KRISTOL: So let's go through some of those. The way I've heard it formulated – you've used this, I've used this – the institutions have been pretty strong, have shown themselves to be pretty strong. The

Founders have been somewhat vindicated by the separation of powers and other things. Do you think that's correct?

GOLDSMITH: I do. I think it's actually – I think it's a really remarkable testament to the institutions thus far, how strong they've been. We can start with –

KRISTOL: Yeah, walk through some of those.

GOLDSMITH: Yeah, so the –

KRISTOL: Law, let's say the legal system.

GOLDSMITH: So the immigration order.

KRISTOL: Yeah.

GOLDSMITH: There are two big examples on the law. The immigration order that Trump announced early in his presidency, which was a legal mess. The process was screwed up. It was overbroad. It wasn't well vetted. They didn't follow the normal executive procedures. They didn't roll it out well. And the courts, they quickly – the initial cases were brought and the courts basically said, "No, you can't do this."

I think the courts in some respects went too far and violated some of their own norms; maybe we can get to that later. But the courts stood up to the president, and there was an important moment when a lot of people weren't clear whether Trump was going to obey the judicial decisions. There was a lot of speculation when the first nationwide injunction came that Trump was just going to say, "Screw it." It seemed like he was hinting he was going to do that. And, yet, when push came to shove, Trump abided by the judicial decisions, and he's been abiding ever since. So the courts really stood up to some of his excesses on the immigration stuff. That's one example.

I think another example and a very important example is the investigation into the Russia matter. Trump has done some really egregious things from the president's perspective, in terms of pressuring the Department of Justice; disagreeing with his intelligence communities' assessment of what happened; really trying to pressure the outcome; firing Comey for what Trump himself had to do with the Russia investigation; trying to pressure the Department of Justice to kill the prosecution. And, remarkably, every institution has held here. I mean, the Justice Department – Sessions was a close political ally and yet he recused himself. Rosenstein, the Deputy Attorney General was an appointment of Trump, and yet he appointed Mueller and made Trump furious. Both of those things made him furious. Trump has continued to attack DOJ and they've continued to maintain their independence on this.

Even Congress, even the Republicans in Congress in the so-called "Honeymoon Year" of the president has really, when he was threatening to fire Mueller and doing inappropriate things against Sessions, they came to their defense.

So, I think it's really remarkable in both of those contexts how well the institutions – all this supported by the press, which has been doing, in many respects, an extraordinary job – in some respects, excessive – but an extraordinary job; civil society. I think that there's a happy story to tell about legal checks and balances.

KRISTOL: Yeah, I mean, one way to put it is, we're not a third world society. I mean, if Trump shows up in a third world country, within four years, the judicial system is weakened or destroyed, the intra-governmental checks are gone, the media is corrupted, and so forth. It's good to be a highly-developed, institutionalized liberal democracy.

GOLDSMITH: Right, I agree. All those institutions, I think, are under pressure. But, thus far – this could change; a lot of things could go bad. Things could get off the rails, so to speak. But I think, to date, the institutions have responded remarkably well – including, you know, bureaucrats inside the government.

KRISTOL: Yeah, well talk about – I think the intra-governmental, intra-executive branch is, in a way, most interesting. Because, of course, the courts were, okay, they're an independent branch; they're supposed to be a check. Everyone studies that in Government 101. But, you were at the Justice Department. I mean, that's more interesting and a little less obvious, I think – the degree to which these internal, I guess, rules, regulations, norms, procedures that we sometimes complain about, I suppose; at times, they're too cumbersome. But talk a little just for practice.

GOLDSMITH: Sure. So first of all, I'll say this about President Trump: He has nominated, at the Assistant Attorney General level, extraordinary people. I mean, he's really nominated first-rate people in the Justice Department. I don't know if he gets credit for that. I don't know who gets credit for it, but he's really had some extraordinarily good Assistant Attorney Generals, who are the people at the head of the main divisions in the Justice Department.

When you work at the Justice Department, and I felt this when I worked there, especially if you're Senate confirmed, you walk in the building, you've taken an oath to the Constitution. You walk in a building with traditions: a tradition of upholding the rule of law; they have procedures and norms and a culture about how to do the right thing. I don't want to be naïve. Every Justice Department reflects the president, and every Justice Department reflects the political appointments of the president. So it's no doubt that the departments change in their emphasis and in their attitude. And all the people he appointed were former Justice Department officials. They served before; they understand the traditions of the department. And you come in there and you take those norms and that culture very seriously, and in addition to your professional obligations.

And I think that on the whole, as best I can tell from the outside, they have done a remarkable – there have been a few exceptions, but they've done a remarkable job of really continuing on with doing the right thing. I'm thinking especially of the Mueller, of the Russia investigation. In the face of just really unprecedented, literally unprecedented onslaught from the president, who is relentlessly pressuring them to do something else. He's threatening to fire people. And as best as I can tell, they've carried on – a truly remarkable thing.

KRISTOL: I guess, the pressure seems to have been – maybe it's fortunate that Trump doesn't really know how to pressure in a more subtle –

GOLDSMITH: Yeah, he's not subtle.

KRISTOL: – subtle or clever way, right. I mean, you can imagine, as you say, he seems to have yielded the appointment authority on this to people we would rather like. You know, standard, if you want to say, reputable, conservative, legal types.

GOLDSMITH: Right, right.

KRISTOL: And he's appointed – I know much less about this than you, but just even I know the names that seem to show up seem to be the names that everyone respects in Washington.

GOLDSMITH: Yeah, they are.

KRISTOL: Who had previously been at the Justice Department, as you say, and so forth.

GOLDSMITH: Right, right.

KRISTOL: I guess we owe them a debt for going in, right?

GOLDSMITH: We do. I think it – I know some of the people that have gone in. And a lot of my former students have asked me – this is at positions just below the position we’re talking about – “Should I do this?” There is, I think, some personal-professional risk from doing this, especially in the Justice Department, especially in the White House Counsel. Those are very politically sensitive jobs where you can quickly dirty your hands and get in trouble. So there’s personal risk in doing this. And so it is admirable that they’ve taken on these jobs and they seem to be performing them admirably.

Again, this is a conservative administration, and these are conservative lawyers and they’re taking conservative views on things. I’m not talking about that valence. I’m talking about basic commitment to the principles of integrity of the department, which they’ve upheld as far as I can tell.

KRISTOL: Yeah, it’s good news so far. But he doesn’t seem to know how to – I mean, I guess, maybe at some point they just decide the tweets don’t matter, and he doesn’t seem to pressure them in a more, as I say, sophisticated way, right? Or does he? I don’t know. It’s hard to tell.

GOLDSMITH: No, he doesn’t. I mean, this is another of the truly remarkable, as best I can tell, completely unprecedented elements of the Trump administration.

You know, we grew up, or I grew up, with the unitary executive in the 1980s and the Reagan administration, and the idea was that the president was at the top and people got in line, essentially, and the president set policy and his appointees followed those policies. Really the remarkable thing about the Trump administration is, he’s barking and yelling and tweeting and saying things in the White House, and people around the administration, including his appointees – Mattis; Tillerson in the State Department, in some respects; the UN Representative; people in the Justice Department – they’re just kind of carrying on with their ordinary policies in ways that just ignore the president. It’s happened all over the administration, and this is one example in the Justice Department.

KRISTOL: How much damage does it still do? So when he says, “I want Hillary Clinton to be prosecuted,” or something, which is, I think, not what we would say is an appropriate presidential thing, to single out an individual, right?

GOLDSMITH: Yeah, yeah.

KRISTOL: It is contrary to norms, right?

GOLDSMITH: It’s terribly – yes. It’s completely contrary to what I would call sub-constitutional norms about the way the president is supposed to act, especially ones that have grown up since Watergate. To openly say that the Justice Department should be prosecuting a former political opponent for *whatever* is inappropriate. It’s entirely inappropriate.

It’s actually a hard question – it’s hard to identify what the long-term damage is. So, it’s a subtle thing. I think, on the one hand, Trump’s attacks on the Justice Department and his attacks more generally, I think in the medium and long-term, they’re going to increase norms of independence. They have not served him well. They have been widely derided. I think we’ll see – in future presidents, we’ll see additional institutional constraints imposed to prevent a president like this from having influence. And it just hasn’t worked for him: firing Comey led to Mueller. And, as you say, he’s not subtle in doing these things. So I don’t think it’s worked for him; I don’t think future presidents will repeat it. So I actually don’t think that the medium-term impact on Justice Department norms of independence are going to be adversely affected. If anything, strangely, they may be enhanced.

However, what he does with these corrosive tweets and corrosive comments is he sows distrust, more generally, among the populous. You know, when you start attacking a former political opponent this way,

it actually hurts the Justice Department vis-à-vis the public. When Sessions – I'll give you an example: Sessions the other day wrote what at any other time would have been a completely neutral, banal letter in response to Congressional calls to investigate Hillary Clinton or to investigate the uranium deal. And that letter was on its face neutral. It was boilerplate, in my opinion. And it was basically, as I read it, a way for the Justice Department to say, "Okay, we received this letter. We're going through a minimal process, and we're not saying anything else."

But that letter was viewed through the lens of Trump demanding that the Justice Department do that. So the Justice Department's independence was immediately called into question. Everyone read it in its worst light. And this is the kind of distrust that he sows in our institutions. He makes everyone question the legitimacy of what's going on in ways that we wouldn't otherwise question.

So, I think it's corrosive, but I don't think it's going to have a long-term – I think it's more corrosive on our political culture.

KRISTOL: And norms, as opposed to –. Talk about the sub-constitutional norms, because that's something you've emphasized quite a lot in the last year, I think, and it's not maybe the most familiar concept to people. They know there's the Constitution and –

GOLDSMITH: So, we didn't – constitutional scholars didn't used to talk about norms very much. We would talk about the Constitution requires certain things and the president has certain constitutional powers. Then there are statutes, and the statutes restrict the president in certain ways and that defines what the president can do.

But the truth is, as you know, there are lots of non-legal rules, customs you might call them, that guide and inform how presidents act, really how all government actors act. The rules about, for example, the president not commenting on an ongoing Justice Department investigation – that's not a legal restriction on the president. It's not something that the Constitution prohibits. There's no statute saying it. But, presidents through practice, especially because of the experience of Watergate and to maintain their legitimacy and to avoid adverse inferences, have really taken, generally, hands-off those kinds of things. And this has developed through practice over many decades.

And it's a useful practice; it's a good practice; it's in everyone's interest. It's a little bit restrictive of presidential power, because, technically, the president controls the executive branch and should be able to order the Justice Department, in theory, to do what he wants it to do. But on the other hand, it serves the presidency by both legitimizing whatever the Justice Department does and helping the president not seem political. So this is an example of a sub-constitutional norm that's been very important, especially in the post-Watergate era, that Trump has just defied over and over again. That's one example.

KRISTOL: I mean, it seems to me that conservatives have been fans of the unitary executive. Isn't that the phrase?

GOLDSMITH: Yeah, that's the phrase, yeah.

KRISTOL: Do you think that was overdone in the first place? Or should be or is being reconsidered by the constraints that you're discussing?

GOLDSMITH: That's a hard question.

KRISTOL: Or was that always sort of more theoretical and *in extremis*? But, in practice, people are okay with these constraints?

GOLDSMITH: Well, a unitary executive means a lot of different things to a lot of different people. It's pretty clear that Article II of the Constitution – Article II of the Constitution vests the executive power in

the president. And it's not ambiguous about that, and it doesn't say "some of the executive power," it vests *the* executive power in the president. And he has enormous powers of removal. Congress can restrict those a little bit – appointment and removal. And so the basic idea that the president controls his administration, I think, is not in question. And, at some level, everyone would respect that.

Now, the unitary executive gets invoked when people want to say the president can ignore laws, ignore congressional restrictions; the president can't be regulated. I don't think that – so let me just say that.

So, in terms of the conservative position on the unitary executive, my reading of history is this was really something that came to fruition and came together in the 1980s. Before Ronald Reagan became president – this started in the '70s. But for most of the 20th century, conservatives were extremely skeptical of executive power and of a broad executive. They were against the administrative state. They were against unilateral uses of war powers. And their main anxiety, if you take someone like James Burnham and his famous book on the Constitution and Congress. He was a leading conservative intellectual in the 50's and 60's. The primary conservative attitude was to be skeptical of the presidency. Robert Taft was the leading politician on this.

This changed under the Reagan administration. It changed for a lot of good reasons. It changed because conservatives thought to slay the bureaucracy, this massive administrative state, which they thought was illegitimate, you needed to have a powerful president. It was also a time when anti-Communism was important. And it was a time when a bunch of conservative thinkers and very important consequential, still consequential conservative thinkers were working in the administration that was committed to this.

So, that idea really got going in the '80s for conservatives. I will say this: that the executive branch is a *they*, not an *it*. And everyone who works in it knows that. And the president sits atop it and he has enormous power. But it's a massive beast and it's hard to control. So we have a unitary executive in theory; but, in practice, it's always been hard. We've just never seen a presidency like this where the main players in this administration just ignore him. They really just are going about their business, doing their own things, while he's tweeting different policies. And in any other presidency, those would be firing offenses, and he just ignores them.

KRISTOL: And in a sound presidency, you'd want more presidential leadership and guidance. You wouldn't want people just to ignore the president. You wouldn't want him to make the law, on the other hand. So I guess, we're –

GOLDSMITH: So, on the law – on policies, the president should be able to set the policies for the administration. He was elected. He gets to appoint his administration. We normally think of – and we had this in the last two presidencies, and in fact, many presidencies – where the president sets an agenda and his appointees carry it out. And that's what elections are about, and that's the way the system is supposed to work.

Now, there's a check on that for illegal action. So there's the policy space, and then there's the check for illegal action. Those checks are many from within the executive and without the executive. But the way the system's supposed to work is you have a competent, responsible president at the top who's been elected on a set of policies that he or she tries to implement.

And here, we don't have a competent president at the top, and it's not clear what his policy commitments are because he changes all the time. And he has people over the different agencies of government who are running them the way they see fit, more or less – often inconsistent with what he's insisting should happen.

KRISTOL: I was very struck when he tweeted out that demand, I guess, that the Defense Department fire or separate transgender soldiers and Marines and airmen and sailors, I guess. And that was, I mean, as

if – I mean, I suppose *in theory* the president can change various regulations. This is probably not congressional, so it's sub-statutory.

GOLDSMITH: Right.

KRISTOL: Still, there are these processes by which you would have to do it: you can't just fire people randomly in the military. There are procedures by which people can be relieved of their positions and so forth. And Mattis sort of said that, in effect, the Defense Secretary, and the system is reviewing it or whatever.

GOLDSMITH: So that's a great example of Trump tweets this out as if – This reminds me of the story about when Truman, when Ike became president. And Truman said to him famously, something to the effect of, "Poor Ike. He's going to think he's still the general in charge and he's going to bark out an order and think that people are just going to obey." When, in fact, the executive branch is a very complicated thing with complicated rules. And it takes powerful leadership and powerful organization to actually make things happen.

And so Trump tweets this out and the Defense Department's reaction was, "Thank you very much for your tweet, but we have some processes here that we're going to go through." Really remarkable thing.

KRISTOL: I mean, I, as someone who came to Washington when Reagan was president, and, you know, thought our job was to cut through some of these – reform some of these processes, make them less cumbersome. Some of them were self-serving on the part of the bureaucracy. Some of them were self-serving on the part of interest groups who'd captured parts of the bureaucracy, independent agencies. You know all this stuff better than I do.

GOLDSMITH: Right, exactly.

KRISTOL: I mean, one does feel today somewhat the opposite, which is, you know what? It's not so bad to have some of these "deep state" systems. It's not so bad that they're harder to manipulate than you would think.

GOLDSMITH: It's like anything else. The bureaucracy and bureaucratic rules are good ends and they can be abused and serve bad ends. And there's usually a little bit of both.

And I would say, what we've seen from the bureaucracy in the Trump administration is, in many respects, admirable pushback. I think the bureaucracy has actually been, in some respects, violating their own norms in quite severe ways. I think especially in the intelligence community.

KRISTOL: You're worried about that – the leaking and the –

GOLDSMITH: Some of the leaks that have come out with regard to the Russia investigation – talk about violating norms. They're unlawful, but we've had unlawful leaks. There's kind of a norm for engaging in unlawful leaks. It's not a norm violation necessarily to leak: that's a regular practice in Washington.

But the types of leaks that have come out are truly, genuinely unprecedented in several respects. Leaking information about communications with adversaries that will allow the adversaries to basically reverse engineer and figure out the ways in which we were able to collect that information. That's happened much more than usual. Leaking information about US persons that were caught up in foreign intelligence surveillance, foreign intelligence warrants – I can't find any examples of that happening in the last 30 years at all. And there's special rules inside the executive branch to protect information about US persons that are collected in these circumstances. Those have been splashed on the front pages of the newspapers.

And then, third of all, we haven't seen really what's going on here, and it may be for a good cause, but what's going on here is leaking to destroy political opponents. Political opponents, by which I mean to try to really kind of bring change at the top and to affect a political outcome in a very severe way. And we haven't seen that level of leaks for that purpose since Hoover, in my opinion – sort of political leaks or threatening political leaks.

So this is a dramatic norm change from the last 30 years. And what I worry about – we mostly focus on the Trump norm violations. I think a lot of those norm violations are going to go back as soon as we have a sensible president. What I worry about is some of these other norm violations, like the government leaks. They won't go back to the old norm, because once the bureaucrats figure out, "Hey, this is a neat trick. We can do this again."

So, anyway, I very much worry, even though I admire what the bureaucracy has done in some respects, that they've – it's not a *they* either. I mean, it's a lot of different people, so I don't know who's doing it. But that the norm breaches that they have done will – I just worry that it will prove to be very damaging in the future. I mean, if it doesn't stop after Trump, which I fear, it's very bad for our intelligence services. So it's not all a pretty story about the bureaucracy.

KRISTOL: Yeah, no, that's an important point. And that is part of the damage that might be done. We're only, I guess it's very important to say, and you hinted at this earlier, we're only in, what, nine or ten months as we speak. So it's not like we've gone through the whole – assuming he makes it through four years, which, presumably, is more likely than not. Yeah, one doesn't know how much –

GOLDSMITH: It could go in any direction. It could go in any direction. But I really fear that the norm damage is going to be greater – I think the norms of the presidency, when we have a sensible president – the next president, Republican or Democrat – are much more likely to snap back. We're not going to see the next president attacking the Justice Department. We're not going to see the next president saying his opponents, his previous opponent, should be prosecuted. That's not in a president's self-interest. No one thinks that's a good idea.

It might be in the bureaucrats' self-interest to leak this type of intelligence information going forward. And now that the taboo is removed, I fear that it will continue. And that's really bad for our country.

KRISTOL: How about the damage to the political culture? That sort of just saying things that aren't true, and demonizing groups and attacking individuals in a much more vituperative way than has been traditional, at least at that level.

GOLDSMITH: Oh, there's no doubt about it. So I think this is probably the most damaging thing in my opinion that, in my opinion – he's done so many damaging things, but this is the most damaging thing.

To be fair, Trump was elected in part because our political culture had become corroded. I mean, he was taking advantage of the fact that the country was deeply splintered in a lot of ways. He was taking advantage of a media culture that was more splintered and more extreme in many ways than it had ever been before. He was operating on Twitter in a way that was already stirring up passions, in a way that was beyond the usual manner.

So Trump was – I don't think he's only the cause. In some sense, he's the effect of this. But since he's come into office, I think this is – The way that he attacks institutions and degrades the institutions and both calls into question for many citizens whether these institutions are legitimate. That's what he's trying to do. It seems that he's trying to delegitimize the Justice Department, his own Justice Department; his own intelligence community, who he says is full of hacks or former hacks, and who he just continues, despite his appointment to the CIA, to say that there's nothing to the Russia-DNC hack. And his attack on courts and calling courts political. And his attack on his own Attorney General. And his attack on Congress. And his name-calling for everyone.

And then what happens is that everybody else starts talking this way. And you see this. You see this with normally sober people in both parties in responding to him, they start acting like him. In this essay I wrote in *The Atlantic*, I used the example of Marco Rubio, who was this principled, very attractive conservative, who had made his reputation over a very long period of time for kind of being above the fray, being principled, being optimistic. And the turning point in the campaign was when he started making fun of Trump and jabbing him for his hand size and the like. And his whole campaign then, when he adopted Trump's tactics, kind of deflated. I think that's a metaphor of what's happening to the country.

I think that in the country, we are unfortunately – I try to resist this, but I can't say that I always do. In the country, unfortunately, we are all kind of, I fear, descending to his level of vituperative comments, exaggeration, disrespect. The president has a huge moral capacity, a huge capacity to shape the thread of moral fiber of the country. And Trump is bringing us all down in that respect. So I think that's his absolutely most damaging thing of his presidency.

And I really worry that we're going to – I don't see how we're going to get this back because it's bucked up by a social-media structure that leads people to be in their own worlds and in their own bubbles – “self-insulated,” as my colleague Cass Sunstein says – by increasingly extreme media outlets that feed these extremes, by digital platforms that allow false news to spread around. I mean, really, all of this is just terribly corrosive, and Trump's in the middle, swirling and swirling and swirling on purpose. It's clearly on purpose. This clearly has some end. He has some end in mind in doing this. I only see it as destroying American institutions. I don't understand why, but that's what he seems to be doing.

KRISTOL: Yeah, I mean, he doesn't seem as purposeful as a sort of aspiring, you know, anti-democratic type might be in trying to destroy them, as he is so unserious about following through, which is good, frankly.

GOLDSMITH: Yeah, I agree.

KRISTOL: But I guess, if you're a demagogue, without thinking it through, perhaps, you do have a dislike for all these things that stand against demagoguery, you know?

GOLDSMITH: I think that's a great way of putting it. I think it may not be any deeper than that with him. It may not be any deeper than that he just dislikes these institutions. He sees them as oppositional to him. He has this weird contrarian streak. I mean, just anything that he's supposed to admire and be respectful towards, he just doesn't.

It's very hard to figure out the motivation. I really don't think it's part of some grand design on his part. It may be [for] some people working with him. I don't think he's intelligent enough to have that level of thought. But I do believe it's just a terrible thing to be coming from the president. And the immaturity of it, and the shamelessness of it. I mean, we could go on. It's unfathomable.

KRISTOL: What about here at Harvard Law School? I'm just curious, have liberals decided – I always sort of joke about this sometimes, that maybe now they could remind themselves why they should respect the Founders, like the constitutional checks and balances, be a little less enamored of a “living” Constitution.

I made some joke when I spoke at Harvard in January that it was great that Harvard Law School has spent 50 years promoting a living Constitution and making fun of people who simplemindedly thought that maybe we should be constrained by laws until they're properly changed and regulations and kind of what they regard as “simpleminded,” you know, legalism or formalism. And that now they had someone, finally, as president who truly believed in a living Constitution: he just thinks it should be whatever he wants. But are any liberals sort of rethinking – is there any revival of constitutionalism among --?

GOLDSMITH: No.

KRISTOL: No? Okay, that was just – I was hoping for that. Okay.

GOLDSMITH: I wouldn't say that – I don't want to speak badly of my colleagues, but –

KRISTOL: Go ahead. Go right ahead. [Laughing].

GOLDSMITH: But there hasn't been that kind of principled reflection, in my view, at all. And I will say, Trump has had a good impact across the country. I'll give you a better example than my colleagues at Harvard Law: There's much more widespread respect for the intelligence community now. There's so many people left of center in the Democratic Party who are standing up for the integrity of the intelligence community. That is a major accomplishment of Donald Trump. And that would not have happened – only he could do that.

It's happened a little bit with the rule of law, I think, and I actually do believe, and agree with you, that, maybe not my colleagues at Harvard, but more generally in the populous, I think there is an appreciation for checks and balances, their importance, how they operate. I think there is, in my view, a very healthy –

This is how it's changed. So my colleagues – we all go back and forth to some degree on this, but the bulk of my colleagues really were quite onboard for executive power under President Obama, and they weren't so much onboard under George W. Bush, and they're definitely not onboard for it now. And I do think, especially to the extent that Trump is using some of Obama's playbook, especially in foreign affairs but also in domestic affairs, that maybe some of the views during the Obama administration have tempered a bit.

But, more generally, I think that it's not all a bad story. Trump has taught the country some basic civics lessons that I think are very useful. And, hopefully, as a country we'll remember – I'm not optimistic – but hopefully will outlast his presidency.

What's likely to happen is – this is what happened – is that we're going to have an overreaction to the Trump presidency, that we'll put huge constraints on the president that will – we need a powerful Presidency. Arthur Schlesinger, Jr. who wrote *The Imperial Presidency*, and who was very critical of the imperial presidency, he always emphasized – because, of course, he loved the presidency with the right kind of president – he always emphasized, correctly in my view, that the great presidents are powerful presidents. Our system works best, the constitutional system works best when we have powerful presidential leadership that's principled.

And so one danger of Trump is that we'll overreact to this president and shackle the presidency for a while.

KRISTOL: You've written, I think, that Trump is, paradoxically, because he overreaches and violates all these norms so much. Well, I guess, not paradoxical, he does that, but in part because of that, he's a very weak president, in a sense. He doesn't seem to exercise the levers of power as – Maybe in contrast to Obama, for example, who clearly thought through pushing the boundaries, I would say, of legality in certain areas with executive orders and stuff, but did it in a pretty systematic way. Managed to get some legal defenders out there and made it harder to fight and to reverse.

GOLDSMITH: Completely agree.

So, as I said earlier, it actually takes enormous competence and organization – as you know; as you well know. It takes enormous competence and enormous organization and fortitude to get something big done in the executive branch. One reason why Congress has not been able to do anything is because there's been an utter lack of presidential leadership. I mean, you really need, for big stuff – and Obama

did this on some of his big stuff – you need a strong White House helping make things happen on Capitol Hill. You need to get your bureaucracy to do things. You need enormous organization and talent to make things happen.

I wrote once that the great danger of the Trump presidency was not that it was too strong, but it was too weak. We need a powerful presidency, a competent presidency, to make the system work.

KRISTOL: And there could be a time when really something has to happen and it's controversial and he orders it, you know, maybe there's a genuine threat or something –

GOLDSMITH: And he won't have credibility.

KRISTOL: Right, I mean, that's a real problem, too.

GOLDSMITH: I agree. It's all bad. It's almost all bad.

KRISTOL: Well, speaking of bad, what about the effects on conservatism, conservative law students, people you deal with all the time? I mean, what's your sense of that?

GOLDSMITH: So I'm worried and befuddled about the conservative movement, especially the legal conservative movement. So on the one hand, in contradiction to what I just said, or an exception to what I just said, Trump's signature accomplishment, what he's done a great job on thus far, is his judicial appointments. Gorsuch is an excellent appointment. And he's appointed really extraordinarily excellent young conservatives to the Courts of Appeals and, less so, but also the District Court level. I don't know who gets credit – maybe it's the White House Counsel; maybe it's Leonard Leo, I suspect – but Trump basically delegated this in a way that has been enormously effective and it's working on the Senate side.

And I think that judicial conservatism – there's always tensions in judicial conservatism between a kind of a rigid Scalia-type originalism and maybe a Roberts-type Thayerianism, which is more about judicial restraint than originalism. But I think that there's kind of an excitement still among young conservatives about the prospects for more influence from judicial conservatives. And I think that branch of it, to the extent that Trump succeeds, I think, is looking pretty good.

Conservatism, more generally – I don't purport to be an expert about this, but I'm befuddled about the conservative movement more generally. I don't know what conservatism stands for today. A lot of my most conservative friends, for whom things like personal integrity, intelligence, good judgment used to be important in a leader, they have simply abandoned that as a criterion for support for this president. Others have gone in the other direction. I mean, my conservative friends are split basically 50/50. I don't know what the essential conservative principles are these days. I get confused between the conservatives and the Republican Party, which also doesn't seem to stand for anything principled. On the whole, I think that outside the judicial realm, the conservative movement seems leaderless and incoherent to me.

KRISTOL: And even in the judicial or constitutional realm, I guess, when I argue with my Federalist Society friends who tend to be very pleased by judicial appointments, and with some of the internal appointments to, as you say, the Justice Department or agencies, general counsels and so forth. In that respect, he's doing some good things for the *Constitution*, maybe, but don't you think *constitutionalism* suffers from a president who acts the way he does and manifests the attitude towards the procedures and institutions and laws?

GOLDSMITH: There's no doubt about that. Trump is trying and succeeding to diminish respect for the rule of law generally, by trashing it all the time. We've never seen attacks on courts like this. I don't agree with some of the things those courts did, but that's not the way a president should behave. It's not the way he should behave. And –

KRISTOL: But distinguish it – you were in the Justice Department, famously, and had some role to play in those big fights on interpreting certain national security authorities, I guess, right?

GOLDSMITH: Right.

KRISTOL: I mean, how is this different? And people might say, “Well, that always happens.” The president or maybe an aggressive AG pushes too far; someone else pushes back.

GOLDSMITH: So that always happens. I mean, that happens. I can’t remember which political scientist famously said that “You can’t be a great president unless you violate the Constitution.” By which he meant that great presidents, in times of crisis, were able to exercise leadership and sometimes had to sacrifice what at the time were seen as constitutional constraints. There’s always a question about whether powerful presidents, at the margins, are exercising too much power. Whatever you think of Obama and Bush, it was true in both of them. Both of those presidents were sharply criticized for excessive executive power. It was true of Lincoln. It was true of Roosevelt. It was true of a lot of presidents. And there is frequently internal dissensus. There’s dissensus about what counts as lawful action, whether the president is going too far. And sometimes presidents go too far.

But, in the worst days of the George W. Bush administration, when we were having serious legal fights inside, to my mind anyway, there was nothing – it was always carried on at a professional level by informed people who all had a deep respect for the rule of law. We were just having extremely sharp disputes about what the law required. They were good faith disputes. They were important disputes, and I don’t think everything was going on right, but nothing – and, by the way, I think most of the people inside the Trump White House, the Trump administration are like that. The problem is you have a president at the top – and this was not true of George W. Bush and it was not true of Barack Obama – who is just openly defiant of the law, openly disrespectful of the law, not even going through the motions about caring about the law. He advised someone the other day, someone from a Native American reservation to just violate the law. So I haven’t ever seen anything like this before. And I agree with you about the generally corrosive effects in the culture on that.

On the other hand, what really matters, I think, in this regard, is what the courts do. I mean – I shouldn’t say that’s all that matters, but that’s a very important thing. I think the Supreme Court did a really extraordinarily important thing, underappreciated thing, when – this will take a bit of explaining – in response to the immigration orders from Trump, the lower courts, mostly dominated by liberal judges, pushed way back on him – in many parts properly, but, in many respects, they went way too far. They didn’t give the normal deference to the president; they didn’t really tie their legal judgments to their analysis. It was some sloppy work in places.

And last summer, the US Supreme Court, and, in most respects, a unanimous decision, basically said – stopped all that. They wrote an extremely respectful *per curiam* opinion – by respectful, I mean low-key *per curiam* opinion, that tamped down on some of what I viewed as nonsense by the lower courts, lowered the temperature on everything, and really set a standard for how judges should act. I thought that was the Court really at its best moment. I don’t know what happened inside, but it was clearly a coordinated action by the Court to present a kind of face that says, “We’re going to stand for the rule of law on both sides.” That the courts have gone too far here – they didn’t say anything overtly disrespectful of the president, but they upheld most of the injunctions.

I think the role that the courts play going forward is going to be very important to what happens to the rule of law. I expect that Trump will get his clock cleaned in every big issue that goes before the Court, because history shows that the Supreme Court treats the president with the respect he deserves when it comes to executive power. And that if presidents act in ways that are disrespectful to the rule of law, or seem overtly excessive and aren’t humble in the exercise of their power in certain respects, the Court will punish them. And I think that’s – we’ve already seen that in some respects.

The big picture point here, and this is something you said earlier, Trump is extremely ineffective. Almost everything he's doing is self-defeating. Self-defeating in the courts, self-defeating elsewhere.

KRISTOL: That's interesting, though, and I myself hadn't focused on that. I should go back and look at that. That that was a moment, you would say, of judicial statesmanship or whatever.

GOLDSMITH: It was definitely a moment – it didn't get nearly the attention it should have, but it was a moment of judicial statesmanship. It definitely was.

KRISTOL: Presumably the Chief Justice was crafting that?

GOLDSMITH: I don't know what happened inside. I mean, the Chief Justice clearly had a role. But one never knows how these things happen. I mean, there was a small dissent on just one issue by the three most conservative justices; but the overall message – everyone joined the main opinion. And it wasn't a dissent, it was a concurrence. And the overall message was, "There's a problem here. We're going to uphold the injunction in some respects. But we're not upholding it in every respect." Because, basically, the two things the Court said were the judges didn't give the president, even *this* president, the legal deference he's supposed to have in national security, and they didn't fully tie their legal analysis to their injunction.

So, the Court gently chastised the lower courts, while at the same time upholding most of the injunction. They kind of –

KRISTOL: This was on the early immigration orders? The early –

GOLDSMITH: The early immigration order. I'm sorry I wasn't clear about that. And the litigation has been getting a little bit calmer since then. So I just think – it's very complicated, but the Court was remarkably statesmanlike.

KRISTOL: And just going forward, are there obvious areas that will come to the Supreme Court in the next year that people like me who don't follow this very closely should look for? Is there sort of going to be – or is it hard to predict these things, I suppose?

GOLDSMITH: I'm trying to think if there are any cases that really challenge the president's power. There are a lot of cases this term on Fourth Amendment privacy and how far the government can go in this new digital age in collecting information. And people don't appreciate this, but those cases at the margins, they get – who the president is matters. And those justices will inevitably be thinking about do we want – they go beyond this. They look at the law. There's a lot of factors they consider. But I think they're inevitably influenced by who the president is.

KRISTOL: Are you worried they're going to restrict power a little too much?

GOLDSMITH: I'm worried in some of the cases that the government will lose when it shouldn't because of who the president is and how he's behaved. I think there's no doubt that that's a factor; no doubt that that's a factor.

I can't imagine – I've got some friends working in Solicitor General's Office. This is the office that argues before the Supreme Court. They have the toughest job. Because they've got to get up there and defend – it's their duty – and defend on principle a president who is not a principled man. And, you know, they have to do that consistent with their commitment to the court to be candid and honest. And they have some good arguments.

This is another underappreciated thing, is how well the Solicitor General's Office argued those immigration cases to get the Court – the whole litigation strategy was designed to get the Court what it ultimately did, to slow it down and to kind of gently rebuke the lower courts. But people don't appreciate what a tough role these political appointees are in, because they have many ethical and professional obligations which they are upholding. At the same time, trying to defend the impossible: this president.

KRISTOL: And your old office, just say a word about that since that's the –

GOLDSMITH: My old office, the Office of Legal Counsel. They just received –

KRISTOL: So they are considered like the government's lawyer? I mean, what's the phrase?

GOLDSMITH: Traditionally, the Office of Legal Counsel, to break it down very quickly, the president has the authority for the executive branch to make interpretations for the executive branch of all the legal issues. That's what Article II means. That power is delegated to the Attorney General because the president's a busy man. And the Attorney General delegates it the office where I used to work, the Office of Legal Counsel, which is a small office of 22-23 lawyers. And on some of the most important and difficult issues of legal interpretation for the executive branch, when the executive branch is deciding how to act and whether to act. The Office of Legal Counsel rules on those legal issues.

They've been quiet thus far. They just had Steven Engel as the Assistant Attorney General, who was just confirmed, I think, last week or maybe the week before. It's the first – that office has suffered from being controversial. It's only had a confirmed head of the office for five of the last 22 or 23 years. So this is a very important event that Steven Engel was confirmed.

It's not clear what role OLC is playing in this, because OLC's power depends and influence depends in part on the influence of the Attorney General; the stature and integrity of the head of the office; the quality of their work, obviously; who the White House Counsel is. I just haven't been able to figure out yet how consequential that office is in this government. But they've got great people. Engel is very good, and, as I say, in general, the Assistant Attorney Generals that have been appointed are superb.

KRISTOL: It will be interesting to see how that goes over the next three years. One feels nine or ten months in is quite a long time. So, in a way, one feels one could start making judgments. But, of course, history would also show that you would have been wrong in some administrations to have decided –

GOLDSMITH: I don't think we know where it's going. We haven't had a crisis yet, and there will be a crisis. And, as you said, there's so many reasons to worry about Donald Trump in crisis. He is thin-skinned. He has bad judgment. He's mercurial. And, most importantly, he doesn't have the trust of the country. You really need to have confidence in and trust the president that he's doing the right thing. Because often, it's not obvious when he's doing the right thing and you really have to have trust, and he has very little trust stored up. And not much confidence – not much confidence in his competence.

So we haven't had – the stock market's been booming. No major national security crises. There's Korea on the periphery, but we've really gone through a relatively stable period in this first year. That might not last, and who knows what his presidency will look like then. I worry about that.

KRISTOL: I think that's a good note on which to end, for now. We'll reconvene in a year and see what more we've learned about the strength of our institutions, the character of this president, how those fit together, and whatever else has happened in our complicated form of government.

GOLDSMITH: That's great. Thank you.

KRISTOL: Jack, well, thank you very much. Thanks a lot.

And thanks for joining us on CONVERSATIONS.

[END]