

CONVERSATIONS

WITH BILL KRISTOL

Conversations with Bill Kristol

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I: The Constitution and Elections (00:15 - 27:54)

KRISTOL: Hi, I'm Bill Kristol. Welcome to CONVERSATIONS. I'm pleased today to be joined by University of Chicago law professor Will Baude, a very distinguished, young but distinguished law professor at that fine law school, at the University of Chicago, well known for his work on constitutional liquidation, a very interesting topic. And Madison. I guess, that's from phrase from Madison, is that right? I think so.

BAUDE: Yeah.

KRISTOL: Yeah, which we should have a separate discussion on. Also, maybe more notoriously, seems to have invented the phrase, "the shadow docket," which Justice Alito got upset about recently, about the way it's been used, not of course about your important scholarly work on it. But anyway. Will clerked for Chief Justice Roberts and is a leading commentator on many matters of constitutional law and the federal courts. But what we're going to talk about today is provoked by a recent piece you wrote, but also by other, just by the facts of this, by the moment, which is the whole question of the elections and election overturning and threats to democratic elections in this country.

Will, thanks for joining me.

BAUDE: Thanks for having me.

KRISTOL: I would say I would not have expected to have this conversation. I've been in Washington a long time and I'd been through transitions of one party losing. I was actually in a White House where we lost after one term, the George H. W. Bush White House. I always knew that the system we have for transferring power, or for ratifying election results and certifying them, and then moving forward to let the new party take power was a little unusual, sort of an accretion of different historical and constitutional and legal procedures. But I got to say, I never thought a moment about it in all the years I've been here.

I went through one where I remember being with Vice President Quayle on January of 1993, and him saying, "I guess I have to preside now and certify that we lost and Bill Clinton will become president." We

joked a little bit about, "not the greatest day of your vice presidency," but of course he went out and did it. None of us thought a thing about what was happening. Occasionally there'd be one rogue elector.

Then it turns out we have a system that, well, I'll let you explain the system we have and the institutions and laws we have. But maybe we should take a minute to talk about what happened. I mean, in your view, what was sort of just the highlights of this very unusual transition we had from November 3rd to January 20th?

BAUDE: Yeah. Well, I mean, the most unusual thing about it was that it was there were a lot of points where it wasn't totally clear it was going to happen. We have these hard-wired dates that turn out to be immovable like Election Day and Inauguration Day. But between November 30th and January 20th, as you said, a bunch of stuff's supposed to happen. The Electoral College has to meet. Their slates have to be certified. Then their stuff eventually gets to Congress, supposed to count it, supposed to affirm who it is. At each stage of the game, there were efforts, sometimes spurred on directly by President Trump, sometimes by sort of other people in the orbit, to try to throw something in the gears and see if they could stop it from happening.

KRISTOL: Yeah. Before we get to the, maybe going through the different aspects, the different places where things have to happen and could have gone wrong, the state level, the executive branch, Congress, the courts, in general, just sort of a top-line summary, how alarming is the whole thing to you now that it's more or less over?

BAUDE: Yeah. I mean, it's alarming, I guess I'd say. It's alarming. I don't want to be an alarmist. I don't want to say we almost had a coup in this country. There were still a lot of things that would have had to happen to go from senators and representatives objecting to storming the capital to get a full-on constitutional crisis or coup, so I think we still had plenty of safeguards between us and that. But we blew through a lot more of the safeguards than I think people came to expect.

I think the whole process is sort of like, I guess most people think about it the way I think about my car, just sort of there's a lot of stuff going on under the hood. I never really worry about it. It seems to work. Every once in a while there's something a little funny and then you take care of it, but you don't really think about how many moving parts there are and sort of how miraculous it is that it usually just works just fine.

KRISTOL: Yeah. That's a good analogy, I think. I mean, I was involved just in a few things, gaming out the situation before November 3rd, because we should remind people, it wasn't that this was a huge, a total surprise. I mean, President Trump highlighted, or what's the word I'm looking for, foreshadowed that he would, might likely challenge election results if they were close and if he had been ahead on election night and then would have these mysterious dumps of votes from the mail-in ballots and so forth. But I got to say even, yeah, we didn't quite see. We saw some of the stuff that could be done.

BAUDE: Yeah.

KRISTOL: Pressure at the state level, but not everything.

BAUDE: Yeah. I had a friend, who people may remember, and the first day after the election results came in and it was sort of too soon to tell for sure who won because several states were still close enough and votes were still coming in, and then a few days later most of the news media decided that Joe Biden had won just enough states to put him over the top. I remember I had a friend who said, "Okay, so is it over? Are we done worrying about what's going to happen?" I said, "Well, this is good. I'm less worried than I was before, but there are still a bunch of things that have to happen. The Electoral College has to meet and I'll be a little less worried after they do that successfully. Then Congress has to meet, I'll be less worried after that happens successfully. Then January 20th, Joe Biden is going to stand on the stage and take the oath of office, and then I'll be less worried once each of those things happen." And at each of those stages, I guess there was some reason to be worried.

KRISTOL: Yeah, and I think a little more rickety than we sort of expect, or rickety is not quite fair, but more pressure points that were where there were norms and expectations, but not quite the kind of maybe legal scaffolding one thought was there.

BAUDE: Right. We grew this process obviously from the Constitution going back several hundred years, so some of the mechanics were originally there for good reasons. You couldn't just like move information across the country at instant speed. You'd spend a lot more time worrying about like, "Is this the real copy? Have we had a forgery? Who are these people?" The system is kind of built, I mean, it is literally built for a horse-and-buggy time when you had to imagine, "how are we going to have the whole country make an immensely important decision and make sure that we're all confident that went well?" Now that we can all watch it on the internet in real time, it takes on a different meaning.

KRISTOL: I also think, don't you think, and we'll get to the actual institutions and sort of the nuts and bolts of the discussion in a minute, but I think people were, I'd say for me, I shouldn't speak for anyone else, maybe a little complacent weirdly because of 2000 and even 2016.

In 2000 we had an election in which the popular vote and the Electoral College vote differed and we had the decisive states decided by an insanely tiny margin of whatever it was, 537 votes. It was messy and it was very, a lot of bitterness and contention, including at the court itself, I suppose, in the final decision.

But it got resolved. And it wasn't, ultimately, for all the talk about it, "there was going to be an overhang and all this," there was some legislation, a couple of little things were fixed maybe, but basically we chugged along.

Then we had normal, so to speak, elections in '04 and '08 and '12. Then in '16, we had another Electoral College/popular vote divergence, though not close enough to really call into question the results, I suppose. And in fact, Hillary Clinton conceded, I think it was the afternoon after Election Day. There was grumbling, God knows, about "What about the popular vote," and all this, and a tiny bit of efforts, "Maybe the Electoral College should decide differently than the popular vote?" The Obama administration cooperated with the incoming Trump administration and not much drama.

I guess one thought, "Gee, we've been through those two," at least I thought. This system for all of its, as I said, sort of historical accidents that had accreted and so forth seemed to be okay. I don't know if that was more generally a view. Do you have the sense that people were —?

BAUDE: Yeah. No, I think that's exactly right. I think people, again, on the other side, there were people that were lobbying the Electoral College in 2016 to make an independent judgment that Donald Trump would be bad for the country and just not let it happen. They took the message that, "okay, we just don't do that." And probably good that we don't do that in the end.

Yeah, I think a lot of people thought that ultimately there's some responsible adult somewhere in the system who makes sure this whole thing works. I think even, I guess we're getting ahead of ourselves a little bit, I think there were even people who were involved in some of these shenanigans who probably knew better, but who probably thought, "Well, eventually the courts will make sure that that the right thing happens." Or, "eventually somebody else is in charge of making sure that this all works." I guess one of the sort of takeaway lessons is that there's no one person who we can just count on to make sure everything works fine, so we shouldn't all just assume we can misbehave however we want and blow off steam, it will mean nothing.

KRISTOL: No, that's a very good, actually, point. I would say, don't you think that also just no one had quite expected a president to be engaged systematically and from laying the ground work, pretty systematically, I mean he wasn't the most systematic person, but laying the groundwork weeks and months ahead of time, and then doing various things at the state level and at the federal level to try to disrupt the system. It's one thing for some grumbling on the outside, but I think one shouldn't, I think we'll get more to sort of institutional and legal questions, but one probably shouldn't leave aside the fact that that's kind of a key fact. But once it's been done once, one can't count on it not being done again. Right?

BAUDE: Yeah. Well, I mean, I will say, so in 2000, we did have both candidates not conceding or conceding and taking it back, but for weeks we had two candidates both claiming they should be president. It's not like we knew, "Oh, somebody is going to stand down the first week."

KRISTOL: Don't you think it was two candidates both claiming that there should be more of a process to count the votes accurately.

BAUDE: Yeah. But I mean, right —

KRISTOL: Not quite claiming — I would say that's in fact I think an important distinction — not quite claiming that they should be president, claiming that the votes when fully counted would justify perhaps a claim that they should be president.

BAUDE: No, that's true. That's true. Even when Al Gore was resisting the 2000 election, even then it wasn't, "I'm sure I won, and if we just dig around long enough, we'll find the 5,000 votes I need to win." It was, "Right. We haven't had a full process." But I think, of course, if he'd had the recount he'd sought and he had lost, he would've accepted that, or vice versa. That's true. But this is something we should have been aware of is one of Donald Trump's greatest skills has been sort of intuitively finding these weak points in people and in institutions and kind of poking at them and getting them to misbehave, so maybe it shouldn't have been a surprise, but I was still a little surprised.

KRISTOL: Yeah. Yeah. No, I think it was. And going forward, I think that once it's been done once, it's more likely to be done a second time. Right?

BAUDE: Yeah.

KRISTOL: I mean, we can't anymore say, "Well, that would never happen."

BAUDE: Yeah. I mean, look, if in 2024, we have another close election where both candidates behave themselves consistent with the rule of law and nobody tries anything, then I'll sleep a little easier. But for the next few years, I'm not sleeping as well as I used to.

KRISTOL: Let's talk about then the particular, I don't know what you'd call them, pressure points, flexion points, institutional hinge points where everyone can, which our system depends on. I guess the states is maybe good to begin with, since we do have a federal system and we got 50 different results and would turn out to be, well, in this case, I think counted pretty accurately, it seems in almost every state. But it turns out there's stuff that can happen between November 3rd and whenever the state electors assemble to ratify the results.

BAUDE: Yeah. Exactly. There's a couple of weeks, more than a month, I guess, between Election Day on November 3rd, which the Constitution calls "the time of choosing electors," and then the day the Electoral College sort of meets, so to speak. They don't all meet in one place. They collect in their individual states to cast their votes. The Constitution calls it "the day on which they shall give their votes." During that six week period, that's the time to try to lobby electors to be faithless, if you can do that, that was the 2016 thing. But that's also the time that there's some ambiguity about whether states can do more. The Constitution never explicitly says that electoral votes in the states have to be done by popular vote, that's just become the custom, but it wasn't always done that way; and textually, states could do other things.

One of the first sets of pressure points was, if you're a red state legislature and your electorate has just given a narrow victory to Joseph Biden, can you take it back? Can you pass a law saying, "Well, ultimately, we, the state legislature, are in charge. We've decided actually not to honor the results of the November election, but instead to pick the Republican slate?" That's a legal ambiguity. I happen to think they can't do that. That once election day has happened, that's actually the time electors are chosen and by then it's too late for the states to take it back. But the statutes Congress has passed, have little

exceptions in them like if the election failed to happen, for instance, then the state's allowed to, as a backup, pick somebody. That was envisioning there'd be a snowstorm or somehow nobody got to the polls. But if a state said, "Well, the election failed to happen because we think there was widespread fraud," or something, then maybe the states could do something.

KRISTOL: Maybe I'm wrong about this, but I think that all the states had passed legislation saying they should ratify the popular vote, right? It wasn't that it was a blank slate exactly, they had to overturn that in a sense after November 3rd.

BAUDE: Right. They would have to convene, pass a new law repealing that and putting in place an electoral slate. But constitutionally, I guess there's a little bit, there was an opening for them to do that.

Now luckily, no actual state did that. There were members of various state legislatures who said, "We should do this," even a couple who claimed that if they did that they'd privately talked to their caucus and they thought the votes were there to do it. Had that gone differently, had Pennsylvania and a couple of states gone with that and said, "We're going to pass a new law rescinding the election and declaring our electoral votes go to Donald Trump," we would have been in a much worse constitutional crisis.

KRISTOL: I suppose there was in some states, and it really does differ now state by state, I think, an intermediate stage where there were election commissioners, who none of us had ever, well, I shouldn't say for you, I had never heard of individually or even collectively. And it turns out in Michigan on November 20-something they meet and there's five of them and they sort of have to do their own mini-certification that their results are accurate.

BAUDE: Exactly.

KRISTOL: That was a point before you might get to the state legislature.

BAUDE: Yeah, exactly. Exactly. Right. I mean, there's sort of almost a stream from the votes come in, the votes get counted, the votes get certified, various legal questions that affect some of the votes have to be determined by mid-level election officials. This is part of the whole machinery between the casting the votes and the Electoral College saying, "Okay, here's what we've voted," has room for, exactly, low level officials, state legislators. I mean, it's interesting.

I mean, I hate doing this kind of Doomsday, counterfactual scenarios but I guess to be responsible we have to a little bit. If you imagine somebody who was better organized and had a lot more people in the party really behind them, you might've known where the pressure points were much, much better. I don't think the president was organized about this, but if you'd carefully put in place the right election commissioners in Wayne County and wherever else, it might not have taken that many people to swing enough votes to swing enough states.

KRISTOL: Yeah. Well that's, going forward, a question which we should get to in a minute. If you have a political party that is now thinking about doing things that I think it's fair to say no political party in modern times really has quite systematically thought about, well, how would you go forward in a forward-looking way going about putting the right people in power? What are the implications of that?

Maybe we should just talk about that for a minute now. Isn't that pretty striking that you do have the Republican party sort of thinking again, not very systematically, but certainly in some states, people running almost explicitly on the, "I'm not going to be a wimp like those election commissioners in Georgia, or the state level commissioners, or county-level executives in Michigan," and so forth?

BAUDE: Yeah, no, I think it's, I mean, I think it's terrifying that one important way to be in good standing in the Republican party and to rise to prominence in the Republican party is I guess the big lie, it's to say, "I believe Donald Trump won the election and that Republicans who failed to take his side, failed to find a way to keep him in office, have betrayed him and I'll be a true party loyalist." I think it used to be that being a party loyalist meant you did everything you could to win the election for your candidate, even

when your candidate was flawed. If the new test to be a party loyalist is that you do everything you can to keep your candidate in power, even when they've lost the election, then we've lost the plot.

KRISTOL: Yeah, no, that's really a good point and a good formulation, I think. And it is, yeah, it's one thing for, again, for people after November 3rd to suddenly a few people decide, "Hey, we can do this," but then there are these norms and customs that sort of helped some people push back. And if you've been elected on that platform, it's a very different thing. I mean, that's where I think the big lie, I think a lot of the people, I'm one of them who've complained endlessly about how can you have a party that's legitimating the big lie and how much damage that does, but the damage is often put in this slightly abstract way of, "Well, it's bad for the country to have people propagating lies, especially about important things like elections and democracy." That's certainly true, I would say. But it doesn't quite get to the concrete character of what you're saying here, that if you have a party that's electing people based on that, it has a real implication for what might happen and I guess conceivably some elections in 2022, but certainly in 2024.

BAUDE: Yeah. Yeah. I mean, maybe it won't matter, maybe it'll be overblown, but I'm suddenly a lot more worried about it.

KRISTOL: What else at the state level? The courts were involved, state and federal.

BAUDE: Yeah. So then, right, so then in each of these sort of internal disputes, you have questions about the votes being cast. You have officials taking action. Then some of those disputes have to go to the state courts who now have to decide who's right and wrong about them.

And then, worse, also the federal courts have some role in kind of policing what's going on in the state courts. Another one of these lingering legal issues, which is actually a legal issue leftover from Bush versus Gore is about the sort of the internal separation of powers in the state.

So the Constitution says that "the state legislatures are in charge" of the rules for presidential elections, but of course in practice you have executive election officials and courts involved the way they always are in the administration of law. And so this is another constitutional ambiguity: does that phrase, "the state legislators are in charge," mean that state courts have less power than they usually would, or that state executive officials have less power than they usually would?

And so you had a serious effort to get the federal courts involved to say the state court ruled this, but the real meaning of our statute is that. And therefore, even though our state courts have resolved the challenge this way, the federal courts would get involved and resolve the challenge the other way. You had several Supreme Court justices looking at the federal courts say, "That's a real issue. We should probably get into that at some point." They didn't choose this election as the time to get into it. But that just adds another round, another layer of kind of opportunity in terms of manipulating the different institutions at the state. Because if you lose in the state courts, now you suddenly have an additional out to say, "Well, maybe the state courts shouldn't really be the ones to resolve it."

KRISTOL: And how, I mean, one has the impression that almost every case was resolved in favor of the state officials resisting last minute efforts to overturn things in 2020, but how certain is that as a pattern going forward in terms of —

BAUDE: That's one of the things I'm least worried about is the federal courts, even the state courts being sort of active mischief makers in this process. The courts have had a doctrine, have had a series of doctrines for a long time that basically amount to, it's really hard to convince the courts to change the results in the middle of the game and even harder to get them to agree to change the results after the fact. Basically, courts don't ever order new elections in this country. They do that in some other countries, but they just basically never do that.

Now people often on the left complained about that and various situations because that could mean that voting rights get abridged and nothing happens. But it does mean that the courts are the least likely to be

receptive, I think. The courts may not save us to be clear. Like that means that if, because the courts leave everything alone, if you can successfully suppress the vote in some county or cause shenanigans to happen, the courts won't necessarily rush in to save it, but they're unlikely to be the ones to rush in and cause trouble.

KRISTOL: And how likely are they though to be passive if you have a pretty, what I think would be from my view and maybe yours, egregious attempt by either election commissioners or partisan election commissioners and obviously partisan state legislature and executive branch to do something that we would regard as kind of overturning the will of the voters. How likely would they be to step in to prevent that, I guess is the other question?

BAUDE: Yeah, I think I wouldn't hold our breath waiting for the court to step in. I guess we'll get to it in a second, but if the process in the Capitol and Vice President had gone differently and resulted in Donald Trump being declared President, I'm not sure the Supreme Court would have stopped it.

KRISTOL: Really? So even when it's a federal process where they presumably would feel a little more ability or responsibility to do something.

BAUDE: It might have jurisdiction. They might have some ability to do it, but I'm not sure that would've happened.

KRISTOL: So better to have responsible judges and justices than not. Much better to have them at the state level it sounds like what you're saying in a way, well, but the federal district courts played a role too, I suppose, and appellate courts. But that's not the first line of defense is what you're saying.

BAUDE: Right. And it is striking. I think this, again, not enough credit has been given here, a lot of the judges who were not falling for these shenanigans were Republican appointed judges. A lot of them were appointed by President Trump. I know that when President Trump was filling the bench, there were lots of complaints that "he's stocking the bench with his people who are going to eventually do him a favor in turn," and that did not happen. Right? The judges that were put on the bench did not show any signs of corruption.

KRISTOL: And I think if there'd been more of a mixed verdict from the courts that would have had its own rebound effect on the political system. That is if you could plausibly say, as a Pennsylvania state legislator, "Well, it's complicated. Some courts were with us, some were against us. We need to resolve this," as opposed to whatever 61, or 62 courts, or I can't remember was there any, 61 out of 61 courts and it all went in the same direction, that would have made a difference politically, I suppose.

BAUDE: I think so, too. So take somebody like Mitch McConnell, who for a long time was quiet on the question of who had won the election. And after the Electoral College had met, eventually he was willing to say, recognize Joe Biden as the President-elect. And I think one of the factors in that was that Donald Trump had brought a bunch of court challenges and they fizzled out, because for a while he would say, "Well, look, he's entitled to bring his challenges, so if the courts agree with him, then okay, we'll follow the courts." But so once you can say, look, there's no ambiguity here. You just lost over and over and over and over again. That allowed at least some people in the Republican party to be more secure in saying we're really not going to do this.

KRISTOL: Right. So that first stage, which I guess let's say in 2020 dates would be what, November 3rd, December 14th, when the Electoral College, is really state focused, almost state, not just focused, but entirely the federal government, Congress does nothing, right? And the federal government does nothing. And a few federal courts do a little, but it's mostly upholding state courts.

BAUDE: That's right.

KRISTOL: Or rejecting cases with no standing or whatever, we're not —

BAUDE: Right. That's right. For the first part, the federal officials really have very little role. They're the party, of course, since people are members of the party, they may still be taking their cues from what they're hearing in Washington. There was this little wrinkle about the General Services Administration, which can sort of turn over transition funding. And there was a period where they were not turning over transition funding because they were refusing to decide who is President-elect. But for the most part, that first phase, it's still out there in the states, hasn't yet all come into Washington for us to —

KRISTOL: And my impression is that right now, as we speak at early October of 2021, not much has changed in the states, in the sense that there are not new safeguards in major states that would prevent that — Those safeguards that would strengthen the system so to speak from a political overturning of elections, nor perhaps the other way either, new anti-safeguards to make it easier. Is that right? We're sort of in the status quo at the state level.

BAUDE: That's my sense, legally anyway. So no state has passed a law saying we reserve the right to overturn the election if we don't like the result or —

KRISTOL: It's been talked about such laws in a couple states.

BAUDE: Personnel wise, there have been some changes in the actual voting laws, in terms of voter registration, polling times, the more normal partisan chicanery that I think we're used to for the last couple of years. And I think, we don't know well enough, are there quiet moves in terms of who's on the election commission on the right, in the right county, but mostly that's about where it was before.

KRISTOL: No, I think we should come back to the political party question, which I think remains a big one. It's a more informal, you might say, question than the formal laws, but it's very important, obviously, because if a party is pushing on every weakness, that's very different from a party saying, "Let's just make sure we don't exploit the weaknesses." Right?

BAUDE: That's right. That's right.

II: The Rule of Law (27:54 - 1:07:25)

KRISTOL: Yeah. So then you mentioned the executive branch. Maybe we should take a minute on that because meanwhile, Trump, in this case is trying to do things at the Justice Department, at the Defense Department, with the General Services Administration, probably less importantly, and stuff's happening within the executive branch. And that goes, I guess that comes more after December 14th when the state efforts fail, you might say. And then you got the vote count and now it's suddenly how do you try to maintain power given that vote count? And that's partly a Congress, January 6th, Mike Pence side of things, and partly an intra-executive branch side of things. So say a word about, I mean, how alarming do you find the intra-executive branch efforts at Justice and elsewhere.

BAUDE: Yeah, so, right. So the President wanted, as far as we can tell from the reports, he wanted the Department of Justice to declare there was widespread election fraud in various places and start prosecuting people. He wanted the Department of Justice to file briefs on behalf of the United States saying that the election had been wrong, joining some of the state AGs who are doing this kind of thing. And none of that happened.

On the one hand, there were more people in the White House who were trying to make that happen than I would like. I would like to live in a world where everybody — the President says this and his Chief of Staff and the White House Counsel, everybody he talks to is just like, "Mr. President, we're not doing that." He had people saying yes, but he had people like Bill Barr, who, again, a lot of people have not been fans of, but people like Bill Barr saying, "Mr. President, we're just not going to do that." You have people in the Solicitor General's Office refusing to take his calls or refusing to make it happen. So I think the Department of Justice, I guess, comes out looking pretty good. The Department of Justice comes out basically unwilling to move on this.

KRISTOL: Despite Barr resigning or being fired, which for me was a huge alarm bell. I mean, I think people, maybe I would say, having been at — you know the craziness of quitting a month early, I mean whoever does that? I mean, first Esper gets fired, the Secretary of Defense, a weekend after the election, and then the Attorney General. And you start thinking, if this were a foreign country and there was an interregnum between the election day and the inauguration day and the Secretary of Defense and the Attorney General either get fired or quit, you'd kind of be worried that something's going on.

BAUDE: Yeah, no, that's right. That's right. So I guess that's a little worrisome, but so Trump needed to get the Department of Justice to actually move to do things and to do that, you can't just fire people. You got to have people willing to do them.

There was some possible theory of installing a new temporary person, which is another one of these pieces under the hood nobody worries about, as one of the rules for installing acting officials and their temporary vacancies. And can you use that to get around Senate confirmation and so on, but in the end, he wasn't able to figure out a way to do that. I think in part, because of the threat that everybody in the Department of Justice would resign, which both practically would be nothing would happen and optically even the President recognized would not be good.

So, again, I don't mean to sound Pollyannish here, right? We lost the Attorney General because he refused to go along with a plot to steal the election a month before Inauguration day. But in the end, his willingness to do that, and everybody else's willingness in the department to stay at their desks and keep doing their job meant that that was not the weakest point.

KRISTOL: Yeah. I think people underestimated before November 3rd how much Trump's being President, as opposed to being a challenger who was contesting an election, it certainly gave him an advantage, but it gave him all kinds of leverage to try to pull mostly, as you say it ineffectually. And of course if you're just outside, it's complaining. You don't get to appoint people to be acting Attorney General. You don't get to threaten to fire the CIA or FBI director so forth. Right? Put loyalists in. So I guess the threat is greater from an incumbent president or party than a challenging party just in that simple way. Right?

BAUDE: Yeah, no, for sure. And I think in terms of the right, I mean, the optic, the fact that you're already in possession. If possession is nine-tenths of the law and for now, Donald Trump possesses the White House and the seat of government, that puts them in a stronger position.

KRISTOL: I suppose that's true at the state level too. Right? I mean, we talked abstractly, not abstractly, but generally about these states, but it sort of mattered that there were Democratic governors in the key, several swing states, and other officials. And then actual Republicans elected who wouldn't go along. I mean, "possession's also nine-tenth's of the law" at the state level. And if you had a very different, I guess you made this point in a way, but just to reinforce it, I mean, if you had different people in office in November of 2024, things could look quite different at the state level.

BAUDE: Yeah, no, exactly. As long as there are enough responsible people and enough responsible people bipartisanship and so on in the various institutions, then I don't have to worry that much. But of course, over the course of a couple of years, you can't be totally guaranteed that everything is lined up in a way that makes it totally secure.

KRISTOL: It tells me that looking forward, just in the very short, medium-term to 2024, the state level is more, assuming that the Biden administration does go the route of the Trump administration and doesn't try to monkey with election results with Merrick Garland or whatever, that the worrying more about the state level and a little less about the federal level maybe would be a good idea for people who are worried about election subversion or overturning elections in the short, medium-term.

BAUDE: That's probably right. Because of course the Republicans possess a bunch of states. They don't possess the White House now. And the other thing is it's just unpredictable. So it makes it harder to plan in both directions. You don't know exactly how many states will be key and which ones they'll be. So it

only takes a couple of people in the right place to have a big influence, but we didn't know exactly which states and which counties it would be. We don't know now.

So that makes it hard to totally sleep easy. You can't necessarily make sure every single county is totally secure, but it also means that if you were plotting a coup in 2024, it's not like you can just put in two or three sleeper agents and you've got your plan.

KRISTOL: Yeah. It has to be a party-wide effort, which of course, unfortunately, it sort of is. So that's like the good news and the bad news, right?

BAUDE: We've got a few years. We've got a few years.

KRISTOL: No, I think that's very important, though, the degree to which — One other point I'd make on this — We're doubling back in a way, but I think it's very important. This is an important topic. This is so much understandable, and we'll get to this in a minute, January 6th, the Capitol. But that's, in a way, maybe not quite as practically important to see as what happens at the state level. But that's a dynamic situation at the state level.

That's the other point, I think, people sometimes think we can take a snapshot in October of 2021 and say, "Well, this is what Arizona looks like. This is what Pennsylvania looks like. This is the governor. These are the laws. These are the court justices, and these are the court judges in these states, the judges in these states. And this is the mood in these states in terms of willingness to stand up." That may be quite different three years from now, though.

BAUDE: Right. Right. I mean, they could be actually different people, and the mood and the national currents and the party currents could be different, for better or worse.

KRISTOL: Yeah. Right. I think people sort of vaguely assume a reversion to the better because that's been the history, but there's also some suggestion, if you look around at other parts of the world and so forth, that once these things get unleashed, they don't automatically kind of — Toothpaste doesn't automatically get itself back into the tube, right? I mean —

BAUDE: Yeah. Well, and here's — I mean, so look, if you're an ambitious politician and you want a higher place in the party than you have now, one opportunity you see now is to promise to be an attack dog. And you say, "You've got to get rid of this guy as the county chairman and replace me because I would've gone to the mat for Trump. Or get rid of this guy as the Secretary of State and replace me because I would've found the 10,000 votes." And you could do that even if you don't believe it, right? You could do that thinking to yourself, "Of course, I would never really do that. I'm just saying this to get in power, and one day I'll behave responsibly once I'm in power." I worry that people who behave irresponsibly to get power don't suddenly develop responsibility later. But you could have plenty of people who are doing this just strategically.

KRISTOL: I bet we do. I mean, I think that's a very important point. It's not as if we haven't. That's something that was thought of. There are a bunch of people running for office and Secretary of State of Georgia and Arizona and elsewhere, who are explicitly running on the platforms you suggested.

BAUDE: Yeah. Yeah. And I think, again, I think some of them may believe it. Some of them may believe it, but I think some of them know better. They know better. They've just made a calculation this is the play.

KRISTOL: Yeah. It's funny how much one gets back — when you start to talk these things through — to the political party and to public opinion and, in a way, a little bit away from the legal formalities.

BAUDE: Yeah.

KRISTOL: Presumably, any structure of legal formalities is susceptible to pressure, and laws have to be carried out by human beings, right? So —

BAUDE: Yeah. Well, and — We are skipping around our institutions, but this is, I guess, the time to say it. Why was January 20th sort of the magic, ultimate date? It's that we did have enough sense, there were enough people that once there was an inauguration in which Joe Biden was sworn in as President, there were enough people who would say, "All right, now it's over." But that's just part of the norm, right?

KRISTOL: That's a really good point. Yeah, yeah. Yeah.

BAUDE: That's just the one norm that, so far, nobody has really managed to shake or rattle.

KRISTOL: And Trump has tried — I mean, some of Trump's maybe more oddball supporters have tried to say that. That's the one part that hasn't quite taken off, I would say, the kind of, "We should reinstate him in August or something like that."

BAUDE: Well, or Trump didn't just stay in the White House, install some loyalists in the military to guard the door and say, "I'm not leaving." Right?

KRISTOL: Right.

BAUDE: That was still not on the table. But that's no different than these other norms we've been talking about. That happens to be one that we haven't lost yet.

KRISTOL: Yeah. That's a good point. So between December 14th and January 20th was January 6th, and so let's talk about that, both in terms — well, both in terms of Congress's action and the Vice President's action, as well as the public, what happened in the Capitol obviously.

BAUDE: Yeah. Right. So obviously, in the Capitol, the House and Senate have this somewhat arcane and mostly ceremonial, although with some question marks, role of officially accepting and tallying the electoral votes under the supervision of the Vice President. And this was a pressure point back in the election of 1876 that produced a contested election and the Hayes-Tilden compromise. And after that, Congress passed legislation and tried to make it work more smoothly, and it's mostly worked pretty smoothly. But that turns out to be a — have multiple areas for pressure. We had objections from — For an objection to be sustained or sort of entertained to any electoral votes, you have to get a Representative and a Senator. There were plenty of Republican Representatives willing to do it, but then there was kind of a hunt for a willing Senator, and they found a few.

And then you have the Vice President presiding over all this with a slightly unclear role. It seems like his job is mostly to be a potted plant and just kind of keep things running, but once you have the gavel — There are questions about that. And then in the middle of that, we had a storm of people invade the Capitol, having been whipped up into a frenzy. I was watching this in a little window in the corner of my laptop while it was happening, while I was preparing for Con Law class, just kind of like curious what was going on. And then suddenly, the screen went dark, and then I go over to Twitter, and people are saying, "They've breached the Capitol." That was certainly one of the moments I was the most worried.

KRISTOL: So on the mechanics of January 6th, how important is it and how doable is it to make that clearer or less susceptible to manipulation? What do you think of the whole Electoral Count Act and the proposals for reform with that?

BAUDE: It's hard to totally fix it. The Electoral Count Act is an old statute that could be clarified and streamlined in various ways. That probably would be good, but there is this lingering constitutional problem that's not totally clear that this is something that can be regulated, because there's a whole bunch of arcane stuff in the 12th Amendment and other parts of the Constitution setting up the process.

So one of the outside arguments is that the whole Electoral Count Act is unconstitutional, and the Vice President has these inherent, constitutional powers. There's not a lot you can do legislatively about that. So I think reforming the Electoral Count Act would be helpful, but probably the more important things are three.

So legally, it was important that each house of Congress had enacted rules in which they agreed to sort of use this process for counting votes, not just in the statute, but that as a matter of the rules of the House and Senate, they agreed to follow them, because that clears up one of the major legal ambiguities of whether a statute can tell a house of Congress what to do.

And then personnel-wise, having senators and a Vice President who are just not willing to sit still for this stuff is probably the most important. And we didn't quite have that on the senators. We did have it on the Vice President ultimately. So somebody probably ought to be talking to this. Yeah.

KRISTOL: Right. And how important was that? I mean, there's been a lot of controversy about Vice President Pence, and some people say, "Well, I mean, even if he had tried to do something, it couldn't have happened. It was all kind of just one state or two states that were being challenged. And even then, what would the challenge have amounted to? It would have all gone away, just in a sort of messier way over the next two weeks." And other people say, "No, it was important that Pence resolved it."

BAUDE: So first of all, I think Pence — There would've been more room for trouble if Pence had had more to work with. This goes back to the states. If three Republican state legislatures had, after the election, revoked the state's electoral votes for Biden and given them to Republicans and sent that to the Senate, so we actually had dueling slates, the elected slate and the legislative slate, then there would have been a lot more sort of legal ambiguity and discretion for Congress and the Vice President to work with. So if they had more to work with, that would have been worrisome.

And then if that had happened and if Pence had said, "Well, I've got two slates here, and there's at least a decent argument that the Republican slate is lawful under these various provisions of the Constitution, so I'm going to either certify those or declare that it's undecided." That alone wouldn't do it. If the Vice President just unilaterally declares a coup, that doesn't happen.

But then the question is who else goes along with it? So if he had said that, and then there'd been a sort of fracas among Congress, and then the majority of the House and Senate had decided to endorse his view, and so now suddenly you had the Vice President and Congress taking the side of a kind of questionable decision, then I think there's a real chance other people would have fallen into line. Then there's a real chance that various other officials would have said, "Well, this is really strange, but we're going to go with it." And then I think there's a real chance the Supreme Court would have said, "We're not getting involved in this." So I guess I think that could have kicked it off.

KRISTOL: I mean, the storming of the Capitol was terrible, and we should maybe talk about that for a second in terms of sort of the tying together of the intra-governmental, if that's the right way to put it, and the extra sort of threats, the governmental threats as a kind of — This is a kind of classic way that these things, democracies do begin to fracture or get challenged or get overturned even. But I do think for me watching it, it was the vote late that night. It was so kind of over-swamped in terms of the coverage of the drama of the occupation of the Capitol, the insurrection. That 140, was it, House Republicans or something like that, but certainly a clear majority of the conference voted to at least — Well, what did they exactly vote to do? Not to accept the electors, I guess —

BAUDE: Right.

KRISTOL: — from one or two states, I think it was approximately.

BAUDE: Right. On the grounds that there were still various, spurious, but various questions about the validity of various things in the state.

KRISTOL: It's unclear what that would mean. I mean, what would it mean if they had had the majority and there had been 218 votes not to accept? Or the majority of each state — I don't even know. We're not quite at the majority of each state question. That's the election of the-

BAUDE: Right. You'd have to have —

KRISTOL: — selection of the President.

BAUDE: You'd have to have the majority of the House and Senate, so they'd have to — If you had enough votes to reject the electoral votes, then it would be as if that state had not voted.

KRISTOL: I see. So that's the Eastman memo kind of?

BAUDE: Yeah, exactly.

KRISTOL: You take Pennsylvania off the board and —

BAUDE: Yeah. And if you get enough down, then you either win a majority of the remaining states or throw the election into the House, depending on the math and the details.

KRISTOL: So all the rhetoric about revoting, that was pure rhetoric? There was no way for that to happen in the real world?

BAUDE: To have like a new election in the —

KRISTOL: Yeah.

BAUDE: Probably not. In 1876, we had the whole electoral count was in sufficient chaos that the result was to appoint a special commission to kind of study it and resolve it and have a compromise. So there's a world that's not totally science fiction in which things are deadlocked and confused. We have a commission, and the commission decides that a special election is the best way to resolve it or something, but —

KRISTOL: Right.

BAUDE: But not really.

KRISTOL: I guess, at the congressional level, we have had occasional moments where, like in North Carolina, where the election for a particular congressional seat was so corrupted people thought that they actually had a new election. But we have never done that at the federal level.

BAUDE: And I think we never will. Of all the — Yeah. And then you, of course, have the storming of the Capitol, which in some ways, I mean, was the most dramatic and got the most coverage. In some ways, it's not nearly as scary as a lot of the other pieces of this puzzle. And it seems to have caused some people to sober up and say, "Wait a minute. I guess we were playing with fire. Let's not do this anymore."

And obviously, now there are prosecutions. I think there were a couple — There were still a couple of places that could have made a huge difference. So if the storming of the Capitol had just meant that they weren't able to get back in and finish the count and finish the vote late that night, that just puts more time on the board for state legislatures to maybe go back and vote. All the moving pieces are still there. It would give everybody more time to try new things. So I think it was very important and very good that Congress decided at three o'clock in the morning, having been hiding under our desks, we're going to die, we're still going back in and getting this done, so as to cut off any opportunity for funny business.

The other — And we were far from this, and so I feel a little bit morbid mentioning it. But if the invasion had been more deadly and more violent, so if there had been weapons on the floor of the Capitol and a

lot of members had died, that could obviously make a huge difference, because the ability to replace — It's very hard to replace members of the House. You have to have special elections for that. There's a whole set of rules for temporary replacements. And it wouldn't have taken that many people to either destroy a quorum or to really swing the election. And we weren't there. The mob was not nearly that armed or that violent for that to come in. But yeah.

KRISTOL: No, that's another issue. That came up more post 9/11. And I know there were people who were trying to change — So that senators can be appointed quickly, I think, in most states. But House members have to be elected. That's sort of the people's house, right, and all that.

BAUDE: Right.

KRISTOL: Is that a constitutional provision, or is that at least just a norm for 200-plus years? I don't know, but —

BAUDE: I think that's a constitutional — It's understood to be a constitutional requirement, that you can't have somebody appointed.

KRISTOL: You have to have an election. And I remember, I mean, people were correctly alarmed after 9/11. If they plane had hit the Capitol, you really literally could have a House of Representatives that wasn't — If they, God forbid, had been there and stuff, they couldn't function because they just would — You can't just reconstitute it right away and stuff. Yeah.

BAUDE: And of course, that process within all of it is the same vulnerability. So if we suddenly were reappointing and re-electing a hundred new members of the House and Senate knowing this issue was on the table, what would the elections have looked like? Who would have supervised those elections?

KRISTOL: And would Trump — would the President have vacated the White House on January 20th, or would he have had the excuse of, "Well, let me just stay here until we resolve this." And these elections aren't taking place till February 15th or March 2nd or something.

BAUDE: I assume we would have moved heaven and earth to have those elections happen by January 19th so that we could have the count by January 20th, but you know. There's even one last constitutional ambiguity. It's just unclear. Suppose that the — Again, this is a terrible world, but suppose that the House and Senate is reduced to like five representatives and one senator. Are they a quorum or not? Like, in a way, there is — This is one of these [inaudible] that I've wrestled with. There's a plausible argument that that's still a quorum, and so those six people are a Congress until you get more. But there's also plausible arguments not. Neither answer is very good because, of course, this could be anybody, and they could propose Constitutional amendments and do all sorts of crazy things. But also to say our country literally can't function until we go back out to the states and get people back in doesn't make a lot of sense.

KRISTOL: Yeah. Let's not give people too many ideas about this, but no that's a good —

BAUDE: Sorry. You can edit that.

KRISTOL: It's a good caution, though. But the vote by the House members — So I see. So you'd need a majority of both houses, and of course, Republicans didn't control the House of Representatives anyway, so they weren't going to get a majority. And they only got two-thirds of their own conference, but —

BAUDE: Yeah.

KRISTOL: But again, that, I guess, becomes more of a laying the predicate for future — making that respectable for future actions. And then having a situation where a member of the House Republican leadership loses her leadership position, Liz Cheney explicitly really, on the issue of whether that vote was correct and appropriate or not.

BAUDE: Yeah.

KRISTOL: And so there's kind of a ratification of the notion that, hey, yeah, if you guys don't — And as you say, in this state, they hadn't even gone to the trouble of selecting a slate of alternate electors based on some fake account of fraudulent election, and even so, they were willing to do it. I think that hasn't gotten enough attention compared to the storming of the capital, it seems to me.

BAUDE: I agree. I have friends who remain loyal Republicans, but are now in the, "I would never vote for Cruz or Hawley, or any other senator who did [inaudible] know they should have done better." But I don't think that's a widespread conversation.

KRISTOL: An awful lot of senior Republicans just have ducked the issue or, "Well, maybe it wasn't right. On the other hand, it's not a huge problem." But if you say that people are running at it, going forward, and if people are going to start taking a — If the whole party moves in that direction, it's a very different story.

I'm curious, these informal norms are important, and one was that pretty much every respectable law professor, former judge, former attorney general, from either party, to the degree they spoke up, were not on board. Let's just say the overturning of the election on January 6th. We have the Eastman memo. Where do you think, in legal establishment world, including conservative legal establishment world, how many barriers are there, there? Can you imagine the Eastman memo, or some version of it, being respectable two or three years from now, in a wider swath of the legal world?

BAUDE: Not in this scenario, but I think so. In this scenario, we were lucky, in that all the legal claims were bogus. But if we were in a world where there really were competing slates, and so now, we were in ambiguities about the meaning of election day and the Constitution. Or if we were in a world where there were a majority of Congress and the Vice President disagreeing, so we have the ambiguities of the Electoral Count Act, or with the state legislature versus state court, the Bush versus Gore question with outcome determinative, and many justices and law professors are on the other side of that. There are plenty of conservative legal scholars who would've honestly given what they thought was the legal answer, even if that wasn't necessarily going to be good for chaos. So, I think, we're lucky here, in that the legal challenges were sufficiently meritless, that people who were just looking at them on the merits, weren't signing on.

KRISTOL: I haven't spoken with Mike Pence in years, but my sense is that, for him, probably the fact that Mike Luttig weighed in, the former judge and associate attorney general, whatever his title was, OLC, I guess, under President Bush and Bill Barr. He is such a respected figure in the conservative federal society, legal circles. It gave him, Pence, I think, a little more comfort in saying no, that you can't just do the — It's not just a bunch of — Larry Tribe is not just telling me this.

BAUDE: Right.

KRISTOL: It's Mike Luttig, right? Don't you think that — That matters, I think.

BAUDE: No, that does matter, and I think Mike Luttig is an honest broker. So I think, if the legal challenge was a little stronger, he would've probably felt compelled to admit that. Maybe he still shouldn't do this, but — You know.

KRISTOL: Yeah, that's where I am struck by what you're saying. The notion that you can just construct the laws to prevent this, or interpret the Constitution reliably and strongly enough, if I can put it that way, to stop this, is a little dubious. That you do need the spirit of like, "Hey, we should not be overturning elections." We shouldn't be looking for excuses to do so.

You can't really ask a law professor to say, honestly, if he doesn't believe it honestly, or she doesn't believe it honestly, that there are no legit possible loopholes or excuses. People who are guilty don't get

convicted of crimes because of genuine legal loopholes, not false ones, but you don't really want a system where people who seek to exploit the loopholes can do so systematically, to overturn an election.

BAUDE: Right. That's exactly right. So there are loopholes. The loopholes are not as big as the Trump supporters thought they were. It turned out to be harder to get anything through the loopholes, but if you spent several years really leaning on them, trying to push something through, I can't tell you that the Constitution is so well constructed that it's impossible to break it open. So, if we have a world where half the country is trying to break it open, we're not going to make it.

KRISTOL: It sounds like you're saying also, you can't tell me that, even if some legislation is passed to make elections subversion harder at the federal level, or even at the state levels, that one could be sure that that could really construct enough of a guard — The guardrails couldn't be strengthened enough to work fine, no matter how hard they're pushed on.

BAUDE: Right. Again, there are laws that can make the loopholes a little smaller. There are laws that can move a little bit of the trouble out of the way, but there's no law and there's no Constitutional amendment we could pass, to say, "We never have to worry about this again."

KRISTOL: We just don't have the experience, do we? We have a party that's pretty systematically, a part of a party, to be fair, but not a trivial part of a party, and the leader of the party, pretty systematically pushing a narrative, as we say these days, that delegitimizes the guardrails and legitimizes a pretty sustained effort to violate them.

BAUDE: Well, the bad news is, we kind of do. We had redemption after the Civil War, in which the Jim Crow party, more or less, cheated and murdered and fought its way back into power, and the Federal government, more or less, let them, and it gave us the rise of Jim Crow. It wasn't a nationwide party, it was a regional party. They powered only a part of the country, but we did let that happen for a long time. Lots of differences. I'm not at all saying there's no parties —

KRISTOL: No, it's a very good caution. It would be as if, I suppose — The ultimate thing would've been, after 20 years of Jim Crow, that having taken control, basically, of a whole bunch of state governments and passed laws that they wanted to pass that were contrary to the spirit, if not the letter of various constitutional amendments and federal legislation that had been passed, they then had succeeded in putting a Jim Crow candidate in the presidency in 1896 or something like that, and that didn't quite happen.

BAUDE: Not quite, although, Woodrow Wilson segregated the federal government.

KRISTOL: No, it's a very good point. I know I myself didn't appreciate — I'd studied this stuff a little, but how far the reaction went and how not inevitable, perhaps, it was, and how much it wasn't what people expected in 1870.

BAUDE: You know, the fact that it's happened before and the country's still here, but a lot of bad things can happen.

KRISTOL: What else haven't we talked about that's important, either legally or constitutionally, or more in the spirit of the laws kind of way?

BAUDE: We were talking about it a little bit, but I guess, the last question is what to make of all this. The thing that I would've, again, slept pretty easy, if after January 20th, everybody had said, everybody in the Republican party especially had said, "Boy, that was a big mistake. We came pretty close to doing something we were really going to regret. Let's impeach Donald Trump, even though it's only symbolic, in recognition of the fact that we're repudiating him and cutting him out of the party, and maybe making him unable to run again, maybe not."

Or even keep Lynne Cheney in the leadership, say — I guess, ideally, it would've been, if the Republican party would say, "We repudiate this. That was bad. We wouldn't do that again." Second best would be if the Republican party would make clear, "You can still be a leader in good standing in the Republican party, and think we shouldn't have done this."

The treatment of Lynne Cheney makes that more nerve-racking. Although, the fact that Mitch McConnell remains in control of his party in the Senate, is encouraging. He made no bones about the fact that he did not like what Trump was doing, did not think it was proper. He gave some strong speeches. Now, he didn't ultimately join the impeachment effort, didn't ultimately have the votes. I get that. So, the fact that he's still around, makes me sleep a little easier. If he's displaced by some other senators, then I'll really get nervous.

But, as we've started with, a lot turns on the states and how things happen on the ground, and just where a bunch of people are in the party throughout the country. I guess that's the question for the next couple of years.

KRISTOL: A lot of that turns on what happens, practically, in a bunch of primaries in general elections in 2022. Even at the federal level, Mitch McConnell will, he may still be leader, but he will feel different if, in Pennsylvania, Ohio, Arizona, and Georgia, Republicans have won running explicit on a big lie platform, and a "We can't let this happen again" platform. As opposed to Republicans running on something I personally would still find insufficient, but a Mitch McConnell like, "No, that's not quite right. Maybe there were problems, but we can't just take the law into our own hands," kind of attitude.

BAUDE: Right. That'll be a big difference. We're not going to kid ourselves. We know that the election is not going to be won on an anti-Trump, Never-Trump, platform. That's just not going to happen. That's not how things work, but —

KRISTOL: The *Republican primaries* aren't going to be won on that.

BAUDE: Exactly. But the difference between the, "Let's do that again, but better," and the "Let's never talk about that and pretend it didn't happen," would be huge.

KRISTOL: I think it's a very good note, actually, to end on, in the sense that you're a law professor and you've studied very carefully the Constitution and the legal structure, and at the end of the day, so much does depend on public opinion more broadly. And then, we have a party structure in this country, which is slightly extra-Constitutional, but, of course, a very important part of the "living Constitution," if we can use that term. A huge amount depends on the overall stance of those two parties. That's more of the Jim Crow point, in a way, if you —

BAUDE: Exactly. Look, we got the Constitution because, ultimately, we overthrew the pre-existing legal regime. Not following any constitutional regimes, but just because that's where the people were. Nothing in the Constitution stops that from happening again. We're a long way from that happening, but it all turns on public opinion, and party opinion, and elite opinion, and the character of the American people.

KRISTOL: Just two last little points on that. I am struck just looking back. We had close elections in this country. 1916, people have forgotten that one. 1960, where arguably, honestly, Kennedy won because of what we might call election fraud in Illinois and Texas. Hard to know, of course. The fact that people just said, "Okay, we cannot get in the business of messing around with overturning election results or popular vote, electoral vote distinctions." We probably took that for granted for much too long.

BAUDE: Or think of the Nixon impeachment. The fact that, once it was clear that the Republican Party was going to abandon him, was ready for him to go, then he wasn't going to put up a fuss and try to stay. If that hadn't happened, maybe he would've been able to hang on.

KRISTOL: That's a good point. Even he decided not to put the country through an actual — What if he had, had 35 votes in the Senate? Is that the right math? He had 34 votes in the Senate?

BAUDE: Yeah.

KRISTOL: What would it look like to have a president who would have been saved by pure party loyalty. What's that?

BAUDE: Right. What would it look like to have a president who, by pure party loyalty, survived an impeachment attempt, and thus felt emboldened to do what he wanted and to recognize that the party was in his pocket. We found out.

KRISTOL: That's a very good point. People have forgotten the importance of the failure of the first impeachment attempt, by pure party loyalty to Trump. Then, what that presumably enabled or encouraged, in a bad way and for the next year, it led to the second attempt.

The final point I was going to raise, which I — Wait a second. I just want to get this out. It just fled my mind. Okay. Finally, maybe, I guess I'm struck. If you had said to me, on January 7th, 9, 10 months ago, that we would be where we are now, not so much legally though, but could have fixed some things, but things haven't gotten much worse, I wouldn't say, legally, in most of the states, but we haven't fixed much at the state or federal level. More importantly, we have a party that's *more* committed to the big lie, arguably, than it was on January 6th. That part, for me, is the most worrisome. Maybe it's temporary. Maybe it fades. Maybe all kinds of other things kick in, and two years from now, we say, "Well, that was a crazy little bubble of authoritarian-lie-legitimizing or lie-tolerating moment in our politics, and we're back to semi-normal." But maybe not. That's been pretty astonishing, I think. It's been an astonishing year, 2021, in that respect.

BAUDE: Also, if I can just make one thing to make it a little scarier.

KRISTOL: Sure.

BAUDE: For now, we've been talking about this in asymmetric terms. We've been talking about this as — "Of course, the Democrats would never do any of this. They all believe in the rule of law and apple pie and obeying the law." It's only so long it can be true that one party refuses to accept the legitimacy of the Constitutional system and the other doesn't. Once both parties don't, it's not going to be possible to get anybody in either party to back down. So, if this keeps going on much longer, it's going to get a lot worse.

KRISTOL: No, that's a very good point. Whatever one thinks of them, the Joe Biden, Merrick Garland, wing of the Democratic party may not be in charge forever, right?

BAUDE: Yeah, indeed.

KRISTOL: Yikes. Okay. We have a genuine Constitutional and legal problem, which ultimately is a genuine political problem. I guess that's the — right.

BAUDE: It's ultimately about the character of the American people.

KRISTOL: Yeah, that's a very good note to end on. Very rare for law professors to acknowledge that though, because law professors often are in the business of, "If only we construct this particular legislation, we're fine." Right?

BAUDE: Yeah.

KRISTOL: But this is where you're, genuinely —

BAUDE: I have no illusions about my ability to fix any of this, unfortunately.

KRISTOL: No, but that's healthy, honestly, because A, there are some things that can be done, however, that would improve rather than make the situation worse. And I do think the indirect effect is underrated. The Mike Luttig effect, let's call it. The legal establishment effect. On the other side, the Merrick Garland effect. Without getting into the business of whether every single decision he's made has been correct, as opposed to a different kind of attorney general being appointed by — You can imagine, a different country, a party where there's been a genuine attempt, you might say, for the incumbent president of the other party to steal an election, the kind of attorney general that gets appointed by the new president is a very different type of figure than —

BAUDE: Indeed.

KRISTOL: — than Merrick Garland.

BAUDE: And there are people pressuring the president to do that.

KRISTOL: So it's very foolish to be at all complacent about the moment we're in. Will Baude, thanks very much for joining me today, for this very stimulating, if not entirely reassuring, discussion on CONVERSATIONS.

BAUDE: Thanks for having me.

KRISTOL: And thank you for joining us.

[END]