

CONVERSATIONS

WITH BILL KRISTOL

Ryan Goodman Conversation

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BILL KRISTOL:

Hi, I am Bill Kristol. Welcome back to *Conversations*. I'm very pleased to be joined again by my friend Ryan Goodman, distinguished professor of law, first at Harvard and then now at NYU, New York University. Served in the government in 2015 and '16 as special counsel to the General Counsel for the Department of Defense, which I think gives him a little more real world or at least real government knowledge than some of his... I won't criticize your fellow law professors, but some of his fellow law professors. And also, an—

RYAN GOODMAN:

Or go unnamed.

BILL KRISTOL:

Unnamed, right... Also an interest in national security, which I share. And he is founding co-editor of the online forum, *Just Security*, which is really a must go-to place for day-to-day coverage of what's happening, particularly on the national security side, I would say, of the current efforts to reorganize the federal government, but broader than national security narrowly understood. So Ryan, thanks. We've done two of these conversations during the Biden administration when the question was, would Donald Trump be prosecuted and convicted of various crimes he was charged with? That now he's president and we can discuss what he's doing as president. So Ryan, thanks for joining me.

RYAN GOODMAN:

I really appreciate it. Thank you.

BILL KRISTOL:

It's great to be with you. So we're two weeks in, it's a little over two weeks in. One day over two weeks in, it's February 4th. I mean, let's help people, help me understand the bigger picture of all the different things that have been going on for administratively, legally, executive orders, planned reorganizations, firings. Put it in context. What's the forest here in which all these trees are living? What's the bigger, what's the biggest, what's the key thing we should understand about what's going on?

RYAN GOODMAN:

Right. Yeah. So I think the way that I look at it is that from a legal perspective, the forest for the trees, the most important element is the, excuse me, the executive authority that the Trump administration is claiming. And what I mean by that is what constitutional power are they asserting behind all of these executive orders that is different in character than anything that's preceded it, including the first Trump administration?

And we had a piece published at *Just Security*. I thought it was one of the most important pieces we published since January 20th, which is by the former dean of NYU Law, Trevor Morrison and Adam Cox, two of the most level-headed legal scholars who are not dramatic in their prognostications or assessments. And their entire piece is actually looking at these executive orders across the board and then saying, actually, there's an assertion here of what they call "dictatorial theory of executive authority," meaning that the Trump team is claiming

that just as president, he can completely override congressional statute, the first branch of government doesn't matter.

And that he's not just claiming that in the realm of a national emergency. He's claiming that across different policy arenas. So just very briefly, they look at, for example, the birthright citizenship EO, the TikTok EO, and then immigration EO. And across all of them, there is this assertion that one can understand is clearly there. That as president, he can just ignore statutes. The TikTok statute on divestiture, he's ignoring it. He's not even making an argument that people anticipate like, "Oh, there's this 90 day extension. Maybe he's operating 90 day extension." He's not. He's just saying, "I, as president can do this." And similarly—

BILL KRISTOL:

But say a word more about the TikTok, if I'm not mistaken, they also make the point that he not only just chooses to ignore it, he then seems to think he can give, waive civil liability for people who, well, you better explain it. You could explain it better than I do.

RYAN GOODMAN:

Yeah, no, that's a great point. So part of what they're saying is maybe there's some space in which administrations over time have claimed that the executive has some discretion not to enforce all the law. A great example of this is immigration law, but that's actually Adam Cox, one of the author's expertise. In immigration law, there are so many grounds for deporting individuals that the executive branch has to exercise some discretion and say, "We're not going to enforce all of this. We're going to prioritize." And there've been other instances, the Obama administration on same-sex marriages, in which they might say, "We're not going to enforce or use some form of discretion." Here that's different. In the executive order, Trump actually says, "...and there's no liability here." The Attorney General—

BILL KRISTOL:

For other corporations that have TikTok on their phones or whatever. Yeah.

RYAN GOODMAN:

Yeah, for the providers. Which is I think part of the reason that two of the major providers have not restored TikTok because it's such an extraordinary claim of legal authority. I think that they might just think we're not confident that you even have that authority to say that we are committing no liability or we're exposing ourselves to no liability by dint of your executive fiat when the law is very clear about that. And one of the interesting pieces in which Senator Tom Cotton has actually been pretty outspoken in the idea that he has said on Sunday news talk shows, for example, "the law is the law. This is the law." And he admonishes the companies and praises the companies that are complying, admonishes the companies that aren't and praises the companies that are complying with the law because there is no executive override of this nature. And that's just one area. And it's important to think about TikTok because there's no claim to a national emergency. That's the other piece in which people might think, "Oh, well, there might be a limitation or maybe there's a commander in chief override." He's not claiming that. He's just saying, "I, as president, I'm just going to disregard the existing statute. And in fact say it doesn't even exist as a matter of criminal law."

BILL KRISTOL:

Just to tie the bow on that point, I mean, he also... This isn't Trump tweeting. Trump opining at a press conference. Presidents can be sloppy in the way they say certain things if they are not lawyers. And even if they are, I suppose. Or Trump is particularly that way. This is an executive order that means that it's gone through some process. It wasn't written personally by Trump or even by his political aides. It was presumably signed off on or written by the White House Counsel's office or by the Department of Justice. It's an official document, you might say, of the executive branch. It's not a presidential whim or opinion.

And so for that kind of assertion to be made in that document, strikes me as particularly extraordinary. And that's true off all these executive orders, they're treated in the media as if, "Well, Trump said this one." Trump didn't say something. I mean, you should explain this better than I could. He issued an actual executive order, which if you're in the executive branch, you have some obligation to follow, no? You can't just pretend... it's not like Trump would like you to be a little more aggressive in the way you're doing your job. That's not what this is. That's true of these other executive orders at a range of areas.

RYAN GOODMAN:

Absolutely right. And I think that to me, it's one of the most important themes that I assume we'll probably get into in our conversation, which is how much the Justice Department is backing these, I would say extra legal claims to authority. And in some of the instances, taking positions that seem to be blatantly unlawful. And that's the bulwark of what we would hope would keep a check or a guardrail up, which is that the lawyers would not approve documents or instruments like this and would not act on them either.

But that does not seem to be the case. In fact, I think it's one of the fire alarms that in my mind is going off, which is how the lawyers are acting. And in fact, many a time when I see an analysis of an executive order and it says, as you just said, Bill, Trump says this, or the Trump or... It's not Trump. It is him, but it is also a collection of people that are behind all of this. It's very deliberately conceived and written into law as though it is the governing authority.

BILL KRISTOL:

Right. I suppose they can be, of course they can be challenged and maybe they could be overturned, but until they're overturned, they're not quite laws. They're executive orders pursuant to law, but that they are pursuant to his, presumably to his real authority.

RYAN GOODMAN:

Yeah, absolutely. And an example of that is birthright citizenship. So the executive order is an extraordinary grab of power. Two reasons. One is the executive order and the Justice department's briefs only say this is his power to do this, which is to strip individuals born in the United States of citizenship per the 14th Amendment without any reference to statutes. So that's the first part of it. There's no reference to statutes, which is unbelievable because there are statutes that despite the 14th Amendment provide birthright citizenship by statute. An executive order cannot overwrite a statute, yet we have the Justice Department going to court in four different cases and claiming, "Oh, this is all legitimate." So it's almost like you could say, "Oh, but they're stuck with it because of the executive order," they're not in a way stuck with it because they really should not be going to court if they don't believe their own argument.

And in fact, the first judge who's a Reagan appointed judge in Seattle said these words in the first hearing that they had, which is, "Where were the lawyers in this? I can't believe this. This is one of the clearest cases my decades on the bench of seeing something that there's no legal basis for. Where were the lawyers when this was done?" Is what he actually says, which is astonishing. That's the one part.

And then the second part of birthright citizenship is just so in case people aren't aware of it, they've gone beyond what anybody had anticipated as far as I know beforehand, which is not just saying that children who are born to undocumented migrants in the country cannot claim citizenship. But they also say children born to legally present migrants in the country cannot claim citizenship if those immigrants are here on even long-term visas that are lasting decades or many, many, many years. And then they have children in the United States, maybe they're the head of a medical school, and that's where they've decided to locate their lives and have children. It says that it strips their children their citizenship.

BILL KRISTOL:

And I guess the alleged, it's extraordinary, the alleged justification for this, and it's mentioned I believe in a couple of executive orders, is to go right to Article II of the Constitution, which I

guess trumps laws. But there's no attempt to really demonstrate the laws violate Article II or any article or any provision of the constitution. It's just the President has this plenary power, apparently under Article II over the entire executive branch. But the way they understand it, I'd love for you to explain, over the legislative branch too though, in a funny way. Because if, I mean, it's both a centralization... I guess there's several things that conservatives have argued for over the last decades. Sometimes they've been friendly to the executive as opposed to the legislature. Sometimes they've been friendly to the President as opposed to other parts of the executive branch and for more centralization of power.

But I think we're beyond the normal jousting on either of those fronts. And we're at a level of centralization and personalization of power being defended in court, as you say. And being exercised as we speak and challenged in some places, but hard to challenge all of it. Anyway, if you could explain that a little. I just think it's hard for people to grasp. It's little hard for me too. So this is beyond the normal, oh, there's a tough case here of whether the executive branch has this carve out right to not to listen to the legislature here or not to quite obey, not obey them, but to use some discretion here.

And also within the executive branch, there's some tough calls about whether the president could fire, I don't know, members of independent commissions. Maybe they're not tough calls, but they're at least plausible to say, "Well, if he has the power to nominate, surely he has the power to terminate it." Not crazy, but the degree of central... of executive power, centralization within the executive and the personalization of the centralization within the executive. I guess that's really what strikes me.

RYAN GOODMAN:

Yeah, I agree. And I do think it's important to mark out, as you just described, that there's some areas that have been made as arguments, conservative scholars and the like and prior administrations. And there's some arguments that are litigable, is the way I think of it. They may be wrong, but they can litigate it. There's an opening, but there are others that are just outlandish. They've never, ever been suggested by conservative scholars or legal scholars or by prior administrations. And then the way I think of it is in terms of the architecture as you just described it, Bill, is like vertical and horizontal.

So vertical is within the executive branch. So there is this idea of the unitary executive that basically at the top is the president and he or she can control everything below without those units below having certain kinds of discretion outside of the executive. He or she controls everything. There's one piece that's happened in the last two weeks that does push on that in a way that I think is potentially very disturbing, which is the nomination hearings of Pam Bondi and Kash Patel.

So Pam Bondi is asked in her hearing, "Who is your client? Who do you serve?" And she answers it the correct way. There's only one answer. And the correct way is, "My client is the American people and the Constitution, I do not serve the president and I do not serve Mr. Trump personally." And that was right. And in some ways it might even reassured some people, but no matter what, that was what she should have said, she said. And then Senator Coons asks the question of Kash Patel. And Kash Patel says, and he's up for the FBI director. He says, "Who do you work for?" And he says, "Oh, I work for the Justice Department." And then Senator Coons says, "And who does the Justice Department work for?" And he says, "The White House."

And Coons says, "That's not the answer." What do you mean? "When I asked Pam Bondi, she gave me the right answer. That's not the answer." And the amazing part of it is I think that's what was just in, that is the way that Kash Patel maybe operates, that's maybe what's in his head. He actually just thinks that's right. He serves Trump and he serves the White House. And so he didn't even back down and say, "Oh, you're right. I made a mistake and I was inarticulate in that respect." And it was left in that way, which is... that's the vertical.

The horizontal is what I'm very focused on in that there are a number of actions that they're taking that is a clear, as you said it, I think is a great way to describe it, plenary power. The executive overrides Congress, can ignore Congress. It's not like... Bill Barr made a pretty

aggressive claim that there's a commander in chief override for surveillance authorities or things like that after 9/11. That's like a national security emergency using the military... It's pretty cabined. This is like the executive orders on immigration, which Trevor and Adam point out. It's just overriding. Overriding the basis that people can even claim to convert their status from one immigration category to another in direct defiance of Immigration Naturalization Act, things like that. There's another one that's about to, I think it's lurking around the corner. So I just want to give a sense of something that's more litigable, but it's still pretty strong claim on the part of the executive. So it gives a sense of how I see that there are others that are more in the gray area. Here's how it goes. The mass purging of FBI agents and members of the Department of Justice. So firing people, which seems to be purely on the basis of their having worked on January 6th and Mar-a-Lago cases against the president. That's it.

In fact, it's in the documents and the memos that are coming from the senior acting leaders at the Justice Department. There was a statement from the first letter that we are aware of, the first memo from the Acting Attorney General, which says, "He's exerting his Article II power." So even though the civil service statutes say that he can only remove civil servants for cause, they're wiping that away and saying Article II. Is that litigable? It actually might be. Justice Roberts has recently opened the door to rethinking who is an inferior officer or principal officer that can or can't be removed by the president. And that's the vertical way as well because it's how can you have a unitary executive if the executive at the top can't fire their people as they so want.

So I still think it's unheard of in a certain sense. People would never think that the civil service statutes are all unconstitutional. We've been operating with these for decades, but they give a sense of very aggressive, but not in the same category that I'm putting the other plenary power authority that they're claiming.

BILL KRISTOL:

Right. But again, it's just a flat-out assertion of under Article II, as you say. It implies that a century of civil service, century plus civil service statutes and laws and regulations have been, at least the President could have overridden them. I suppose maybe that Trump would just probably say previous presidents didn't choose to, but that's not what they thought. I mean, in fact, they went to a lot of trouble to find cause at times to remove people. Various cabinet secretaries went through a lot of trouble to go through a lot of processes that were in law and regulation to both respect the rights of civil servants. And of course, different agencies have different rules. Your different FBI agents aren't covered by the exact same procedures and rules as employees at the education department or whatever. This whole structure can be just wished away with a snap of the fingers. That seems to be what they're saying, right?

RYAN GOODMAN:

That's right. Exactly. And I imagine if we went through and looked at every single case in which a civil servant has litigated the question of their dismissal, I don't think there's a single case in which an executive branch has said, "We can do whatever we want, it's Article II, the statute doesn't bind us." And that's decades of experience. And even the most recent instance of this in the Federal Register in 2024, so it's the Biden administration. They try to reaffirm protections for civil servants in the commentary. It refers interestingly to Trump administration 1.0 the solicitor general at the time in 2018, submitting briefs to the Supreme Court in which they clearly marked out that civil servants have protections under the statutes that Article II does not override, and they're now claiming something very different. I'm sure that those briefs are going to come back to haunt them when litigation goes forward on these matters, because it's totally inconsistent with what even the Trump solicitor general said in the past.

BILL KRISTOL:

You know I'm struck... I want to ask you actually about the litigation side, about what happens when the litigation goes forward, in a sense of how much they practically can do though in the next weeks, months, years, maybe, to really reshape the very structure of the government even if they end up losing some of these cases. One thing I'm struck by, some lawyer told me the

other day, "Well, they're going to lose before the Merit Systems Protection Board," I think it's called, which hears these arguments, which could then be for different civil servants. Which again, I don't think the constitutionality of that has not been challenged, I don't believe. And I don't think presidents have thought they can just go personally override such a decision of this board that's constituted by regulation or law, I suppose, and which has a whole appeals process up to the DC Circuit Court of Appeals and stuff.

There's this massive structure that they're just... You could go to Congress and say... It is very striking that they don't go to Congress. Heather Cox Richardson just made this point in her newsletter just this morning. It's really nicely, very simple, but very nicely done. Republicans control Congress. If they want to get rid of AID as an independent agency, have Congress pass the statute saying no, it's no longer an independent agency. It's being merged into the State Department. And furthermore, the Secretary of State has the—I'm making this up, obviously—has the authority to reduce the size by half and blah, blah, blah. This is what legislators presumably do. There wasn't even talk about that. There wasn't even a thought to do that. There wasn't even a sense of there's an emergency in AID because they're helping too many poor mothers in Sudan or too many helping having running literacy programs in Cambodia or something. There's no emergency. It's just they decided to do it and they're doing it.

So I guess the personalization of power as well as the assertion of executive power, I guess they go together in a way when you think about it for a minute, in practice, they're likely to go together, right? The strong executive is going to be a unitary executive is going to be a personalized executive.

RYAN GOODMAN:

That's right. And I think that it's out of fear of the person, that the members of Congress on the Republican side, especially in the leadership, seem to be giving up their authority, giving up congressional authority. It's incredible to me because the USAID, the only way that you'll be able to abolish it or create these radical reforms is by getting new legislation. It's not legally permissible. There's a piece by Tess Bridgman in *Just Security* on that particular topic. The same thing going to potentially come up with the Department of Education and the like. And I even thought that maybe some Democrats should put forward legislation to abolish USAID just to show, if you want to do it, let's do it and let's have a vote. Is there a majority vote for this? Because it really is the prerogative of Congress. So to give up something like that is enormous. And that seems to be what's happening though.

There's some ambiguity in some of the statements I've seen most recently in the last 24 hours, Senator Thune, whom I'm somewhat counting on to protect the institution of Congress, was asked by Manu Raju what he thought of the actions inside USAID being abolished, and he didn't endorse it. Instead he said, "Well, really need to think about how they haven't been answerable, they haven't been giving information, and we really have to do a review of their fund, how they've been spending." All fair, great, legit, but he's not actually saying, and it's okay to abolish them without coming back to Congress or absorb them inside State. So I think that's to me a big concern.

And then in terms of what the law can do here on some of these, I do think that the law has some teeth if litigators and those who are stakeholders get to the court and ask the court for an immediate temporary restraining order and injunction and so that the court can freeze the status quo. And then as the litigation then proceeds, at least we've protected the institutions and the rule of law in the meantime. That might be more difficult with the firings in the sense that the civil servants may have to exhaust administrative remedies first. I have theories as to why they don't have to do that, and there's some statutes under which they do not have to do that at all.

For example, what's right now looming if people aren't aware of this is that according to the *Washington Post*, the Department of Justice's acting leadership, he's asking for all of these names of any individual in the FBI who ever touched a January 6th case to create a master list. And according to the *Washington Post*, with the threat that they will publicly release the names, which is extraordinarily frightening given the environment that we're in for the risk of political

violence against those people. And that is a claim you can rush to court to stop the public release potentially. So there's some aspects of this, that I think that's the way it works.

But there are other aspects in which it does feel as though the strategy on the part of Musk and others might be to do things that are radically illegal and find out later. Let's figure it out later. And it's a rush. It's a fast-paced move across the different departments and agencies for them to put facts on the ground and for example, USAID. Well, next time in a few weeks from now when we get to the budget, they'll say it's gone. So don't appropriate any funding. Then maybe the Republicans don't appropriate any funding and it's gone. It's done. Even though the initial period is highly illegal, but it's too late. It's after the fact to be in court arguing about that. I think that's one of the ways in which the law is just not equipped for the constitutional crisis and moment that we're in.

BILL KRISTOL:

That's so interesting. We'll come back to DOJ and the FBI because it's so important obviously in a minute. But one last thing. I think one of the biggest instances of the assertion of executive presidential power, executive power seems to be that they're trying to revive, and this is pretty explicit, the power or revive or assert the power of impoundment funds, which was what Nixon pushed for, which he lost, unanimous decision, I can't remember. But he lost pretty overwhelmingly, if I'm not mistaken, in the Supreme Court. Doing it in ways that weren't even public and appropriate or legal is one of the counts in the articles of impeachment against him, and if I'm not mistaken, and that's been the law for 50 years. There's been limits on President's ability.

There's some discretion in how to expend funds, when to expend funds. One thinks you should they have to do it the same amount every two weeks. If there's more need for it in the second month than in the first month, or if the system's not set up yet, they have a normal, you might say, managerial discretion. It's my memory, at least from being in the government, and sometimes you can go to Congress and ask for more discretion. But the notion that the entire regime that insists on Congress' prerogative to appropriate funds and the executive does not have the right to overturn that, that just seems to be explicitly challenged both in what the Trump administration's doing and what the Trump administration's saying, I think. Is that right?

RYAN GOODMAN:

Yeah, absolutely. And especially what Musk is proclaiming he's doing, we don't know if he's overclaiming what he's doing, but what he's saying he's doing on X in terms of just stopping funds to different programs and the like seems to be a complete violation of Impoundment Act.

BILL KRISTOL:

Which is an actual law, right?

RYAN GOODMAN:

Yeah. It's an actual law that's been abided by all administrations past, and there has been reporting that their strategy is to, and that there's an internal OMB memo that was leaked that suggests the strategy, which is to get it all the way to the Supreme Court to hopefully overturn the Nixon precedent. And I say that in a neutral sounding way. That's very audacious. It's acting illegally. It's basically saying, okay, yes, the Supreme Court has said we absolutely cannot do this, and the Supreme Court has the authoritative interpretation of the Constitution. We're doing it, we're doing it, and we'll give the court another opportunity to say whether or not they were wrong in the first time round. That's not how the rule of law system in our country works. It can't work that way because then you'd have executive branches saying on any Supreme Court case or precedent, we're plowing ahead. It does not matter that the Supreme Court has told us that it's unconstitutional.

It seems as though that's the strategy of the Empowerment Act also based on the reporting about it. And it seems like it's the strategy with birthright citizenship. Without getting into the technicalities of it, there's a piece that we're about to publish any minute by Marty Lederman at

Just Security, who's a very, very careful lawyer, and he's basically saying there are pieces of the argument that the Justice Department is making before these courts that just flatly rejects what the Supreme Court has said about birthright citizenship. The two are inconsistent. So it's another instance in which I think they're just saying, we're going to plow ahead. We're going to base this on a view that is being told to us as illegal and unconstitutional by the Supreme Court because maybe on the second time around, this time around, they'll side with us.

And I think on birthright citizenship, for example, the likelihood that the Supreme Court sides with them is so low, one of the most conservative judges in the country in the Fifth Circuit, judge Ho has written law review articles on that birthright citizenship is part of the U.S. Constitution. I think they maybe get two votes at most. So that's the playbook that they're running. But to me that really smacks of illegality.

BILL KRISTOL:

Right. And there are ways that sitting administrations can say they don't agree with previous Supreme Court decisions, and they can go to court if they wish and argue against them. And there's often test cases and so forth, but there's not... Yes, I don't believe there's been in the past, maybe Nixon would be the one case, just a flat out widespread disregard of existing law and precedent to just do the opposite and then assert later on, presumably to the court that the court should uphold everything that they did if they... That's another question, whether they actually at some point continue to defer to the courts. Because some of these Article II, the constitution comes above any individual Supreme Court decision. So they're laying the predicate a little bit for that too. Let the court enforce its decision, I suppose. But the impoundment stuff, that will get to the courts one way or the other, I suppose, right?

RYAN GOODMAN:

I think that's right. So some of the cases, the litigants are not necessarily raising the Impoundment Act, but I think it's just inevitable. There's no way given all the actions that they're taking and all the stakeholders whose oxes are being gored, that litigants are not going to bring the Impoundment Act case, and then it goes up to the Supreme Court. There's one little bit of a wild card, and maybe it's just semantic in a certain sense, which is I do think that some of these positions by the Trump administration are so outlandish, take birthright citizenship and the Impoundment Act one as well, that the Supreme Court doesn't even grant cert because birthright citizenship is now, and I think it's four different jurisdictions. And if all of those jurisdictions uniformly come out the same way, which I think is very likely, unless you get a strange anomalous way where judge and then panels, maybe the court just says, "We're not even taking this. We're going to let those holdings stand. Why would we take the... It's uniformity across the country on this? We don't need to take the case." And I think there would also be a pretty powerful signal about just how out of bounds this particular administration is.

BILL KRISTOL:

Yeah, that would be interesting. I want to come back also at the end of where this all ends up in terms of its real effects on governments and governance and on the country a year, two years, four years from now, because it's only two weeks. It's hard to believe. But one last point before we get to DOJ and FBI in more detail. I'm also struck by, and this maybe gets to the personalization of power. There's not even a pretense that cabinet secretaries are running their department. Most of them aren't confirmed yet and are making judgments based on a review of the situation that they've taken over and are doing things internally, therefore are trying to make changes happen internally or going to Congress if they need those changes or making recommendations that the White House then accepts for what to do in terms of some personnel or whatever.

And that is the way it's been done, and maybe that's just pro forma, and a lot of this stuff is of course the White House is telling the cabinet secretary behind the scenes, we want you to do X, and then the Cabinet Secretary recommends whoever the White House wants. It's an important pro forma thing, I've always thought though. You do want to have a chain of command in the government that in which it's not literally the White House says X, and again, it is the White

House, not the President in almost all these cases. So some White House person is calling some acting person at some cabinet agency and saying, we want these people fired. That is not really... I don't know. Is that how the government's supposed to work? There is supposed to be...

Now, if an Attorney General says, we want to remove these people and goes to the Assistant Secretary of State and says, in your division... Doesn't ask for recommendations maybe from the Assistant Attorney Generals and then says, yes, we should go ahead and make these changes and the White House maybe is or isn't consulted and says, fine. You do want to have some regular order, I guess is what I'm trying to say in the workings of government, or at least the form of regular order. I'm very struck by the absence of that. There's very few confirmed people in these agencies. They're not even pretending let's have a 30 or 60 day review and then we can make all these big changes. That's how it's happened in the past with Reagan and others who went in and did want to make pretty big changes. And again, what's the urgency? It's one thing if there's 9/11 and then, okay, you're not going to wait for the system to tell you exactly what to do in every case, but these are just agencies doing government work and why can't they wait 60 days to have Marco Rubio set up a little task force to recommend what should be done with AID and have Congress weigh in if it wishes? And it seems to me that they of course know about this option. So they want to send the signal that it's not regular order and it's not regular lines of authority and that everything is at the discretion of the White House, it seems to me.

RYAN GOODMAN:

I agree. And I think it's in part because of the radical push that they're trying to do now, and it puts everybody in their back heels because it's happening at such a momentum across the different agencies. And just to give two very specific examples of what you just described. One, the massive purge that's happening right now at the FBI of potentially firing up to 6,000 FBI agents and personnel simply because they worked on an assignment that they were given to do some kind of investigation or something related to the January 6th investigations. That purge, that massive purge is being carried out by whom? The two and three, because of the U.S. Attorney in DC, acting heads of the Justice Department, not Senate-confirmed for the positions that they're operating out of, acting.

And one of the FBI associations makes a big deal about that in their statements that came over the weekend when they're trying to protect their members. They say, this should not be being done by acting heads of the Justice Department. Why not wait until Pam Bondi, who seems as though she's probably going to be in place soon, in days. So that is deeply troubling that something like that would be happening in that regard. And then the second one, by way of example, is definitely, I recall in the Pam Bondi confirmation hearing, she's asked this a couple of times and she answers forcefully that she, as Attorney General, shall decide what is best for the Justice Department, what are the decisions that the Justice Department will take.

She as Attorney General, which is right. That's once again, she's speaking in the register of normality as to what we expect of our institutions, especially the Justice Department in terms of its norms around having independence. But what did the executive orders do? They command the Attorney General to do X, Y, and Z, and it's taken out. It's not even up to her to decide whether or not she wants to do it once she's in place. Example of it is the weaponization executive order, the order that says that the attorney General shall, and that's the word used in the executive order, shall open up an investigation to look back at the last four years to investigate the investigators, prosecute the prosecutors. And it's an executive order. It's there and it commands her to do it, which is what we're now seeing, not just through executive order, but something that's happening on the back end.

And I also wonder how much of it is the White House or it's just President Trump has delegated it essentially to Elon Musk and then he has this roaming authority to carry out these orders from the White House down through the agencies. And the agencies and their heads don't really have the kind of independence that we have expected for good governance reasons for time, not immemorial, but time since the last several administrations.

BILL KRISTOL:

Yeah, I think it's both Musk, but maybe on the January 6th stuff a little more Miller and Vaughn, I don't know. But of course Kash Patel's going to be in there. Yeah, they're going to get Bondi, they may get Patel. Let them, they can ask the Attorney General, the FBI director to look at things. But it would be so much more palatable, I think, and so much more, even if they ended up doing things you and I wouldn't like, if it were done after some, at least semblance of a Senate-confirmed official ordering a review of some sort in which there's actual documentation and actual consideration of alternatives, and there's not even a pretense of any of that. And I guess I also am very... Yes, ordering the attorney general who's not yet in place to go after individuals, and incidentally, probably illegally who were assigned to a particular investigation.

So again, but I first thought, "Well, they don't quite understand. They don't see how bad that looks bad for them." Maybe it could even be used against them in court, I should think. But I think they want to intimidate everyone and they don't want to make it look like Marco Rubio's making decisions or Pam Bondi's making decisions.

RYAN GOODMAN:

Yes, I totally agree. I think they also think, we'll just absorb the cost. So sometimes there's writing in law and economics about when you try to impose a fine, for some people, also especially if they're wealthy enough, they just think a fine is a price. "I'll pay the fine. I'll still engage in the illegality and I'll just pay the fine. That's okay."

So the fine for them might be we're going to fire all these people illegally. It's going to take them two years to work their way through the merit board, et cetera. Yes, they might get their back pay at the end of the day and we'll have to pay that or the taxpayers, but we've gotten rid of them for two years. And then the other piece of it that I think is—

BILL KRISTOL:

And they don't care about paying that. It's the government that's going to have to pay that, the taxpayers. And they want to cut the government, so let the government spend money on that instead of on enforcing other laws or whatever.

RYAN GOODMAN:

Yes, yes. And then another part of it, just to see how important it is to have that Senate confirmed person in the chair making the decisions. I think a great example of it is, one could talk about this theoretically, but it happened, that the Senate advice and consent role is important because it's a relationship between that Senate confirmed individual and the promises and commitments that they're making to Congress and the Senate.

An example of that is when Kash Patel goes before the Senate Judiciary Committee on Thursday of last week, Senator Booker says to him, "If you were to fire agents, would you go through the regular process of review," et cetera, which is what they're absolutely not doing. And we now learned that they were actually not doing that on Thursday as the hearing is going on. And what does Kash Patel say? "Yes, Senator, I commit to you that that is what I will do."

Now if he goes into the seat, he's made a commitment to the Senate and that's part of the condition and the understanding. I bet that that was something that reassured Republican members of the Senate Judiciary Committee as well. And that's the nature of our process. That's why we have Senate confirmed people in those seats. And then they're answerable to the committee that has a lot of power over them in other respects, oversight, funding requests, et cetera. And we don't have that. We have acting people doing it in direct defiance of what Kash Patel said he would do or what the Justice Department and FBI would be doing.

And in fact, that's one of the FBI associations in fact said, once the purges started emerging, that this was a violation of the commitment that Kash Patel had made to them. And that's also part of the confirmation process. He needed to get their support in the confirmation process. How does he do that? He commits to regular order when he gets into the actual seat. Then that's why what's happening right now is a level of madness when it comes to the proper way of governing.

BILL KRISTOL:

Yeah. We keep coming back to DOJ and FBI, as examples, but I think that's not an accident. I mean, it's so important and so central to the Trump administration's ambitions and also to the way government functions, our government functions.

So let's talk. You mentioned in passing, but maybe elaborate a little on the extent to which DOJ, the Justice Department is the guardian you might say, of legality within the federal government, how that seems not to be the case now. And then maybe I could just push further, and you could also explain. It seems actually they are now, DOJ and FBI, the agents of retribution for Trump. So it's not just they're not checking Trump. They're being weaponized by Trump. So it's sort of a double... It's more than just a sin of omission. May be also a sin of commission.

RYAN GOODMAN:

Yes. And what's incredible is to see it on paper. They're doing it fairly out in the open. So the memorandums that have been issued by the Acting Attorney General and the Acting Deputy Attorney General to the Department of Justice and to the FBI that are ordering these purges and people being terminated, invoke Trump's language explicitly with quotations when Trump pardoned all the January 6-ers, including the people who assaulted law enforcement.

And lo and behold, they're saying basically that the January 6th investigations of people convicted of assaulting law enforcement and of seditious conspiracy, that that was the threat to the nation, that now the two acting heads of the Justice Department are following through on that fictitious recreation revisionism of the situation in order to, as you said, enact retribution. These are retaliatory actions against individuals, including many, many individuals who are simply doing their job because that's what they were assigned to carry out.

And that to me is so worrisome in the sense that it's happening out in the open. What would stop those people if this is their modus operandi from using other powers of the Justice Department to go after Trump's perceived political enemies? I don't know why there'd be any break between what they're doing right now and instead using the power of the Justice Department to criminally investigate and potentially prosecute perceived political enemies, Liz Cheney or the like. They're telling us what they're doing in that regard.

And that's I think to me, one of the red flags. But it's not even like a red flag. A red flag is like a hint of something going on. It's actually demonstrated here.

BILL KRISTOL:

That's so important. Just the way you're speaking, it really kind of clicked in for me. I hadn't really focused on just how amazing it is.

So Trump pardons them, which he's entitled to do. He has his own opinions about January 6th, which he's entitled to have. But the explicit order to the Justice Department and explicit rationale, I guess, by the Justice Department in terms of their firings maybe, but also in terms of ordering the FBI to do firings is that these people were involved in the investigation of January 6th.

But there's been no legal finding against the investigation of January 6th. There've been no charges even, let alone findings I don't think of impropriety or corruption or the various things that you might say, "Okay, that investigation was wrong and requires the disciplining of people who were involved in it," maybe including even people who were not, didn't know that it was wrong, but they just got ordered to be involved in it. That's a little more dubious.

I mean, you're right. Why can't they do that for eight other things that they don't like? "I don't like these investigations. I don't like what EPA did under Biden in investigating an oil company owned by a buddy of mine," Trump could say. "I want the investigators who've investigated that fired." Again, there's no even pretense that there's been a legal or judicial or internal finding of malfeasance by these attorneys or investigators. The cause in which they were investigating quite the contrary was upheld in the courts by juries time and time again. But even if it hadn't been, there's no finding of, as I say, of misbehavior or whatever. There's an assertion

of it by Trump personally, but no backup and certainly no adjudication of it either internally in the government or by the courts.

So you're right. What is the rationale? Why can't they just fire anyone in any agency who's been involved in any policy they don't like? Well, I guess the answer is they think they can. So if you were involved in DEI stuff, you also can be fired, or at least, well, I guess are they trying to fire them or just putting them on administrative leave? They are certainly eliminating the jobs. That's a little different.

I guess, I hadn't really focused on just how insane the overreaching of the claim is based on January 6th because Trump personally has an opinion about it. As I said, there's no legal basis for this. The Republican Congress hasn't passed legislation saying this was a very unfortunate thing and we should... or done illegitimately somehow. I don't even know how you would do that retrospectively. But anyway, I just I guess I'm now, as you speak, I'm getting more alarmed and flabbergasted.

RYAN GOODMAN:

Yeah, no, there's no inspector general finding of wrongdoing. And as somebody else pointed out, we're not even talking about—and it's kind the way you put it as well—we're not even talking about whether or not there was some impropriety in starting an investigation. We're talking about completely finished cases that were brought all the way through to a unanimous jury convicting people of assaults and law enforcement that is also just heavily documented, there's live video of the fact, and that's the people that have been put on the chopping block for having done their duty. And there's no official finding whatsoever of wrongdoing. That's where we are.

And it does make me think that they are coming out of the gates with this because it is such an assertion of power and is a form of intimidation. And it has to be. Even if they didn't even intend it to be, that has to be the chilling effect that is a result of this kind of action.

BILL KRISTOL:

And that theory is being endorsed, and not just endorsed, but repeated and propagated by the acting leadership of Justice and to some degree the FBI. I guess, they're more just taking orders from Justice. So that is really alarming that the Justice Department of all departments is embracing this kind of, we can punish whoever the White House wants us to punish.

RYAN GOODMAN:

It seems to be the case. I mean, I do think that because they've already fired a number of people or given them an "ultimatum" which is resign or you'll be fired.

I do think the next shoe to drop is what they do do now that they have the list of up to 6,000. Do they then try to fire them? And that's the one in which would be like, that's another massive assertion of power if they think they can fire people who are that low level as in terms of Article II.

The other piece that I do think is maybe very worth mentioning 'cause you just touched on it, is that in our country right now, the senior leadership of the FBI, as far as I can tell from news reports and the leaking of their internal memos are standing up for the rule of law. They are holding the line. And I think that for listeners and folks watching this, that is so important to understand just how brave of a moment we are in because it gives you a sense of how lawless the action is by the acting leaders at the DOJ.

The Trump person who is put in as currently Acting FBI Director, Brian Driscoll and his deputy put in there by Trump have sent out a memo that basically says, "We are not in agreement with this purge. We do not think it is right." And the head of the FBI New York Office has also said he will dig in and he's fighting on behalf of the FBI employees, and he lauds what Mr. Driscoll and his deputy are doing. And senior FBI leadership across the country is also trying to back their employees because it's so illegal. You cannot fire people on the basis of just their case assignment.

That is why Kash Patel, when asked in a public forum of the Senate Judiciary Committee, there's no way that he as a nominee can say, "Oh yes, we're going to do this and we can do this." He has to say, "We can't and I won't." That's how far off the cliff we are right now and that ... But it's also an optimistic moment in my thinking that there are some real heroes with valor that are defending the rule of law inside the administration at this point under enormous pressure.

BILL KRISTOL:

Yeah, that's interesting. Well, we'll see how that comes out. We should certainly help them both however we can, but there's pretty big forces up against them.

Say a word about the Defense Department also as another key agency of course, that if you think of wanting to amass power and use power and use it illegally or extra legally. One thinks of the Justice Department as an obvious place you would target. One thinks of the FBI, one thinks of the Defense Department in obvious ways. You worked there. What's your analysis of what's been happening there?

RYAN GOODMAN:

Yeah. So right now I think that from everything that's taken place, it's somewhat within ordinary uses of the military. There aren't any red flags in terms of what operations have been authorized. And sending the troops to the border. The kinds of logistical work that they're conducting is the same type of work that other administrations, Republican and Democratic, have done in the past.

The question is whether they break through some firewalls. And to me there are two that we should all kind of keep our eye on. One is the invocation of the Insurrection Act for not just immigration purposes, but if there is in this country domestic political protest, which that's my concern about one of the bad or worse case scenarios. And one of the executive orders asks basically Pete Hegseth to report back as to whether or not the administration should invoke the Insurrection Act. I think that's a concern.

And then behind that concern is this very detailed white paper that Ken Cuccinelli, who served in a senior role in the prior Trump administration, wrote in 2024 that gave people like me the legal playbook. And in that he says that the Posse Comitatus Act, which limits the use of the military for law enforcement purposes, might very well be unconstitutional under Article II. So there we go. That's the theme and that's in that white paper. So I have to imagine that that might be what's happening on the back end of what they're thinking about with respect to just getting around the Posse Comitatus Act by claiming it's an intrusion of the President's Article II powers. That's one.

The second is that there's this EO that's right out there that is the EO that says, clarifying the military role on the border. That to me is the one of the most worrisome ones, that it looks like a framework that would actually say the US military would conduct a full-blown military operation on our borders.

So, forget your Posse Comitatus Act. The Posse Comitatus Act is about use of military for law enforcement purposes. They might just say, "We're categorizing it as a full-blown military operation." And what's concerning about that EO is it's just directed right at the military. The other EO that is the declaration of an emergency on the southern border is tame. It's limited. It has DHS as the lead agency, and yes, the military is also referenced, but in support of and in assistance of DHS. So it's a civilian run operation, and that's within the realm of normality.

The other one is not. And it might be an end run around the Posse Comitatus Act that people like me had not anticipated. Everybody was focused on, "Oh, well, did they invoke the Insurrection Act to get around the Posse Comitatus, da, da, da, da?" It's like, no, we're just doing a full-blown military operation. And what is a military operation, but the greater power includes the lesser power use of lethal force, use of detention authority, et cetera? And I think that's... I have to imagine that is very worrisome to commanders at the US military inside the Pentagon.

BILL KRISTOL:

Is that related to the reference to invasion in one of, I think that's in one of the titles, one of the executive orders, which makes it sound like, well, of course, if the military were literally fighting an invasion, 1812 or something, they would use lethal force. They would override civilian control. They would override civilian laws in the areas where fighting is taking place. That's also a civil war issue, right? I mean, but, I don't...

RYAN GOODMAN:

Yeah, I think so. I think that these are interlocking both in the way in which they think the authority would work. I also think it's interlocking in the sense of trying to change the background atmosphere so that if you go into a court and you say to the judge, "We've got to do this. We're dealing with an invasion that's been, and a finding of an invasion," by the commander in chief, it gives that greater strength to that argument, both just normatively, as well as legally.

And then legally, I also think that invasion kind of interacts with designation of the drug cartels as foreign terrorist organizations. And if they're foreign terrorist organizations, then we can go back to John Yoo's OLC memos, which are actually cited in the white paper I mentioned of use of the military domestically because you're dealing with a terrorist organization. So I think these are working together in that respect.

And another one is if they invoke the Alien Enemies Act, which one of the executive orders says like tell me that the agency should come back and tell the president, tell me as president whether or not I should invoke the Alien Enemies Act. You only really get there if you have something like an invasion from a foreign power. It really has to actually be a foreign government. So I don't think by the letter of the law, they can get there. But they're getting further down that path by saying, "This isn't migrant invasion. This is an invasion by cartels that are foreign terrorist organizations. So don't put form over substance."

I think their argument would go like this, "Don't put form over substance. If there are authorities that we have for the President if we're invaded by a foreign government, let's imagine we are invaded by an al-Qaeda force. Are you telling me that, 'oh, only said foreign government that we can have the President Act to defend the country?'" So it's a cartel that has taken over certain governmental powers, even in some parts of Mexico. That's what we're dealing with." I think that's their argument, and they're laying the groundwork for that in various ways.

It also means that there's another instance of looking at the forest of how all these pieces work together. 'Cause if you were just asking me about, let's just focus on very discreetly the designation of drug cartels as foreign terrorist organizations. I can understand certain policy reasons to do that, but not when this is actually what seems to be the much broader architecture of what they're trying to effectuate, which would have very significant legal and policy concerns. I'd imagine that many people would be very worried about the Alien Enemies Act being re-invoked in this country. It applies to legal migrants as much as illegal migrants by way of example.

BILL KRISTOL:

Yeah. One more word on immigration, and then I want to close by asking you broadly also on the forest, spirit the forest, and also where we could be six 6 months, 18 months, four years from now. But on immigration, that has been so central to Trump's rhetoric and central to the very early executive orders at least. How much is that kind of at the ... Well, just say a word about how they're addressing the immigration issue.

RYAN GOODMAN:

Yeah. So Adam Cox is my colleague and a eminent expert on immigration law and on executive power, he's written a book about it as well. He and I wrote a piece in December anticipating what they would do, and they actually really are doing it. And we wrote it for that

purpose. We really thought this is what they're going to do. So we wanted to inform people about the moves they would make.

So the basic argument is, and analysis is it is very difficult to meet the promises made of deporting millions of migrants in the country, very difficult, and prioritizing those who have a criminal record of a serious crime. And that's because of capacity reasons and all sorts of things, and all administrations, the last several administrations, have tried to deport every illegal migrant who's committed a serious crime. And Obama bested Trump on that. He has better numbers on an annual basis. So the only way they can get there and to really get there on mass deportations is to do something, which I'm not sure the American people voted for when they understood what is mass deportation, is to change our conception of what it means to be a criminal migrant, an illegal migrant. And they're doing that. They really are.

So DHS has now said at least three times to The New York Times, The New York Times just seems to report it without any qualification, that people that have been in the United States in the last four years and have been authorized to be here, they filled out the CBP One app, they filled out all the forms, the government knows them, they're not undocumented, they're the most heavily documented people in the country, in a sense, they're illegal. They're—

BILL KRISTOL:

Yeah, what is the story with that? So they paid \$500 to get their work permit if you're in the, what's it called, the protected...Temporary protected status. You're a Venezuelan, you're a Haitian, you filled out the forms, you showed up in the right place, you're legal, the government knows who you are, where you are, you paid \$ 500, I think it is, \$545, to get your temporary work permit, they're mostly working so far as one can tell, and the government's just decided, the administration, the new administration just decided they're illegal?

RYAN GOODMAN:

Yeah. And part of the reason that Adam Cox and I were able to anticipate this is because they did it during the campaign. So just refreshing everybody's memory about the migrants in Springfield, Ohio, who Vance in particular and Trump said were eating people's pets, et cetera. Right? Okay. At a certain point, Vance said, "And they're here legally, but," and then he just fell in line with Trump and said, "I call them illegal. They're illegal because they came here on the Biden-Harris illegal program and they were then converted into being illegal aliens." That's the argument. And now they're doing it.

And they're doing it in that regard. They're also doing it in other regards, like here's another instance where they will say, "Well, if somebody's in the country illegally," in the way that we would all understand illegality, they do not have authorization, that they're criminals. And the White House spokesperson, it might've been her first day out as spokesperson, said just that in answer to a reporter's question, "Well, then they're all criminals. They're here criminally." That's not true. That's not true. If somebody overstays their visa, that is a civil violation. It is not a crime. And Adam and I anticipated that as well, they would start to call everybody a criminal, and that's exactly what they're doing because they need to persuade the American public that they're getting rid of criminals when they're not. And *Axios* did a very good job of correcting the White House spokesperson on that, same day within hours, and because it's so obvious what they're doing.

And I'll mention one more. The White House border czar Tom Homan has gone on national TV now multiple times, and he will say, "Well, if you cross the border illegally, that's a crime, and therefore you're on the chopping block." And he's never gotten pushback from that as far as I've ever seen from a reporter or an anchor.

So one point is, just in his favor, I think, look, the guy is the border czar, what is he supposed to say? It's something like if you say to him, "Oh, well, are those people also subject to deportation?" he has to say, "Yeah, they crossed here illegally. They're subject to deportation and they committed a crime," and he's right about that. But here's the pushback, sir, the crime is a misdemeanor, right? It's a misdemeanor, and we're trying to tell you that people are living in

absolute fear, and mainstream media is reporting people in Chicago who haven't left their home since January 20th because they're living in absolute fear.

And then as an immigration expert has pointed out recently, and the statute of limitations has run for the misdemeanor. So what you're talking about, and just in terms of the humanitarian nature of this, that once again, I don't think the American public voted for that at all. They were thinking mass deportation of people who had recently crossed the border, send them right back, or had committed crimes and especially serious crimes, but the Overton window is shifting.

So that's where the public has been, but obviously they're being pushed, pushed, pushed, but that's the strategy.

BILL KRISTOL:

Yeah. We'll see if the public is open to deporting hundreds of thousands of Venezuelans who came here fleeing from a pretty dictatorial and oppressive government and terrible situation that seemed to be doing well here in the US, not committing many crimes actually, and they're now going to be deported because Trump has just decided, I guess, to either abrogate the current temporary protection status they have, or at least let it expire when it expires, though it sounds like they even want to abrogate what the current schedule would have, right? These people thought they had 18 months or something and now they're being told, "You guys are on the list."

RYAN GOODMAN:

Yeah, and it's a little bit of a wonder to me because they did not do well in the first Trump administration when they tried to do that in litigation. And if I were a lawyer and I was inside the government and I was trying to advise them, like what's the best strategy, I'd say just let it expire because you might be even tied up in litigation until the expiration date. Just do the thing that's not legally risky, has a huge litigation risk, is not even legally risky, but basically unlawful to do that to these people.

And they haven't chosen that route. I'm not sure why that is. Maybe because they want to do the big, the bold, and there's a lot of pressure on them because they're not getting the numbers that they want because it's so hard to do it capacity-wise, and maybe Trump and Stephen Miller think with the wave of a wand, they can make these people immediately illegal and deportable, and that's the path they're trying to choose.

BILL KRISTOL:

And deter others more effectively, I suppose they would say.

RYAN GOODMAN:

Yeah.

BILL KRISTOL:

They've also shut the borders, so I don't quite know who they're deterring, and they're encouraging more people to come in, if I could just editorialize for a second, in an undocumented way. These are the people who did the right thing and showed up. If you have to pay a huge price or the same price for having showed up and done the right thing, why would you just not sneak in and stay beneath the radar screen, right?

RYAN GOODMAN:

I think that's an excellent point. Isn't the whole idea that the mantra is that we want legal immigration, and we want people to stay? Yeah.

BILL KRISTOL:

Yeah, well, they don't, yeah. Okay. A final thing, and I'm just really curious, so where do you think, I mean, obviously there are various scenarios here depending on how much pushback

there is and stuff, but if, I don't know, give two or three scenarios if you want, but I mean, we're two weeks in and we're talking, how does this play out over three months, six months, but God knows, two years, four years in terms of the justice, especially, well, throughout the government, I would say, but also, and some of that depends on mid-year elections, I suppose, in terms of Congress's action, but I'm particularly interested in terms of the FBI, justice, maybe DOD, what are we looking at here?

RYAN GOODMAN:

Yeah. I mean, like you say, we're just two weeks out. This is two weeks. It feels like two years. And another way I think of it is if they get away with 50% of their lawless action, it's a radical constitutional crisis and restructuring of our government, and with the loss of human lives around the world, I mean, the USAID piece is just, to me, absolutely ghastly. And in terms of babies dying, if you can say babies die, babies are dying because of it. And it will, in all likelihood, come to haunt us, even though that does not need to be the justification, like bird flu. At this moment in time, a former senior head of the USAID said to Fox News that the United States is currently pushing back successfully on bird flu spreading across a couple dozen countries, and that just terminated. That just got terminated.

So I think that there might be this wake up call for the country. It's a bizarre situation we're in, in which it is so damaging, what's occurring, that maybe it's a real wake-up, just like the tariffs. It's maybe such a wake-up that they have to walk it back and that the midterms, it's even more of a risk for the vulnerable Republicans such that they need to be doing something now to protect their constituents, similar to the funding freeze. In some sense, I even think that the Trump administration is saved by the law because we have judges right now that are stopping the funding freeze domestically for domestic assistance because if they didn't do that, I would imagine many constituents would be absolutely apoplectic about what's happening to them and their families and their access to medical care and their access to Social Security checks, et cetera.

So I think they're playing with so much fire, and I do think that they are, in some regard, it's so extreme that they've overplayed their hand. I think Donald Trump has overplayed his hand on January 6th pardons across the board, including to people who have committed acts of extreme violence against law enforcement officers, I think they've overplayed their hand with USAID, and I think they've overplayed their hand with birthright citizenship in the sense that they will be immediately rejected by the courts and it will also send a signal to the country. I think they've overplayed their hand with the FBI. I mean, they could have come in with a lot of support from the FBI and law enforcement and they've turned all of the FBI law enforcement associations against them.

So there's part of it that I think it's so difficult to tell what's going to happen because of that. So I don't think they succeed in that. I think they fail by their own success in a certain sense.

BILL KRISTOL:

Of course I don't quite know where, as you said it, I'm trying to think, where does that metaphor come from, 'overplaying your hand?' I suppose it's poker or bridge or something, but of course you only overplay your hand if someone else calls your bluff, if you want to— Let's mix metaphors a little bit here. Either calls your bluff or trumps your high card or whatever, and that requires real pushback by someone. I mean, we've seen it a little bit from within the FBI. We've seen a little bit from Democrats on the Hill, almost nothing from Republicans on the Hill, courts, some, temporary restraining orders. I do think people, maybe people imagine the magic moment where the Supreme Court steps in and saves everything. It doesn't feel like... There'll be a lot of distinct cases, right? There's no one moment where... Plus, the court may not agree with you, as opposed to the Trump administration, on every matter, the Supreme Court.

So again, yeah, that's interesting that you think though that there are plenty of opportunities, is what you're saying, for people to push back to play their hands, to make them pay a price, I guess, is the way I'd put it. Make them pay a price for overplaying their hand.

RYAN GOODMAN:

Right.

BILL KRISTOL:

I mean, that's the other thing. They can overplay their hand. And again, if you want to use the poker analogy, you don't call and raise and you just, they lose a hand or two, but they still have a big stack of chips and they continue to push them in. You really want to make them suffer, as it were, if you want to use that analogy, for overplaying their hand. There, I think that's hard, actually, to do. Executive has just a lot of power and a lot of chips to play, right? It's hard to make them feel the price, but—

RYAN GOODMAN:

Absolutely. And it maybe, in some sense, goes back to the earlier part of our conversation on the kind of cult of personality and deference to personality in the sense that when I think they're overplaying their hand, in part I think it's because the American public will turn against it. When they really understand public support generally, and then elite support as well, when they understand the dramatic consequences for the country and for themselves personally from this, including what's going to happen to institutions, research institutions in red states and fantastic schools and universities in red states, they're under a significant threat from what's already happening. And in some ways, I think they're even saved by the '22 Democratic attorney generals going to court to say, "Stop this funding freeze," and then it seems as though they're stopping the funding freeze from across the country. Everybody benefits from that.

But if indeed people understand and Trump's support starts to crater, I think that that's, to me, the big question of how willing are people to then grow a spine in Congress because Congress has to be one of the institutions that pushes back, and how much is there a momentum in litigation in which the courts do or do not think that this is a dramatic threat?

But you're right, it's hard to point at concrete players around the table who are even playing the game.

BILL KRISTOL:

I mean, the in-between position or prognosis would be, and I think this is quite possible, not that Trump support doesn't crater and the whole country turns in one direction, but various, not just elites, but various groups that are particularly affected, particularly concerned about, interested in different issues, different constituencies, different parts of the country do decide, "Ooh," for now they're going to decide only, "this seems a little odd. I mean, this is going too far, but I haven't seen the effect yet."

But I don't know, if you're in South Florida and hundreds of thousands of Venezuelans whom you respect as neighbors and you patronize their businesses and they patronize your business and they're working next door next to you and suddenly they're under threat of deportation and maybe they don't quite get deported yet, but they're suddenly changing their, as you say, not going out of their houses or not picking up their kids at school because they're worried that ICE is there, that affects some number of people there. It doesn't affect the whole country. It doesn't mean they immediately decide they shouldn't have voted for Trump, but it raises doubts.

And then other things happen in other constituencies, business with tariffs, and I mean, there are many, many possibilities, law enforcement with the way the FBI is being treated. I do feel that you could get an erosion, let's say, and some court decisions, and gee, they don't seem to be following the law, but I think it's an interesting question. It's very hard to predict these things, I found, over time. Are there tipping points? Are there inflection points? Are there just many sort of cuts at it or are there not, incidentally? Does the Trump administration succeed in making it, backing off where they have to, declaring victory, like Trump did with tariffs over the last couple of days, and avoiding obvious things that really will affect people's... Actually, the NIH funding continues. Actually, people at key research institutions don't say, it's not the case that their efforts are being severely affected. I don't know. Are they subtle enough to make those adjustments, is a question.

RYAN GOODMAN:

Yeah, I think so. And it's interesting to me as well that one of the inflection points might be over immigration because they really do seem to be doggedly committed to it. And I remember *The Wall Street Journal* wrote, the editorial board said, "Please don't do this." After he was elected, "Do not follow through on your mass deportation. That would be bad visually in terms of who's seeing the human part of that in terms of who'd be thrown out of the country, and it's bad for the economy as well."

And an example of it, I think, in a microcosm is the Haitian migrants in Springfield. So when there was the assault on them, and Trump said he would deport them as well, where did they then get their support? The business community in Springfield said that they needed them. The mayor, a Republican, the governor, a Republican, all said and spoke out against Trump, which is hard to do as a Republican in those circumstances, because they saw these people as members of their community and as vital to their business thriving.

And so I do think the mass deportations in this way that is not according to what people voted for at all, I think might be that inflection point of, in a way, and I don't want to use the metaphor of overplaying one's hand because in that instance, it's just there's so much human loss.

BILL KRISTOL:

Right.

RYAN GOODMAN:

But yeah.

BILL KRISTOL:

Yeah. It's also, well, it's all speculative, so we won't continue speculating. I mean, I think my experience has always been, yeah, it's often things you don't expect too that turn out to be the biggest issues that knock an administration's approval down a few points, which in turn, gays in the military for Clinton or Afghanistan for Biden, people didn't expect that to be, have the effect it did. And then that in turn frees up some members of his own party not to simply fall in line. That's hard to imagine with Republicans these days, but maybe that could even happen, emboldens the other party, emboldens others outside to not quite capitulate to Trump preemptively, as we've seen quite a lot of that in the business world, and to some degree, beyond even.

So it's a very dynamic situation, but I guess basically we don't know, right? I mean, these are on track, as you said at the beginning, just to come back to that key point you made, it's a cliché, but it's true in this case, I think, these are uncharted waters. We have not seen an administration try to do what Trump is trying to do in terms of the way he's running the government in modern times, I don't think. I mean, Nixon '73 after his reelection by 20 points in '73, '74, a little bit of that, gets very short-circuited, of course, by Watergate, but that's it, really.

RYAN GOODMAN:

Yeah, absolutely. And it's funny because somebody said this as well, which is they're also operating as though they came in with a 20-point mandate, you know? It's like...

BILL KRISTOL:

Right.

RYAN GOODMAN:

And they didn't. So where the direction that this goes in is unpredictable and kind of see what happens because we can't look at these kind of precedents of trying to use them as predictors of how it's going to shape up or shake out.

BILL KRISTOL:

That's a good note to end on, I think, the limits of what we can predict, but this has been extremely, for me, Ryan, enlightening and clarifying, really, just what's the forest as opposed to the trees, and thank you so much for joining me today.

RYAN GOODMAN:

Oh, thank you. I always appreciate a conversation with you.

BILL KRISTOL:

And thank you all for joining us on *Conversations*.