

# CONVERSATIONS

WITH BILL KRISTOL

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BILL KRISTOL:

Hi, I am Bill Kristol. Welcome back to *Conversations*. I'm very pleased to be joined again after a bit of an interlude, I guess, by Jack Goldsmith. We did four conversations back from 2017 to 2020 I discovered. They sort of blurred together, but they were excellent and stand up well, I think. Jack, a Harvard law professor leading student of the presidency, executive power, law institutions, that's a complex of things. Served in the George W. Bush administration, wrote an excellent book about his experiences there, *The Terror Presidency: Law and Judgment Inside the Bush Administration*, served in both the Defense Department and then somewhat famously as Assistant Attorney General, the Office of Legal Counsel in 2003, I guess. And then a recent book in 2020 with Bob Bauer that came out at the end of the Trump presidency before January 6th, I think.

JACK GOLDSMITH:

Yes. Yeah. We didn't have that in the book unfortunately,

BILL KRISTOL:

*After Trump, Reconstructing the Presidency*, which we could talk about a bit, whether it has been reconstructed. Anyway, Jack has an unusual combination, I would say a deep understanding of the constitution and the more theoretical sort of side of executive power, but really practical experience and someone I think who values judgment and prudence a little more than some law professors do, who are a little more legalistic, if you'll allow me to criticize any of your peers there.

JACK GOLDSMITH:

Yes. It's fine. It's fine.

BILL KRISTOL:

So Jack, thanks for joining me again.

JACK GOLDSMITH:

Thank you, Bill, for having me.

BILL KRISTOL:

We're talking here, what is it, December, just the 11th, 2024 about the presidency, the rule of law, the institutions, the guardrails, all these issues that are pretty front and center. I guess we should begin maybe a little bit with the forest rather than the trees. Now, I do want to get into two places you actually worked in government and sort of help explain to people the implications of the situation we're in and what might happen in justice and the legal side, you might say, of the government and the defense department and the intelligence community. But first, give me a... You wrote that book four years ago, *Reconstructing the Presidency*. How stands the presidency? We want a strong president. We want a law-abiding president, more or less. Those things are intention. How are we doing that?

JACK GOLDSMITH:

I'm with Arthur Schlesinger Junior who said, "We need a strong presidency, but a strong presidency accountable under law," and those two things need to go together. My view is that given the modern world, given foreign dangers and domestic complexity, and really the nature of the Constitution as it was set up, vigorous presidential leadership is vital to make the Constitution work. But to also quote Schlesinger, the government runs best when the president has checks and balances stitched into his breast and values those things and understands that there are implicit constraints on his powers, even if they're not written in law. So that's the ideal in my opinion. Bob Bauer and I wrote this book in 2020, and it was basically a book about how President Trump in his first term had identified a whole slew of loopholes and deficiencies in the post-Watergate regime of executive branch accountability.

He wasn't, we made clear, the first person to start chipping away at the post-Watergate norms, but he definitely was much more aggressive and successful in kind of exploding the norms, circumventing the laws, and so we wrote this book that had a vision of how to restore the presidency, this powerful presidency, but subject to proper constraints. We had 50, 55 proposals and almost all of them got basically nowhere. As soon as Trump left office, nobody seemed to care anymore, including the Biden White House, to my disappointment to kind of doing what I thought it would take to put the presidency on a sounder footing.

**BILL KRISTOL:**

Yeah, it was disappointing how... I read the book and did a little bit to try to promote some of it, and yeah, people lost their sense of urgency and alarm, I guess, once Trump had left office. I guess the one thing that happened that you, I think, called for and were pretty sympathetic to, was the Electoral Count Act. I mean, reforming somewhat the procedures on January 6th.

**JACK GOLDSMITH:**

That was very important. Bob and I were involved in that. At the margins, I don't want to take credit for it, but it was a very important reform, and it was an astonishing, really, that it was able to happen. It had bipartisan support. The worry was that it would take on the patina of an anti-Trump reform, which it could have, but it didn't, and there was just a really bipartisan consensus that the old—hundred and fifty-year-old—rules governing how basically the accounting of electors works and all the rules around that should work and clarifying the role of the vice president and the like. So that was a hugely important reform that did happen in the last four years, and there were some smaller ones as well.

There were some important in the weeds, Inspector General reform. There were some important, in my world, reform of transparency of international agreements. But the core issues about conflict of interest, about obstruction of justice, about tax disclosure, about justice department independence, electoral interference... There are a whole set of laws maybe reforming the pardon power, which you can do at the margins, none of these things got any traction.

**BILL KRISTOL:**

Yeah. I was going to ask what the particulars were, we just went through them briefly and we can come back to them as is appropriate. The pardon power particularly, you'd think since both sides are now unhappy about the uses of the pardon power, it'll just... I don't know. I'd be curious... I mean, it just seems like it's become something that it was not intended to be. It's pretty hard to make the case it is good for the country really, or good for mercy or good for national comedy or the various reasons the president had this extraordinary power and was given it. And also has been used in ways that even previous presidents have somewhat bent, you might say, the intention. This has gone further. Am I right about that?

**JACK GOLDSMITH:**

Yes, I think so. I mean, it is an important provision of the Constitution. It was a provision designed to establish the executive branch mercy. That has an important role in reconciliation. It's played an important role in the Civil War and the Vietnam War and other contexts. It's a

check on certain forms of prosecutorial abuse. Done rightly, it is, I think, a very important power and one worth preserving. The problem is that it is stated in absolute terms, and the Supreme Court has interpreted those absolute terms to meet to be absolute. It really is an enormously broad unchecked power, and presidents for a long time have been using it in politically self-serving ways. Bill Clinton did this. The first George Bush did this. Donald Trump abused the pardon power for self-serving reasons like no other president ever, and then of course, we just had President Biden pardoning his son.

So there's nothing in the pardon power that prevents these self-serving pardons, but it's really corrosive of the pardon power and not necessarily of the rule of law since this is the part of the law, but it's certainly corrosive to the idea of even-handed justice, that the president can use a pardon to give a get out of jail free card to his friends and family. But reforming that takes a constitutional amendment in my view. There are some things one can do in my view, and Bob and I wrote about this, to put some constraints on the pardon power to clarify that a president can be subject to criminal sanctions for taking a bribe in exchange for a pardon and the like, but these are marginal things and the efficacy of that after the Trump versus US immunity case is unclear. So there's not a whole lot that can be done, and I'll just say one more thing, and then there's the possibility of a self-pardon, which has never been tried, but could happen.

BILL KRISTOL:

Yeah. We're speaking, as you say, just a month after the Biden pardon of his son and what, six weeks before very likely... Not just likely. He said he is going to do it, pardon of January 6th, people who invaded or stormed the Capitol or intruded on the capitol, however you want to say it. So yeah, it's certainly a live issue. I guess it makes the point that you just alluded to, maybe you could develop a bit, though. It's partly a matter of these guardrails being fortified, made intelligent, check abuse, but also allow for presidential leadership and a strong executive and so forth. It's partly the internal thinking and sort of internal checks of the presidents and his team themselves. It can't all be done by Congress doing A, or the Supreme Court doing B.

JACK GOLDSMITH:

This is one of the most important things that we have learned since 2017, and that is... I'll zoom out and then I'll come back into the pardoning power.

BILL KRISTOL:

Okay.

JACK GOLDSMITH:

That so many effective constraints on the presidency were grounded in self-understandings by the president, the character of the president, the ultimate reasonableness of the president, and that checked... Bill Clinton, when he did his pardons at the end of his term, he knew he was doing wrong, and he did it anyway, but there was this sense that you're not supposed to do that, and that kind of called norms or expectations of the office or self-constraint by presidents not to abuse the office, it's a really important constraint on the presidency. And Donald Trump came into office promising to explode those understandings. He tried to. In his first term, he did to some degree. He wasn't as successful as he hoped to be, but the problem is, as Bob and I wrote in our book, there were precursors to everything Trump did.

Then Trump comes in and just takes a wrecking ball to all of these norms and understandings. Then we have the Biden administration where they too violate norms and understandings in some important ways and don't take steps to buck up the norms or to do the reforms that are needed to put the presidency on the right foot. Then Trump runs on an even bigger wrecking ball, pledging an even bigger wrecking ball. So we've had a downward spiral of these norms. The Biden pardon is definitely a big step in the downward spiral of the use of the pardon power, because as many people have pointed out, it's going to give Trump cover to do basically whatever he wants. Also, Biden, in the course of that pardon, trashed his justice department for being politicized, which plays into the Trump narrative. So it's a downward spiral of these,

whatever you want to call them, norms and expectations of the offices just really becoming ineffectual.

BILL KRISTOL:

Yeah. One thing that struck me about the Biden pardon, which I was not happy about either, if anyone cares... It was, compared to various other pardons of leaders, at the family side of it, but Bush... At the end of George H.W. Bush, I was in that White House with the Vice President Quayle—chief of staff—pardoned people because from Iran-Contra at the very end, but they had mostly, actually not every single one, mostly had pled guilty or been convicted, or they'd been held accountable to some degree. And a very high percentage of pardons, when you think about it, including Clinton's example, which are pretty deplorable, the huge majority of them are cleaning the record as a favor of someone. Maybe you shouldn't do it. It's not quite equitable. But the two previous family pardons, Bill Clinton's brother, I think had served a year in jail in the '80s. Clinton pardoned him in 2000 to kind of clear the record, so to speak, and the same was true... There's another one, which I'm blanking on, but where it's a very similar situation.

JACK GOLDSMITH:

Yeah, I can't remember, but there's one other.

BILL KRISTOL:

It's a previous... It's an old, so to speak. Yes. This was the middle of a court case. He'd gone to trial, he'd chosen to go. It was kind of messed up the way the plea deal fell apart, but he'd chosen, in any case, to go to trial. There was a jury. It wasn't like this was some arbitrary star chamber thing. I don't think people thought the trial was particularly unfairly conducted or anything. He was, of course, ready to appeal. He had plenty of attorneys to do that. I feel like doing it in the middle like that is more egregious in a way than doing a favor for someone that you respect or to be fair to someone you think was a good civil servant, a good public servant who deserves to, in a sense, have a break retrospectively.

JACK GOLDSMITH:

Yeah, I agree with all those distinctions. I mean... I agree with all those distinctions. We could still debate the late Bush pardons. I actually think they were justified because I think the independent counsel there had overreached, but you're right. They came after guilty pleas. They came after trials. The Biden one was in the middle. President Biden claimed that, and I can't assess this, that his son... No one else for these crimes would've been prosecuted, but the idea that his justice department was engaged in misbehavior is ridiculous. I don't know if you noticed this, but when Hunter Biden sought to have the case dismissed, the judge took issue with the president's description of the unfairness of the trial process and the prosecution in pretty strong and effective terms. The closest analogy, I think, to the Hunter Biden pardon is Ford's pardon of Nixon, where he basically pardoned him for a long period of time for crimes that he'd not yet been charged with. He was an unindicted co-conspirator, and so he was still in the middle of things.

Of course, that was an historically unique context that was controversial at the time, not legally, but politically. Some people still do argue about the legality of these forms of pardons, but there's good case law support for them, in my view. So anyway, it's an extraordinary pardon, and it's right up there with the most extreme pardons in terms of scope and covering things that he hasn't even been charged for or that he was in the middle of being charged for. Anyway, because it was his son, because he promised he wouldn't do it, it sets a bad precedent, obviously.

BILL KRISTOL:

Yeah. The promise that he wouldn't do it, I think, it was also a bad precedent, again, certainly going forward. I mean, I guess, Trump, since you mentioned that he really blew up some of

these norms, pardoning people in the middle of his term, or partway through his term, two-thirds way through his term, who might have testified against him or might have spoke... that's closer to the sense, for me at least, of the abuse that's kind of really corrupting justice. I mean, Hunter Biden wasn't going to affect anyone else's life.

JACK GOLDSMITH:

Well, I mean, I don't follow these things. There's a claim that Hunter could potentially implicate his father.

BILL KRISTOL:

Well, fair enough. That's true.

JACK GOLDSMITH:

I don't follow these things, and in fact, though the pardon makes that... Because now I think he loses some of his immunity to testify. But anyway, I haven't studied those claims. I agree. Trump was incomparable in his abuse. Many dozens... And I think Hunter's actually listed all of these and studied them all. I have a chart on this, and I think something like, I can't remember the number, but the person I did it with, we concluded that about 70% of the pardons were for friends or friends of friends. Several of them, as you say, were for people who had been indicted and prosecuted by Mueller and who may have testified against Trump. So he was incomparable in his abuse. I mean, remember, Bill Clinton was investigated after his Marc Rich pardon by the Southern District of New York. Jim Comey actually investigated him, so there was some possible wrongdoing there, but nothing compares to what Trump did in number or abuse. Nothing compares to it.

BILL KRISTOL:

Well, let's look forward, since he's about to become president again in six weeks, and talk generally maybe. And we can go to whichever order you want. I'm sort of interested in, I think, some people, I am, are alarmed about some of the nominees. We don't need to get into that at a personal level, but how alarmed are you by what Trump, maybe leave the nominees almost aside, they've spoken too, but Trump himself has spoken so much to these issues, you don't really need to get to the nominees, by what he seems to want to do? And I'd say, unless you think there are other buckets that we should talk about, the sort of, let's call it, Justice Department rule of law side of things, and then, the Defense Department intelligence community side of things. I feel like those are two big areas where we could be pretty uncharted waters.

JACK GOLDSMITH:

Yes. So, I spend a lot of time trying not to be alarmed. So my general disposition is to not be alarmed and to wait until we have concrete evidence that we need to be alarmed. Because so many things in his first term that he pledged to do never came about. I suspect that's going to happen here as well. You already see, and I don't want to be naive, you already see some moderation in what they claim to want to be doing. So just with that background, for me, one of the most worrisome things is, and there's a contradiction in what the Trump people are saying, is whether they are going to fight the lawfare they perceived with lawfare of their own from the Justice Department. My own view is that the Trump people have credible reasons to be upset about some of the things that the Department and the Bureau did to them over many years.

I wouldn't agree with all of their complaints, but you just need to read five or six Inspector General reports to see that the Bureau and the Department didn't always cover itself in glory. And there was another one that just came out yesterday from the Inspector General of the Justice Department, and we can talk, if you want, about which of the prosecutions and investigations were legitimate or not. But in any event, we've been in this downward spiral, and again, I'm going to use that phrase a lot, because it's been happening in a lot of contexts, of one administration investigating another, prosecuting another, going back to the Obama

administration investigating the Trump campaign, which I think they had reasons to be concerned, but they made a lot of mistakes along the way, which got this whole ball rolling. And then, there was the Mueller investigation and then, there were investigations by the Barr Justice Department about the Mueller investigation and John Durham.

And then, the Biden people come in and they start investigating the last administration. And now, Trump's coming in threatening to go after people, for which... who have not plausibly committed crimes and don't warrant investigation. I can't say that about everyone, but the vast majority of the people he's mentioned. This is the thing I worry about the most. It would be wonderful, and this is naive, it's going to seem naive, it would be wonderful if they meant what they said when they said they're going to stop the lawfare. And they've spoken in two sides of their mouths on this, and I don't expect them to go in there and do nothing. And it doesn't take much, by the way. It just takes opening an investigation to really wreck people's lives. You don't have to actually bring them to prosecution. This is the thing I worry about the most, that we're going to have the next round of lawfare, that it is going to be ratcheted up like the next rounds tend to be.

And it just depends on what they want to accomplish. I think it will actually damage their administration if they're too aggressive on this stuff, because it's going to hurt the integrity of the Department and the reputation of the Department before courts and things like that. But this is what I worry about the most, because the Justice Department is in bad shape right now, is in really bad shape for a whole bunch of reasons, some deserved, some not deserved. And that would be terrible for the country in my view and for the idea of apolitical justice. So that's the thing I'm most discouraged and worried about, in terms of what DOJ might do.

BILL KRISTOL:

Is this a DOJ thing or an FBI thing primarily? I understand FBI is part of DOJ.

JACK GOLDSMITH:

Well, they're going after both. They've pledged to go after both. And again, Kash Patel has said very different things, SS Pam Bondi, these are the nominees for Attorney General and FBI. I don't know what they're going to do. At times, they've pledged to prosecute the president's enemies, to root out the people who were against him, whom they think have done something, I suppose, is criminal. There are other times when they say they want to end lawfare, and the president, just last weekend, said that the best retribution is success. He seemed to be, in some sense, of course, speaking out of both sides of his mouth saying he wasn't going to push the Justice Department to prosecute, but they still deserve to be prosecuted.

I don't know what they're going to do, but it is definitely the Justice Department, there's the Justice Department component and there's an FBI component, and it's got two elements. One is cleaning house, so to speak, getting rid of people that they think are disloyal, under the guise of reform. And then, there's using the tools of the Department to investigate and prosecute people. And both the FBI director and the Attorney General are directly involved in those things. So their decisions are going to be vital.

It's going to be interesting. They have to go before the Senate. They're going to be asked about all of these things. They're going to have to explain what they're going to do. I know that there will be many senators, including on the Republican side, that would like to see the lawfare end. There are a lot of people, on the Republican side, that think the best way to end the lawfare is to really hit them hard with the lawfare, as a kind of tit for tat strategy. This is the thing maybe at the top of my list that I hope doesn't happen.

BILL KRISTOL:

And how much—you've been inside the Justice Department—how much, I have the vague sense, how much is an Attorney General call on a lot of these things? How much autonomy have FBI directors had in the past? And how much is that simply a subordinate matter for the AG? And then, I guess the White House connections to justice is also important. There have been certain barriers and norms there in the past.

JACK GOLDSMITH:

There have been barriers and norms in the past. The "White House Contacts Policy" is what it's called, but the White House contacts policy does not apply to the president. It never has applied to the president. It's really about ensuring that communications between, I'm simplifying, but the communications between the White House and the Justice Department go through certain channels and are limited in certain ways, but it just doesn't apply to the president. The FBI Director has lots of independent discretion about what investigations to pursue, but the FBI director also formally or technically works for and inside the Justice Department that the Attorney General leads. So they can both have big roles here. Ultimately, I think the Attorney General, again, who knows how those two are going to get along, but ultimately, the Attorney General is in charge on almost every matter. And so, again, one can be optimistic or pessimistic about what they're going to do. And I suppose whether it's one as optimistic or pessimistic is in the eye of the beholder.

BILL KRISTOL:

Yeah, Trump was amazing on just this past Sunday to "Meet the Press." He had, I'd say, half the time, was being pretty careful to, "I'm not going to order anyone to do anything. It's their call." On other issues too, mass deportations, while the Dreamers. "Well, we try to work that out with Democrats." And then, the other half of the time, it was, "Well, Liz Cheney deserves to be in jail."

JACK GOLDSMITH:

Right.

BILL KRISTOL:

And that, I found a little astonishing from the president elect to say about a member or former members of Congress, all the members of that committee deserve to go to prison. And what was striking in some of the commentary was we're so used to Trump, A, some of it's dismissed maybe correctly, it's just Trump being Trump and blowing off steam and so forth. It is kind of amazing to say that people should go to prison without specifying a crime. It may be that previous Justice Departments have overreached in indicting people for things or investigating people for things, but there's at least been the claim that there's an actual statute somewhere in the, what's it called, the code of whatever it's called, the legal code.

JACK GOLDSMITH:

UC Code, yeah.

BILL KRISTOL:

Yeah. There's like Statue 1274, which someone violated.

JACK GOLDSMITH:

Well, we don't usually... Let me just back. Yes, first of all, I wasn't surprised, because he did that all throughout his first term. He did it all throughout the campaign. So the thing that surprised me last Sunday was the moderating part, not the part about people needing to go to jail. Yeah, we don't typically have presidents talking about who should go to jail. Biden actually did once in violating norms during his term and said some other things he shouldn't have said. But typically, presidents don't even talk about this stuff. And typically, law enforcement doesn't talk about people going to jail. They talk through investigations and indictments, and the indictments come down and they specify the alleged facts and the law that was allegedly violated. And that's the way these things typically work. So this is all way outside normal, but it's normal for Trump.

And let me just say, part of what Trump is about is to just blow up all these norms. He thinks or talks or acts as if he thinks that they're just illegitimate, that they're corrupt, that the Justice

Department is under the control of the deep state or the Democrats or some combination of both. And there were some deep state shenanigans against him in his first term, and I get it, but this is all completely out of the ordinary. Unfortunately, it's started to become ordinary. There's so many things, nobody, just to change topics for a second, nobody in this election talked about tax disclosure, very few people. That was a big deal in 2016, 2020. Trump defied it twice, and now, nobody cares.

BILL KRISTOL:

And it had been in practice for, what, 40 years or something like that?

JACK GOLDSMITH:

Going back to Watergate, going back either to Ford or Carter, I can't remember. And same with conflict of interest rules, very little discussion of that. Now, it's just accepted, now, that they're not going to follow the statutory rules, almost very few of them, and none of the important ones apply to the president. So he's, by continually defying these things, then by nothing happening over the last four years, they're no longer being held up as norms. They're not even being discussed. And that's a Trump success.

BILL KRISTOL:

And the president personally has often been not covered by these rules or only covered as a matter of courtesy or norms like with the tax. But of course, we were covered. I was in the White House, and pretty strictly, I've got to say, this was still many years ago, so it was fairly recently after Watergate and so forth. And every time, this is very what strikes me, having gone through my pathetically small earnings disclosures and being careful to put them in mutual funds, because I didn't want anyone to say that I'd heard something that might lead me to buy some stock with my \$2,000 worth of stock or something. And now Elon Musk is going to apparently, I don't know, have a roaming all over the government trying to find savings and efficiencies, which that's fine. But he's not a government employee, so he doesn't have all the conflict, I guess, so he doesn't have all the conflict of interest and ethics things. That's how they're going to take it, I think.

JACK GOLDSMITH:

Yeah. Yeah, that's right.

BILL KRISTOL:

But of course, no one's not going to share information with the president's—one of his closest—confidants and advisors, who's been announced as doing this Office-of-whatever-they-call-it-Government-something... Efficiency. And so, he'll have access to all kinds of stuff without having, including contracting, I should think and so forth, without anything...

JACK GOLDSMITH:

Maybe. Yeah.

BILL KRISTOL:

I don't know.

JACK GOLDSMITH:

Maybe.

BILL KRISTOL:

I'm struck that people don't even raise it, I guess, is what I'm saying. It's sort of your point, right? We used to be kind of fastidious about these things.



JACK GOLDSMITH:

Some people are raising it. And let me tell you, on the Musk group, whatever it's going to look like, there's going to be some serious litigation about that. The Federal Advisory Committee Act is designed to govern just this situation. It has rules about, again, depending on the role that Musk plays, it has rules about transparency, conflict of interest, organization. I'm confident they're going to try to structure this in a way that circumvents this statute. There's an old Scalia opinion in the OLC that says the statute's unconstitutional. Not clear who can sue, but there have been lawsuits before. But I predict that's going to be...

I'm sure the Trump people are working hard to exploit the loopholes. And there are some loopholes, but there's law governing that and there will be constraints on how they do that. And on the other hand, you're right, there are ways that the president surely can ensure that Musk gets the information he wants and can come to the conclusions that he wants. And Musk won't have any authority to implement anything, but the president can or the president can try to. I wouldn't underestimate how hard it's going to be. There are lots of rules about changing the administrative state, and maybe if I could do... This is actually an important distinction.

BILL KRISTOL:

No, this is important, so please spend some time on this, yeah.

JACK GOLDSMITH:

So this is an important distinction that doesn't get talked about enough. So most people think about reforming the administrative state in the kind of Reagan sense of pulling back the regulations, deregulating through changing the nature of the regulations. So instead of regulating the environment heavily, you regulate it lightly and you change the laws. And there will be a lot of that. But there are the different strategy, structural deregulation, Jody Freeman calls it in an article in the *Harvard Law Review*, which is about basically undermining the agencies, not staffing them, defunding them, attacking them to destroy their reputation, putting people in charge that are going to shut them down effectively. That can be a very effective way of deregulating. And then, there's the civil service reforms that Trump is proposing to make a larger swath of civil servants, political appointees that can be fired at will.

Those types of strategies, I think, are going to be much more consequential, the kind of things that I think the DOGE group would be doing. And that's never been tried before in an aggressive way. Trump started to do it in his first term. I think this is the big, underappreciated approach to deregulation here, not through using the Administrative Procedure Act, but just undermining the administrative state through manipulating the Vacancies Reform Act, which you and I have talked about offline, impoundment to try to not allow the agencies to spend appropriated monies. All of these things are very law heavy and will be litigated and are complicated issues, but they've got room to run.

And this is the other big theme I just want to get out on the table. Trump doesn't need to break the law to accomplish a lot of his ends. The President of the United States has enormous authority under Article II and under various grants of authority from Congress to do a lot of these things. And some of them will be litigated and some, they'll be pushed back, and it's going to be an interesting to see how much they win and how much they lose and how well they are organized to defend their legal positions. They did a terrible job in the first term on that, but this is where the action is going to be, in my opinion. Does that make sense?

BILL KRISTOL:

Yeah, very much. I think I was about to get to Schedule F, the new schedule they're going to... Apparently, I guess they had the discretion to just put in place, which would turn a fair number of civil service jobs to political appointees. There already are a couple thousand others and maybe three 4,000 political appointees, but now, maybe many more. How much does all of that add up potentially or how likely is it to add up to a real change from what was maybe too bureaucratic too rule-bound, too whatever you want to say, administrative state-ish, Administrative Procedure Act-ish, kind of government executive branch to sort of the opposite

problem, which is some version of, I don't know what you want to call it, Richard Daly Chicago in...

JACK GOLDSMITH:

Yeah, the spoil system.

BILL KRISTOL:

Yeah. And personal, either explicit corruption or not really corruption in the sense of money changing hands, but favors. And again, no expectation of equal treatment for people or bidding. When I was at the Education Department, I mean, bidding processes for grants, and it was yeah, and then you'd be appealed of something. One person on the review committee had some relationship with one of the places that got the \$5 million education grant. It was like, we probably go too far the other way, honestly. But how—

JACK GOLDSMITH:

So—

BILL KRISTOL:

...struck are you by that? Or I don't know.

JACK GOLDSMITH:

So, here's how I think about this. I'll start at the 40,000-foot level, and you know this better than I. There's been an incessant fight really going back to Jackson and maybe Jefferson, Andrew Jackson or Thomas Jefferson, about how much control the president should have over top appointees and how deeply into the Executive Branch that should go. And doesn't the president have a right to put in place his people so that he can effectuate the consequences of the election? That's the argument for democracy on the one hand, and then the argument from expertise and neutrality on the other and it's always been a back and forth. And this has gone on really from the beginning of the nation in some sense with peaks and valleys. And in some sense, I'm sympathetic to the idea that a president should be able to come in and especially, and frankly, Republican presidents, and I think you'd agree with this, have always received more resistance from ...I'm making a general claim. It hasn't always been there. I mean, not in every case, but have in general received more resistance from the civil service than Democratic presidents.

That was very true in the Trump administration. There was organized resistance along a number of dimensions. So I can understand why a president would want to come in, and they tried to do this at the end of the last term, and to have more control over more jobs so that they can implement their program. That's the benign case for the civil service reform. By the way, I don't think it's quite as easy. They're not going to be able to implement this at the snap of the fingers. It's a complicated set of legal moves. It might take a year. It involves some hard legal questions about Article II, but we can talk about that later if you want. The other side of the story is that Trump is trying to get in 50,000 more loyalists, not just so that he can ensure that his programs get implemented that he ran on, but to do other things, corrupt things, things that benefit him personally. Things that are on the line between corruption and non-corruption, that's the worry and I think it's too early to assess.

I mean, I guess, one could be pessimistic based on some of the things he said, but I do think it's important to understand that the fight over the civil service is not a brand new fight. Republicans have long been, especially, but not just Republicans, trying to exercise more political control over top officials because they feel stymied by the bureaucracy in implementing their plans and I just think it's important to keep that in mind.

BILL KRISTOL:

No, fair enough. And yeah, a lot depends on what you... Is this just to implement policies the president has the right to implement? We should come to Congress in a minute since we haven't even mentioned Congress, which probably has some checking and oversight roles. But is it to implement these policies that are genuinely within the president's discretion or genuinely just lawful and haven't been implemented much for various reasons or effectively. Or is it putting various thumbs on the scale in terms of everything from in a Richard Daley, Tammany Hall way of contracts and so forth, to a more complicated kind of politicization where one goes beyond what the normal, you might say willing ability? I was thinking, so you were at the Defense Department in 2002 as, I think, counsel to the general counsel. And then you came over to run the Office of Legal Counsel, a very important office of the Justice Department in 2003. And famously reversed the previous memos of your predecessor and got in some pretty big fights with people in the White House and so forth, that you wrote about in the book.

I mean, I don't know, it must have been something to go through that. I mean, you capture that a bit in the book. But I do feel like that is somehow healthy maybe, somewhere between—

JACK GOLDSMITH:

Yeah, I agree.

BILL KRISTOL:

... you don't have to have shouting matches with the vice president or chief of staff, or whatever you had with that. But I mean, there's some healthy tension there and I guess one... I don't know how much that will be there.

JACK GOLDSMITH:

Yeah, this is a hugely important point. I mean, it may be the most important position in the Trump administration that hasn't yet been announced is the Office of Legal Counsel, the job I used to have. And the reason this is such an important job, I'll just give for listeners a little bit of background. This is the office in the Justice Department that exercises authority. The President of the United States has the authority to interpret law for the Executive Branch. That's a function of the executive power and the Take Care Clause. And the president delegates that to the attorney general who delegates that to the Office of Legal Counsel. And that means on all of the hard questions that are going to come up, is the Federal Advisory Committee Act constitutional? Can the president impound these funds? Does the Vacancies Act work here to allow you to put in this official? Again, these sound weedy, but they're just so vital to the actual running of the government. The person in the Office of Legal Counsel is going to be deciding those in the first instance.

And different administrations have different models and that's a tough job because you're on the president's team. I tried to describe this in *The Terror Presidency*. You're on the president's team, but you're not there to be a yes person. And that tension, as you were calling it, is hugely important that that person have the capacity to say, "No, you really can't do this. It just crosses a line." This is normal in government, by the way. OLC says no all the time. You don't see it as much because they don't write opinions about when they say no. This is normal in government or not no but, "No, you can't do it this way but try it that way." That position is going to be absolutely important. If it's a person in that position who says yes to everything, that's going to green light a lot of what the Trump people can do, but it's also going to backfire on them. It always does because they overreach. And OLC is a really important office for using law to prevent policy overreach.

On the other hand, if you have a great lawyer in there who is calling it like he or she sees it, that could be hugely valuable to the president. Because the truth is the president has a lot of room to run on executive power, but it would be a more credible place if you had someone saying, "No." I'm doubtful at this point that the Trump administration is going to get someone in there like that. But I do think it is in their interest, they might not see this. It is in their interest if they get a great lawyer who's on board for their conception of executive power, but is not on board for being a yes person.

BILL KRISTOL:

And I guess I'm thinking about your experience right, it's been a while since I looked at the book, but so correct me on that. I mean and explain this more, but I mean of course, you by yourself could have been overridden by either—

JACK GOLDSMITH:

Yes.

BILL KRISTOL:

... I suppose the AG or by the White House and presumably you had—

JACK GOLDSMITH:

I was once. I was once and I talked about it. Go ahead, sorry.

BILL KRISTOL:

But you had also had at times were supported even in somewhat tense and difficult—

JACK GOLDSMITH:

Yes.

BILL KRISTOL:

... moments, situations by I say White House counsel or White House Chief of Staff—

JACK GOLDSMITH:

Yes.

BILL KRISTOL:

Or the president personally or the AG and that I think is also important, right? You could have the whole structure... there was a certain... I mean Bush made mistakes in the War on Terror, no question, and there was plenty of usual kind of politics and favoritism I suppose and stuff.

JACK GOLDSMITH:

Right.

BILL KRISTOL:

But something of a culture of, well, no, we can't really, if the serious person says this is just wrong or bad law, we can't quite just ignore it and—

JACK GOLDSMITH:

This is getting a little bit in the weeds, but especially when it comes to criminal law and without relitigating old disputes or going into too much detail, with the Terror Surveillance Program we in the Justice Department ruled that parts of it couldn't go forward under earlier interpretations because we just thought they were dead wrong. And originally the White House disagreed with us and overruled us, which is their prerogative to do. I mean as OLC, I was exercising authority delegated from the President of the United States, and it was always overruling by the AG or the president. President Bush did that but then he reversed himself the next day and he went along with us and the reason was there was going to be a massive meltdown in the Executive Branch. And the reason for that is we had looked at it hard and they hadn't really taken a genuine, independent, fair-minded crack at the legal issues. And more importantly, when the Justice Department says something would violate criminal law if done, that is very fraught even if the president says it's okay for anyone to go forward.

And there were a lot of people including Bob Mueller, who's the FBI director who said, "I'm just not willing to do this even if the president says so." And he was going to resign. So it's a hugely important office for having... I mean that's a big power, which has to be exercised carefully. But to your point, just backing up a little bit, it's important to have someone who is independent to some extent. Who's on the team in terms of sharing the outlook and goals of the administration and maybe even the general interpretive view of Article II, but not in the can for the White House saying yes to everything because that's just not the way it worked. The law just doesn't allow the president to do whatever he wants.

BILL KRISTOL:

Yeah, you mentioned the FBI director, and that's very much now, again, regardless of the wisdom of the 10-year term and how sacrosanct that should be treated and all that, there's some virtue to having an FBI director who will say, "Look, in this case I think the Assistant Attorney General has the right argument, not the White House people."

JACK GOLDSMITH:

Listen, Bob Mueller was absolutely the key person there when he told the president that he wasn't going to be able to continue the program because OLC and the Justice Department had made this ruling. That's when the president changed his mind.

BILL KRISTOL:

Wow.

JACK GOLDSMITH:

And Comey was in that conversation as well. But it was Mueller, in my understanding, that really convinced... And actually Comey was also there telling the president he didn't have full information, he thought he was making a mistake. But, it's important. And these rules are hard to capture, and it's always judgment calls on both sides. But that tension, as you said, is really important. You need to have arguments about these things, at a minimum.

BILL KRISTOL:

This was the national security issues mostly that you guys were talking about sliding over into criminal law, obviously in terms of the surveillance and all. But let's talk a minute about the national security side of things and you worked in the Defense Department and you've always been interested, I think, and you stayed abreast of those kinds of debates too. So, I mean you hear on the one hand, it's a massive bureaucracy. They're pretty good at handling political... They're pretty good at finding ways around political interventions, excessive political interventions, I'd say. The military's pretty big norms there of not politicizing too much and so forth. On the other hand, they've talked about having an outside review panel for three and four-star generals and so forth. You want civilian control in the military, but on the other hand you don't... It's pretty important, I think, for the last since the Cold War really to have a somewhat apolitical military. They have their own politics in the sense of jockeying for whatever. So tell me, what do you think about—

JACK GOLDSMITH:

Well—

BILL KRISTOL:

... all that?

JACK GOLDSMITH:

... so I'll say something about the military, then I want to shift over to the intelligence community if I can, because I'm more worried there.

BILL KRISTOL:

Yeah, please, okay yeah.

JACK GOLDSMITH:

So look, Rumsfeld, when I was in the Pentagon, he was a wrecking ball and a lot of the things you just said Rumsfeld was doing. And in other words, he thought... And I'm not going to get the details right, I don't remember them, but he thought the way the DOD was organized was wrong. He thought the way people were being promoted was wrong. He thought some of the top people were bad, and he tried to put his footprint or fingerprints or vision on the department and I can't say that that's not sometimes healthy. I don't know. I can't assess... I just never studied enough to know whether Rumsfeld did more good than bad there. But so I'm not opposed, I don't think it's necessarily bad to... And the DOD is such a sprawling bureaucracy and a traditionally wasteful bureaucracy and a traditionally over-bureaucratized bureaucracy. I wouldn't say that there's not important reforms that can be done there and spending savings to be made. I definitely wouldn't say that. I don't think you would say that. How it's done is important.

Who does it is important, whether it's seen as political and whether there are clear winners and losers that have a political valence, all that is bad. And this is where I want to move to the intelligence community. It could have impact on the ability of DOD as a fighting force. Now, the Trump people are saying they're going to come back in and get rid of the PC stuff and make it focused as a fighting force. And that's their theory of the case, is that DOD has gotten too far away of being a fighting force and they're going to restore it to that. So I'm not in a position to sort that out. Here's what I worry about the most, and it's on the intelligence side. The people that the president has, and the president himself says he wants to reform the intelligence community, the FBI and the DNI and maybe the NSA, maybe the CIA, and get rid of people. There's talk of ending the Foreign Intelligence Surveillance Court. There's talk of ending Section 702.

These are two absolutely critical laws that are at the core of our national security and our ability to protect ourselves from national security. If they wipe those out, either by overruling them by statute, which they won't be able to do, or just by the structural deregulation I was talking about, hollowing them out from the middle, I'm confident that would have a bad impact on our national security. Just the way that when Stansfield Turner under Jimmy Carter became the CIA director and fired 900 human intelligence officers following the Church Commission, which led us to be blind in Iran and Afghanistan and other places. I mean, it had a direct impact. I do think that there's some things that need to be looked at in the FBI. I definitely believe that. And in the whole FISA process, because there have been documented serious problems with that but that's one thing. It's another thing to come in and be a wrecking ball about the kind of guts of how we collect intelligence and use intelligence. Another example is the FISA wall that you'll remember. I won't go into the details.

But in another attempt to reform and constrain the use of foreign intelligence, we ended up putting the wall between foreign intelligence and law enforcement that many people think led to 9/11. So the thing I worry about the most is going overboard and getting rid of some of these important laws because they're angry that Carter Page was surveilled and that bad things happened to them. And so this is the thing that I very much worry about in the intelligence community, is not only hollowing out the intelligence community through the structural deregulation I was talking about. Again, acknowledging that there may be room for reform, but really just getting rid of some of our most important tools. I don't think when they get in there they'll do this. I just don't believe it because it's just too important and they're going to see that it's too important but we'll see.

BILL KRISTOL:

And you think, I suppose, I don't know if you've been looking at anything. We shouldn't discuss anything classified, but you've not been involved in the government for quite a while, but your

impression from when you were in government and from following it subsequently, is what you said. I mean it really is important. I mean, this isn't just—

JACK GOLDSMITH:

There's no doubt.

BILL KRISTOL:

... people talking about you know. It really makes a difference in our actual national security.

JACK GOLDSMITH:

A huge difference. And by the way, bipartisan panels have said this over and over again. The PCLOB has said this, intelligence committees have said this. There are problems with FISA that the Inspector General identified, and there was a debate about Section 702 and how it should be used. This is the broader forms of collection as opposed to the narrow traditional Foreign Intelligence Surveillance Act warrants. So again, it needs to be looked at. There may be other reforms that need to be done, but if they're talking about getting rid of FISA, getting rid of 702, I think that's crazy talk, frankly. I don't think they'll be able to do it. I don't think they will want to do it once they get in. Maybe there will be superficial nods in that direction, but based on what I know and everything I've read, it would be catastrophic actually.

BILL KRISTOL:

Interesting. Just one last thing on the national security, which slides into other areas too. I mean, I was a critic of, actually, of Rumsfeld though I had known him before and liked him. He had been White House chief of staff. He had been Sect F before, 25 years before. He had been on various congressional and other commissions in the 90s on intelligence and I think on defense. Again, what everyone thinks about him, you couldn't say that he... He wasn't a wrecking ball. He was a kind of wrecking ball, I think.

JACK GOLDSMITH:

He was a kind of wrecking ball, actually.

BILL KRISTOL:

He was a well-educated... I mean he was a—

JACK GOLDSMITH:

He was an informed, sophisticated, shrewd wrecking ball.

BILL KRISTOL:

Right. I don't know if that's always better, but there is some... One feels a little more, okay, he's president's choice and he's studied this stuff and he's brought in some people who studied this stuff and so let him try to make some of these reforms, and same with various CIA directors and national intelligence sections. Not that they were all perfect or anything, but mostly people with some experience in that area and so forth. Bob Gates told me, "Look, I need to really fix..." He did, in fact. Bob Gates overruled some of these military promotion panels. I know this a little bit because I was following things quite closely at that point in 2008-9. And the military bureaucracy didn't like the people who were doing counter-insurgency and Petraeus's kind of proteges who were part of the surge. Gates thought that was fresh thinking and I think intervened to actually get a couple of people. He didn't do it himself. He had a second, I can't remember, second panel or got different military officers, different general officers to be on the next panel and various people got promoted and so forth.

So that's one thing if Bob Gates thinks that's a wise thing to do. I do think, again, getting too much into personalities, it's another thing if some 44-year-old who's never had a senior position in the Pentagon, or is a national security expert or a three-term member of Congress, Tulsi

Gabbard, who's not exactly... I hope it works out, trust me, for the country, but the balance of expectation changes a little in terms of how wise they will be in doing it.

JACK GOLDSMITH:

But it's an interesting question whether it will even work. It's not easy to reform these organizations. The contrast with Rumsfeld's important. I mean, he knew what he was doing. He knew where the dead bodies were. He knew what the channels of communication were. He knew how to reach down and do things. And there's always this problem that populist governments that put in non-experts to lead agencies fail because they don't know how to manipulate the bureaucracy. They don't know how to reform it. We'll see. I mean, we'll see. Again, depending on how, if Patel is confirmed, how he goes about it, depending on how Gabbard, if she's confirmed, how she goes about it, there are definitely right and wrong ways to go about reform and if there are wrecking balls that didn't work, it's never worked out before, frankly, and it didn't work for Stansfield Turner. He tried it, took that approach and he ended up doing the opposite by the end of his term as CIA director under Carter and other intelligence community leaders have had this.

I'm not saying that reform is not a good idea and that certainly looking at reform isn't. And it's just a question of how they go about it and whether they're going to... This is another important point, so much of effective government is not just about the exercise of hard executive power to coerce people into doing things. There's just only so far that can get you. I don't care how broad a view of the unitary executive the president has, there's always an element of cooperation, persuasion, leadership, et cetera, and the people who can really bring reforms are the people that have that full range of qualities. So I think it's an open question.

It's also an open question whether when these people get in these jobs, they're really going to be wrecking balls because they're soon going to discover that if they're really wrecking balls, it's not going to be in their interest, at least that's what I think we'll see. I mean, of course national security could suffer if the agencies become dysfunctional, but it's just not clear to me that the wrecking ball approach is the optimal approach for bringing the reform they want. Does that make sense?

BILL KRISTOL:

Yeah, absolutely. So last topic. I'll let you go in a minute. I mean, Congress, so we barely mentioned it, which probably itself tells us something about some decline of Congressional oversight, and competence, and supervision of all these things, or maybe not. I mean, there's a partisan issue of Republican Congress will do less because we'll be oversight than the Democratic, but I don't know. A lot of the things you mentioned before suddenly were challenged and I know your own cases. I mean, there were Congressional committees that were also looking at this and they had some influence on the actual outcomes, right?

JACK GOLDSMITH:

They did, yep. Congress can't push back and especially in the intelligence side, but let me just back up. So first of all, Congress is still more involved in this stuff than you think. Every year, there's a National Defense Authorization Act. It's the only statute, maybe along with tax statutes that actually get through every year. In fact, it's become the Christmas tree of statutes where everyone tries to get something in the National Defense Authorization Act because it gets through. And so every year, Congress weighs in with about 2,000 pages of new law working with the DOD, sometimes working against DOD. It's a complicated process and at least continuing through the last 20 years, 30 years, both the Intelligence Committees and the Armed Services Committees have done pretty robust oversight of the DOD and the Intelligence Committee.

And frankly, they've worked pretty well together. My sense is most of the time, there've been some glitches obviously, and this is a very important and not well understood element of congressional control and regulation that actually still works better than almost every other element of Congress. And so it's not clear how this is going to work in the Trump



administration. I mean, are the Senate and House Intelligence Committees going to really stand up and really give robust oversight to what Trump is doing? I'm a little doubtful, same with the Armed Services Committees. I don't know. We'll see. So that's my first take on Congress. I guess the point is there's actually more congressional involvement in the areas we're talking about, defense and intelligence on a regular ongoing basis by people who are motivated and informed on Capitol Hill, and the staffers in these areas in my experience, are excellent. But I don't know how it's going to work during the Trump administration. I just don't know if it's going to be any counterforce at all. And the president always needs these counter forces. It is good for the presidency to have to justify itself to the Justice Department, the White House have to justify itself to the Justice Department, to the Congress. These inside-the-government constraints and checking points, going back to Madison's vision, frankly, are so vitally important to keeping the president on the right track. Presidents without constraints end up doing badly and hurting themselves. So we'll see what role Congress plays in this context. Is that the question you had in mind? I'm not sure what you meant by [inaudible].

BILL KRISTOL:

I think that last point is so important. I do feel like my sense is that in national security, really Armed Services and Intel, what you described is correct, judiciary, routine domestic policy, I just feel like I'm not sure there's ever hugely great oversight that we would look at pretty closely at the rather unimportant, honestly, education department there in the late 80s. And they didn't like something we were doing, we heard about it. I just get the feeling there's much... And that was bipartisan, it sounded like. We had Republican senators coming down our throat if they didn't like something as much as Democrats. I get the feeling a lot of that isn't what it once was, but maybe I'm just [inaudible].

JACK GOLDSMITH:

That's my sense too. I don't study those areas as well. I study defense and intelligence. That's my sense too. I think in those area—

BILL KRISTOL:

Well, did Congress play a big role in your fights, I mean, was the Judiciary committee or senior members on the Hill important?

JACK GOLDSMITH:

After I left the Justice Department and things blew up, the Justice Department took a more aggressive role because they were changing some of the laws related to torture and stuff. The intelligence committees, they were being briefed on all this stuff and they were sometimes going along, sometimes pushing back. They got more aggressive because over time, they thought they weren't being given all the information they needed. I didn't have a big role in intersecting with the intelligence committees when I was at OLC, but they play a role. And listen, the intelligence community and the executive branch realizes that it has to keep its committees happy. It has a statutory duty to keep them informed and the intelligence committees can cause all sorts of problems. It's been going on. I mean, all sorts of problems if they get a bee in their bonnet about something. And same thing in the Armed Services side, there's an ongoing every day relationship. I mean, really intimate with staffers talking to people [inaudible].

BILL KRISTOL:

Less so, don't you think on judiciary, less so?

JACK GOLDSMITH:

I do. I do. I think it's much less... My sense is—

BILL KRISTOL:

Seems more like a food fight between Jim Jordan and whatever.

JACK GOLDSMITH:

That's my sense. That's my sense. I'm not an expert on that. But you asked me about... I mean, we were talking about intelligence and defense. Again, I don't want to romanticize it, but there has been serious Congressional oversight. I'm not saying it's been adequate, but it's been non-trivial.

BILL KRISTOL:

And from both, including their own party to some degree.

JACK GOLDSMITH:

Yeah. Yes. The Republicans and Democrats don't always agree, especially on the intelligence committees. There's more of a divide there in my sense than on the Armed Services committees, but I think they still have pretty good relationships across the aisle there even when they disagree. And again, my experience with those committees has been that they're moderately well-functioning. Now, not everybody would agree with me on that, but that's my experience.

BILL KRISTOL:

This will be an ongoing drama over four years, but a final question maybe. I mean, this is maybe stupid, but when should we have another conversation and you'll be able to say with some assurance where on the spectrum things are shaking out in some of these different areas, or will it just be an ongoing zigging and zagging and so forth?

JACK GOLDSMITH:

I'll give a two-part answer. I mean, I think we'll know a lot after these confirmation hearings and in the first three months. These nominees are going to be asked a lot of questions. They're going to be pinned down on their views, and it'll be interesting to see if... I actually expect this to happen. I expect Pam Bondi to say, as Trump just said, that she's going to be independent and that of course, the president has the constitutional authority to order her to do whatever he wants, as he reminded us, and he does. But she is going to be independent. They're going to have the White House context policy, which actually doesn't impact the president so it's a no-brainer for them. It's in her interest to say that. I hope she realizes that and I hope she does that. Even Patel, in talking with the Senators, he hasn't been emphasizing killing FISA. He's been emphasizing ending the fentanyl crisis, stopping crime, et cetera. That's smart. So we'll learn a lot in the confirmation hearings. We'll learn a lot in the first three months of governance. And I think in three or four months, we'll have a sense of how much the lawfare is going to get going, whether there can be special counsel appointed. So I would say there are two stages, one, the three or four month stage, but then Trump is capable of causing chaos at any moment, and that's going to be an ongoing thing for four years. So it's going to be very hard to say, okay, we now know what's going to happen because he could... And who knows which one of his new subordinates he's going to have fallings out with. He's already fired his White House council before and gotten a second one. He's lost one nominee. I mean, this idea that this is going to be a disciplined organization compared to the first one I think is yet to be proven.

BILL KRISTOL:

And I suppose just on the first three or four months, we'll also see these second and third tier appointments, which the overall character of which you mentioned OLC in particular, but will be pretty important. Does the FBI suddenly have 20 non-career people there working for Patel, or is it basically one director and some career—

JACK GOLDSMITH:

I'm pretty sure that... Maybe is an inspector general in the FBI or is it in the DOJ? But I'm pretty sure that the FBI director is the only political appointment in the bureau.

BILL KRISTOL:

Up until now, but this will be—

JACK GOLDSMITH:

Well, we'll see if they can use the civil service rules and the two—

BILL KRISTOL:

I'm going to say that's one instance of just... There'll be many similar things—

JACK GOLDSMITH:

Yes, I agree.

BILL KRISTOL:

... in justice all the way down to career people.

JACK GOLDSMITH:

I agree.

BILL KRISTOL:

... the assistant attorney general jobs to...

JACK GOLDSMITH:

These are vital. That's where the rubber meets the road. Excuse me. The assistant attorney general jobs are where the rubber meets the road in terms of—and assistant secretary jobs—rubber meets road about whether the policies are going to have a chance of getting implemented and with what integrity they'll be implemented. So those are the jobs to keep one's eye on. My friend, Chris Landau, was just named to be the Deputy Secretary of State. Chris is a A+ person and I think he'll do an excellent job there. I was very encouraged by that, but we'll see. You're absolutely right, it's very important. It's the next level of jobs. There was a column in *The Journal* about this couple of days ago, I think by... I can't remember who it was, but that it's the next level job political appointees that are so important and that we'll learn a lot from about how law-abiding they're going to be. But let me just close, if we're closing, by emphasizing that there's going to be a lot we can't anticipate. The Trump people have been studying these esoteric rules like the Vacancies Act, and the Empowerment Control Act, and FACA, and the Anti-Deficiency Act. These laws that no one has heard of that really get to the guts of how the government is organized and run. And I'm quite confident that they're going to try to use those laws in an imaginative way to assert unprecedented control over the Executive Branch. My own view is it's their prerogative to try because they've got good arguments on some things and plausible arguments that can be litigated on the other, and this is what presidents do, but we'll see how that works out.

We'll also see if the anarchic approach to governance is going to work out for them and if they're going to have enough great lawyers to litigate all these cases to craft these laws in the right way. It's going to be law heavy and it's going to be down in the weeds, but we should expect surprises in terms of them doing novel things. We shouldn't confuse the familiar in terms of how government is organized with the necessary. There are different ways to organize the government and they're going, I predict, do some radical things that I probably can't predict and that's going to be really interesting and important to follow.

BILL KRISTOL:

That's terribly interesting and good way to close and there's also reason to get together in, I don't know, six months or so and see what things they're doing that we didn't anticipate, and whether they're sensible things that are good reforms, as you say, that we shouldn't assume the familiar is necessary or good, or whether they're leading us in a bad path. And also, we'll have some sense of some of the real-world effects of some of these things, right?

JACK GOLDSMITH:

Absolutely. And let me just say the proof's in the pudding. I mean, however they organize the government, whether they can make the country better is the ultimate test. And people have different views of what making the country better is, but the success of the presidency is going to turn on that big picture question. And who knows?

BILL KRISTOL:

Who knows? Jack Goldsmith, thank you. Really, this is a terrific conversation. I think very educational for me personally, and I think for our viewers and listeners. So, Jack, thank you for joining me.

JACK GOLDSMITH:

Thank you, Bill. It's really a pleasure and I hope we can do it again.

BILL KRISTOL:

Yeah, let's do it again. And thank you all for joining us on *Conversations*.