

# CONVERSATIONS

WITH BILL KRISTOL

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BILL KRISTOL:

Hi, I'm Bill Kristol. Welcome back to *Conversations*. I'm very pleased to be joined today by Steve Vladeck, Professor of Law at Georgetown University, where he teaches the Supreme Court, federal courts. And I discovered from looking at your... quickly at the Georgetown website, national security law, which I hadn't realized you were as much of an expert on, which is actually very interesting, and maybe we can get to that a little bit in this conversation. But Steve's well known as really one of the best, I'd say, explainers of complex legal issues to normal people who are not lawyers or not constitutional lawyers or not law professors... but explaining them in a way that does justice to the complexity as opposed to simplifying. Author of an excellent book on *The Shadow Docket*. I guess that's a phrase you get credit for inventing. Is that true or?

STEVE VLADECK:

No, no. Will Baude did it.

BILL KRISTOL:

Oh, Will Baude did. Right.

STEVE VLADECK:

I shamelessly stole it from him and don't even pay him royalties.

BILL KRISTOL:

That's right, you have a little footnote on the cover there. This phrase borrowed from Chicago law Professor Will Baude. No, I guess not. Yeah. And Steve has an excellent Substack weekly, but now I noticed you've been doing it more often than weekly, because there's so much news called *One First* O-N-E, *One First*, which you should all subscribe to, and it's really informative about what's going on in the courts. And I noticed also from your Georgetown bio that you're a Mets fan, which I had not realized, and I was a Mets fan before you were born and has it, yeah. That's nice. Yeah. I've survived. So you can keep going too.

STEVE VLADECK:

Mets fans, we all know how to suffer in silence, right, Bill?

BILL KRISTOL:

Exactly right. Right. Occasional groaning of something during the playoffs. Right. But I mean, I became a Mets fan, I was what, junior or senior in high school in 1969, and that was enough. You can't really ask for more than that one season in your lifetime.

STEVE VLADECK:

Yep. So not to age myself, but I was seven when the Mets last won the World Series in 86, so.

BILL KRISTOL:

86, yeah, with Buckner. Anyway, great to have you. We could discuss the Mets for an hour and that might be very popular, very popular conversation.

STEVE VLADECK:

That'd be less depressing.

BILL KRISTOL:

Yeah, yeah. Well, that's saying something, right? The Mets is what would have to cheer us up compared to the rule of law and constitutional government in America. So we're halfway...halfway. We're halfway through the 100 days. We're 50 days in basically to the Trump administration, a blizzard of court cases and legal developments and questionably legal developments. Let me just ask one broad question and then we'll go into some of the categories of what we should know about what's been happening. I mean, how normal a situation is this and how extraordinary? Obviously there's always fights, especially when new administration comes in, often between assertions of presidential power and a legislative prerogative. There are fights between Democrats and Republicans. There are fights between, I don't know, narrow interpreters of legal authority and broad interpreters and so forth. How close is this to business as usual? How close is it to a bad version of business as usual, and how close is it to not business as usual?

STEVE VLADECK:

I mean, I think that hopefully the one thing that everyone can agree on is this is not business as usual and it's not close to business as usual. And if you look for business as usual, you'd have real trouble finding business as usual. I think the overarching problem is not any one particular thing that Trump and the executive branch have done over the last 50 days. It's all of it. It's the aggregation.

We've seen individual flashpoints for some of these legal controversies before, Bill. We've seen presidents claim the power to not spend at least certain money Congress has appropriated. We've seen firings that have been controversial, if not unlawful, but we've never seen it at this scale and we've never seen such a wholesale attempt on the part of a president basically to clear out and hollow out the executive branch. We've never seen, I think, such a wholesale effort to install loyalists in all of the relevant positions of government and not to sort of put this all on the executive branch. We've never seen Congress, I think, so completely abandon its own institutional interests, even though we may have been sliding toward that for years. Just the wholesale abdication of any responsibility for appropriations, for appointments, you name it. So you can point to any one thing and say, well, here's an example where something like that happened in the past. We've never seen it at this volume and this scale. And I think that's what's part of why the last 50 days have felt so overwhelming.

BILL KRISTOL:

No, that's very helpful. I guess quantity creates a new quality or whatever that phrase is, right? So I think you've divided, and things you've written are certainly, and what we've been talking... you've sort of divided the categories very helpfully I think, of issues or cases into three broad ones, sort of the workings of government, I guess, the internal, what you were talking about, hollowing out the government, loyalists, how legit is a lot of that, or how legal or questionable is it? Spending, which gets to, we'll get to the impoundment and conditions on spending. And then some policy issues where they're also testing policy initiatives that previously might've been thought beyond the pale either constitutionally, well, constitutionally... I guess they can test anything legally. They can ask for the change of a law, but... So why don't we just go through those three categories if you want. So you mentioned the first one, government, the firings, the loyalists. What strikes you the most about that and which—are there particular court cases that are kind of going to be indicative of how that works out?

STEVE VLADECK:

I mean, I think we could do an hour on this alone. I mean, I think the short version is, what strikes me about it is how little it... basically if everything actually works out the way it seems

like Trump wants it to, what shell of a federal government we'll have left at the end of this. And so when it comes to not spending money Congress has appropriated, I mean that is an arrogation of Congress's most important legislative power. When it comes to firing thousands and thousands of employees and not replacing them. We can all probably, Bill, identify examples of government agencies that might have been inefficient and we might be able to identify offices that maybe weren't doing what we wanted them to do. But what's been clear from what's happened over the last seven weeks is the firings have not been especially thoughtful. My favorite was when a nuclear waste transport team was fired while it was in the middle of transporting nuclear waste.

BILL KRISTOL:

Right.

STEVE VLADECK:

There's no sort of thought process here other than fire as many people as quickly as possible. And that has, separate from the legal issues, although there are legal issues, that has just massive ability-of-government-to-do-its-job issues. And that's not just in the context of NIH medical research. It's in the context of food inspection, air traffic control, highway safety. I mean, the federal government is ubiquitous in our lives. And this kind of hollowing out, I think is a real, real unprecedented effort to make the federal government less ubiquitous in ways that I think are not carefully thought out to sort of cut off the chaff from the wheat.

BILL KRISTOL:

And on the legal side, I mean, I was chief of staff of an agency many, many years ago. I mean, it was hard to remove employees because there were all kinds of protections either in law and or in regulations or policies or procedures or union contracts, presumably all of those ultimately pursuant to law. Right.

STEVE VLADECK:

And so, right and so— I'm sorry.

BILL KRISTOL:

I mean, I remember we would move people around. So I mean, it was carefully done and you get... someone would challenge you to the Merit Systems Protections board and you'd have a case, and I mean it didn't, I honestly think, occur to us that we could begin to do what Trump and Musk have done in terms of, you say, mass firings, mass... changing people's jobs, closing agencies. So I mean, do they have more power than we realize? Have the courts changed over the last 40 years, 30 years enough that they now have power they didn't have? Is this untested? What's the legal situation?

STEVE VLADECK:

Sort of a little bit of everything. I mean, so it might help just to start with the basic structure here. So for the most part, and I'm going to generalize a bit, there really are three classes of folks who work for the federal government. There are what the Supreme Court refers to as principal officers. So those are agency heads, cabinet secretaries, and the like where Bill for a long time the understanding has been that maybe with one or two exceptions, those folks, once they're confirmed by the Senate, serve at the president's pleasure, and so they can be fired for whatever reason. There's the mid-level folks—the folks the Supreme Court calls inferior officers, so deputy secretaries, deputy administrators, regional directors, I mean folks who hold single positions that are still within the agency—where the historical tradition has been that Congress has some ability to protect those folks from being fired for political reasons, but whereas you know the Supreme Court has increasingly become skeptical of whether Congress can do that.

That's a bit unsettled. But Bill, then there's the bottom of the pyramid, which is by volume, the overwhelming majority of the federal workforce, folks who are not officers at all, folks who are employees. And at least since the 1880s, we've had a robust tradition of a civil service, of a statutorily and regulatory protected civil service where folks can earn protection from being fired, where we don't expect the janitor at the Department of Energy to be someone who's hired or fired because of their connections to the current president.

BILL KRISTOL:

Yeah. And the trade-off was, in a way they accepted perhaps lower salaries and less opportunities for big windfalls because they had the security of a government job. Now within that category, as someone who was chief of staff of a department, they were the Schedule C employees, the political appointees who were fireable, hireable at will basically and fireable at will. They were a rather small number—

STEVE VLADECK:

I mean, that's the key.

BILL KRISTOL:

...were at least of this huge pyramid. And then there was this massive civil service space. So Trump is going way beyond, I mean of course every administration removed, if it comes in with succeeding the opposite party, pretty much all the Schedule C's leave and you put in your own Schedule C's. So that part is not controversial, I think.

STEVE VLADECK:

No, but your point about numbers is I think the important one, which is, right, the issue here is not trying to resist President Trump's ability to have his own hand-picked folks at those jobs that have always been political appointments. The point is everything else. So the firing of probationary employees, many of whom are not actually probationary, right? Maybe many of whom were 15, 20-year veterans of their agencies who were just recently promoted. Right. Those are not the folks who are—

BILL KRISTOL:

Yeah, the way that works is you're "probationary" for a year when you're in a new position, I believe. But as you say, many of them were quite very experienced and in fact probably were among the better employees because they were put in these new jobs and more responsibility. Right.

STEVE VLADECK:

And this is the problem. I mean, so whatever you think of the law, and I think a lot of what Trump has done in this space is unlawful, right? But even if you aren't troubled by the legal constraints here, the folks who are being fired are the folks who are the real just force of these agencies, the productive force, the folks who have moved up in the agencies as they've gotten more and more sophisticated, more and more experienced. To sort of take the whole premise here, the folks who actually are best positioned to help the government run efficiently.

BILL KRISTOL:

But maybe that's not what, of course Trump and Musk want. In some sense, they want a responsive government, not an effective or efficient one. But on the legal side, just clarify that. So there are these laws and regulations. I remember them vividly being explained. The general counsel explaining to me that this one person was really not doing a good job somewhere, here's what we had to do. We had to document it. And I didn't do this personally, and there were people who did this, but the council's office did it and so forth. How come they get to just remove all these people? What's their argument for that and—

STEVE VLADECK:

I mean, for many of them they don't, but right, so the argument is in some cases, they're claiming the power to remove these folks because they're no longer performing up to what they believe is their appropriate level of work. I mean, what's crazy is they're firing people Bill, allegedly for cause who have spotless evaluations.

BILL KRISTOL:

Because for cause is legally permissible in a way that firing with no cause is not, right? I mean...

STEVE VLADECK:

And what's tricky about it, Bill, is there's a complicated regulatory system through which fired federal employees can challenge what they believe is a wrongful termination. And Trump is going after that too. So Trump has sought to fire the person who's the chair of the Merit Systems Protection Board. This is the federal agency not that many people have heard of, that's actually in charge of adjudicating these kinds of civil service claims. Trump very publicly fired, Hampton Dellinger, who's the head of the Office of the Special Counsel, which is the sort of, the ombudsperson who looks at whether the federal government is behaving in a way that's inconsistent with its own employment obligations. And so it's this multi-layer problem where you're firing lots of people under circumstances in which they probably have at least a viable claim that their firing is unlawful. But then you're hollowing out the administrative apparatus that's supposed to resolve whether those individual firings are unlawful. And so at the end of the day, the problem is that you have tons of people who Bill, probably have been fired illegally for whom the remedies are going to be increasingly difficult to obtain.

BILL KRISTOL:

And where do you think six months from now, the courts will end up on this? Will they sustain this kind of network of rules and regulations, or will they say, no, the president's in charge of the executive branch and basically it overrides an awful lot of this stuff, or it minimizes, let's say, the constraints?

STEVE VLADECK:

So I mean, I think this is where, to talk about the current Supreme Court for a minute, I mean, I think it is a true statement that the current Supreme Court is more supportive of the so-called unitary executive theory of presidential power than any court before it. But even devout "Unitarians," for lack of a better term, have never actually reached any kind of consensus about the civil service. So the unitary executive theory has been principally about presidential control of principal officers, which is now just about settled and presidential control of inferior officers, which is mostly settled with a couple of little flashpoints.

Bill, it has not been part of the unitary executive theory or arguments or push that the president can therefore fire the entire civil service. And so my own assumption is that this Supreme Court, and I mean the one we have right now, is not going to be especially in a hurry to stand up to Trump when it comes to firing people like Hampton Dellinger, the head of an agency, but actually is very much going to stand up for the civil service if and when we get a case to the court. The problem is that there's such this like, complicated labyrinthine administrative process for civil servants to challenge their firings that getting that case to the court could take some time.

BILL KRISTOL:

And I suppose as I understand it from Project 2025 and talking to John DiIulio and others about this who know a lot about the internal workings of the federal government, if something like Schedule F, which would vastly increase the number of political appointees, the Schedule C's I mentioned before, there's a schedule, there's also ABCD. This is F. This would be a new schedule, I think. Trump tried to do it at the very end of his first term, and it never went

anywhere. But if there were 40,000 of them, instead of the four or 5,000, I think it is Schedule C's, that I think he has quite a lot of ability to just do on his own. Congress sort of in effect either yielded him that power or maybe he always had that power to convert in effect civil service positions to political positions, which does make them hireable and fireable presumably at will. But I'm struck that they think they can do it with existing positions. It's not that you—

STEVE VLADECK:

That's the problem. Right. I mean, so there are two layers of questions here. So the first is, does the president have the authority to do Schedule F at all? Late in the first Trump administration, when they tried it, it was blocked by lower courts. That litigation, I think, will also happen again. Bill, it's not clear to me that all of Schedule F is actually consistent with the relevant statutes, but even if it is, you have the second problem, which is it is fairly well settled that different considerations apply when you're changing the rules and applying those changes to existing job holders. And so even if the president has the power to convert these positions going forward from civil service into political appointments, I think it's a whole different ballgame when it comes to doing it with existing folks. Bill, which is part of why firing all of these people is part of the idea here because once those offices are vacant, once those positions are vacant, then you don't have that concern.

BILL KRISTOL:

And then there's a Schedule... and that's why they induce the buyouts and stuff. So then you put in a Schedule F and it's harder to, well, you can remove someone who came here to take a job and so forth. Yeah, that's interesting. What about on the internal workings of government issue... I think this has been very clarifying. Well, I have two questions, I guess, which you can answer in whichever order you want. One, yeah, just six months from now there'll be temporary restraining orders and there won't be, and there'll be this and that. But it sounds to me like we should expect most of the announced firings, most of the firings to be happening or to have happened or to be hard to reverse. I mean, you pick up the [inaudible] this morning, "education department, Trump's going to slash it in half." That's where I was chief of staff. It didn't occur to me that honestly, under my boss, Bill Bennett, that we had the ability to slash the education.

We went to Congress. This shows how different a world we're living in. If I can take 60 seconds on this. We went to Congress each year proposing a slash in the education department of the budget by about 30%. This was Reagan's policy. He had originally come in saying he would get rid of it because Carter had just put it in. But we came in with this budget request, which included obviously a request to slash numbers of employees. Congress said, "No way, here's your budget for next year. It's basically level as this year." And we said, "Okay, I guess we lost that fight." Congress gets to decide these things and it didn't occur to me that we could reduce by half the size of the education department, but here we are.

So A, my first question is six months from now, education department, half the size it is, halfway between half the size it is and today, and my second question is about the principal officers. Again, when I went from education to the White House, this is just drawing my own experience, but that's always some guide. Of course, we couldn't call the Justice Department. Any call that came in to me about a pending case, I had to refer immediately to the White House counsel's office. I had friends at the Justice Department, but I couldn't call them and say, "What's going on with this case? It's of interest to a donor, to the president," or something like that.

They've just seemed to have just, those were internal regulations, guidance or something like that, I guess. I remember the long briefing from the White House counsel about this and the ethics specialist at the White House counsel's office. They've just abandoned all of that so far as I can tell. Kash Patel wants to talk directly to the president. Pam Bondi is great with going after the president's enemies, the DC attorney, that guy, Ed Martin is just totally, the mask is totally off. All that side of things are going to stand up. So I guess I have the question about the mass firings and then about the unitary executive side of things.

STEVE VLADECK:

So I mean, let me take the second one first because it's easier. So all that interagency stuff is norms, and maybe there are a couple of internal memos in some of the departments about when you can and can't pick up the phone and call someone in a different department. But all of that stuff, I think is easily overridable. And frankly, Bill, I would argue vehemently both for the norm of the agencies being silos and for it only being the norm. If you want—

BILL KRISTOL:

You don't think justice is a little special there maybe, or criminal prosecutions?

STEVE VLADECK:

I think justice is special because of the risk of politicizing criminal prosecutions. But for the Department of Education to call the Department of Health and Human Services because you're worried about a measles outbreak in schools, you shouldn't have to spend 10 days getting the right approvals.

BILL KRISTOL:

Right. No, no, no. But I was thinking more of justice in the FBI and stuff.

STEVE VLADECK:

But DOJ is a special case, and I think we should come back to it. On the mass firing of the Department of Education, so part of the problem here is that the three buckets that I think about these cases falling into are not hermetically sealed. And so part of the Department of Education story is also a story about congressional appropriations. And you already basically alluded to that in talking about the, you asked Congress to slash the department's budget, they said no. When Congress says, "Hey, Department of Education, you've got to spend this money." The understanding historically has been you've got to spend the money, and not just as a matter of politics, Bill, but legally. The President can't just unilaterally impound funds that Congress has appropriated.

So my best guess for six months from now, and folks can check the tape and send me nasty messages six months from now, is that a lot of what it sounds like the government's trying to do with the Department of Education is going to be blocked. Blocked whether because of its interference with civil service protections, blocked because it's not spending money Congress has said to spend, blocked because it violates the Administrative Procedure Act because the way the government goes about it is sloppy and procedurally careless, whatever, something will lead courts to push back, as we have seen, at least in some of the foreign aid spending cases, as we saw very quickly with the OMB spending freeze right at the beginning of the administration. The problem, Bill, is not that we're going to have court orders blocking this action. The problem is that it's not clear how effective in the short term those court orders will be, whether in preserving these folks' jobs or in actually requiring the department to spend the money that's been appropriated. So there'll be perhaps a gap between the law on the ground and the law on the books at that point.

BILL KRISTOL:

Interesting. Okay, let's come back to the spending thing. That's the second bucket, but it's such an important one with impoundment and the conditions for spending and so forth. But just on the DOJ, FBI stuff, let me just put it this way. It does sound to me like they think Ed Martin can boast about going after Trump's enemies. He's the DC US attorney, and Pam Bondi cannot disguise the fact that the Justice Department is doing that, and she's moving people around to gut the parts of justice that were allegedly unfriendly to Trump and Kash Patel is putting in a direct line to the President, to the Oval Office as FBI director, that all that stuff, as you say, is any of that legally able to be stopped? Is that or just— is that all norms and it's a matter of [inaudible]?

STEVE VLADECK:

So I mean the legal response is important, but also messy. The legal response is the theory that at least some of this is a violation of the First Amendment. And so you mentioned Ed Martin, who I can't resist pointing out as the interim US attorney for DC. He refers to himself as the US Attorney. He has not been confirmed by the Senate. Even this Senate, I think may not confirm him to that job. But Bill, historically, the limit on the government's ability to basically sort of so hyper politicize the enforcement process and not just the regulatory process has been the idea that the First Amendment protects against that kind of retaliation.

The problem is that it is often, and thanks to the Supreme Court, especially, very difficult to establish that there is First Amendment retaliation because you have to show that there's some degree of selectivity. You have to show that the government's prosecuting you as opposed to someone with different views who committed the same crime. The good news here, and I think it is good news, is that President Trump is not, how do I say, strategic about what he says publicly. So for example, over the weekend when President Trump posted on social media about this Syrian national and former Columbia student who was arrested by immigration officers. That suggests a very, very specific level of targeting by the White House based on things that this particular person, Mahmoud Khalil has said. So Trump's, I guess it's a "truth," is what he calls them. Trump's post is going to be an exhibit in the lawsuit saying, "You can't do this because it violates the First Amendment." That's going to be where the litigation happens.

BILL KRISTOL:

Does the First Amendment help if they do selective prosecutions of law firms and businesses? And I mean there I think it is a little harder, right? It's harder to show that this is, I don't know if it is harder or isn't harder to show, but law firms may be a special case because that is [inaudible].

STEVE VLADECK:

I think the law firms are a little different, Bill, because in that context, I think what the government's doing and what the claim is that the government's behavior is chilling constitutionally protected speech. And so it's not a selective prosecution claim, right? In that context, the claim is a more conventional First Amendment government chilling argument that by—

BILL KRISTOL:

Which courts are somewhat friendly too.

STEVE VLADECK:

Certainly friendlier than selective prosecution.

BILL KRISTOL:

But if you're running a business and you think, "My God, look at this White House, they have no limits. They're going to call not just justice— this gets to the other agencies. They're going to call regulatory agencies. They're going to call the Department of Commerce." Now, again, they always have the right to call the Department of Commerce. Obviously not an issue. I talk to people at the Department of Commerce all the time. On the other hand, they're not supposed to tell the Department of Commerce, "Give this grant to that firm." They're supposed to go by some requests through the administrative procedures that are laid out and stuff.

I mean, is it foolish of corporations to think this is just a different world? It always was better to be a friend of the President than not a friend of the President. We can stipulate that, or certainly Congress is different where it makes a lot of difference to have good friends, but that's the legislative process in a liberal interest group democracy. But the executive branch, I don't know. I feel like they're not foolish, are they, these corporations to think, "You know what? It's better to have Trump on my side because whatever the Justice Department does, what the FTC



does, what the Antitrust Division does, what the Department of, I don't know, Interior does in giving out—I'm making this up—oil permits for national lands, all of that's not going to be shielded from high-level political interference or direction.”

STEVE VLADECK:

Which is why I think this first generation of First Amendment cases is so important because the more that courts don't aggressively push back, the more that that's the message you're sending to the general counsels of these corporations and to the boards of these corporations. And listen, I would hope that there are a number of corporations out there who would see it as a feature, not a bug, to be the subject of President Trump's criticism. I mean, in the DEI space, we've seen, I think a bit of a split about those corporations that have abandoned their commitments to DEI and those that have leaned into them, like Costco, for example. But Bill, I'm a pragmatist. I mean, yes, a corporation with fiduciary duties to its stockholders would have to think about that. Which is why we should be so invested in, for example, the lawsuit that Perkins-Coie is filing and filed, I believe, on Monday against the Justice Department and a bunch of other federal agencies. I mean, yes, this ends very badly if it's not blocked, because this ends in a world where grift and sycophancy take precedence over principle. But we're not there yet because there's still the possibility and I hope the likelihood that as these cases, the Perkins-Coie case, et cetera, get litigated, the courts are going to actually really, really insert the First Amendment between private actors and what the government's trying to do.

BILL KRISTOL:

And to slide a little bit then from the courts to Congress... I mean, I'll also ask you at some point how likely do you think the courts are on a spectrum—

STEVE VLADECK:

Oh yeah, Congress.

BILL KRISTOL:

... to be aggressive? Congress, you might remember that Article One of the Constitution and all that. I mean, so they created the Administrative Procedure Act, which Trump is bending to say the least in so many of these cases. And that's, as I vaguely recall, why we had, I don't know, all these—I mean regulations pursuant to that act, I would say—is why we had, you know, blind competitive processes for judging grant proposals, whatever it was. Bill Bennett couldn't sit in the office and say, "You know what? I like this state here, and I like this guy who's at some med school there, and I'm giving him \$10 million. And no one else is getting anything."

I mean, we had some right to weigh in, obviously, from the secretary's office, but it was all through a process and so forth, and public documents and FOIA-able documents and all this. So how much will the courts uphold those kinds of things? Or do they not think that's their job? It's sort of Congress's job. And secondly, would the courts even allow Congress though, to uphold it? Because doesn't the unitary executive, in a broad sense, cut against Congress's ability to tell the Education Department how to run its grant process?

STEVE VLADECK:

So let me do this backwards again. So to the second, no, the unitary executive theory taken seriously as opposed to just using it the way a drunk uses a lamppost, for support rather than elimination, right? If you take it seriously, the unitary executive theory is not a theory that cuts Congress out of the universe. You still need Congress to create the executive branch agencies and departments. You still need Congress to fund those agencies and departments. Congress, Bill, gets to set the terms of the offices that the President fills, right? The Secretary of Education is a statutory position created by Congress. And when it comes to contracts, I mean, contracts with the federal government are subject to a ton of both federal, statutory and regulatory rules. Rules that the government is running roughshod over left and right. I mean, the breaches of contracts that we're seeing—

BILL KRISTOL:

I'm wondering about that. I remember all these complex, 60-day notice if you wanted to shorten the grant, 30-day notice for them to appeal. I mean, I'm making this up. Something like that. Now they're just cutting money off and end of this week, your money's gone? I don't recall thinking that we had the ability to do that unless there was like massive fraud. And then we probably had to document such a thing.

STEVE VLADECK:

Right. So many, if not most of these government contracts do have termination provisions, but terminations based on particular findings and with particular requirements about how you do the terminations. That is all vulnerable to legal challenge. Some of it's being challenged. But Bill, again, the problem is those are retail lawsuits. I, the University of, I don't know, Maryland, am bringing my lawsuit because the NIH canceled a contract with this lab, right? Versus over there, the University of Kentucky. Right? I mean, so the problem is that it's retail litigation that's going to be slow and expensive, and not everyone's in a position to bring.

But I mean, I don't want to sort of bury the lede. The lede here is that, yes, a lot of this is illegal. A lot of this is a violation either of the APA or the terms of these contracts or both. The problem is that when you are acting illegally in such a massive way, it's actually not always easy or efficacious to have that illegality litigated in the same massive way. The courts are not really set up to do wholesale litigation in this space. Back to the—

BILL KRISTOL:

They have class actions and national TROs, I guess and all, but it's not... Yeah. So I mean, I was going to get to this at the end, but maybe you should talk about that for a minute. The limitations, then we'll get to Congress. The limitations on the courts as guardians as it were, of legality, ironically, right? I mean...

STEVE VLADECK:

I mean, for better or for worse, and I would say in the main, it's for better. The courts are not roving commissions, right? Our court system is set up to be basically the reactive recipient of concrete disputes between adverse parties. And so it's one thing to say publicly, "Look at all the stuff Trump is doing that's illegal." It's another thing to say, "This particular thing he did is illegal because it violates this particular law and I am injured because of X." And so there's some ability to do class actions, although the Supreme Court has made that a lot harder in the last 15 years. Nationwide injunctions, it's really not a good name, but injunctions that are a, in effect, nationwide block on individual government policies have become more of a thing. But Bill, in the contract space, that's not helpful because there are—

BILL KRISTOL:

It's an individual contract between Maryland and NIH—

STEVE VLADECK:

It's an individual contract.

BILL KRISTOL:

... which is different from Harvard's contract. And so you can't really, yeah.

STEVE VLADECK:

And therein lies the rub. So as opposed to say, birthright citizenship, where it's one executive order and you can challenge it, at least under current law on a nationwide basis, we're talking about tens of thousands of contracts. We're talking about hundreds of thousands of employees. Maybe the employees can have some kind of class action. But Bill, if the government's argument is that we had cause in each one of your cases, then that's going to defy the typical

criteria for a class action. And so we're stuck in this, I think, really frustrating feedback loop where the courts are doing, frankly, I think almost as much as they can. I mean, maybe there are a few things they could do more of, but where we're seeing why that's not enough. And let me say, I mean, thank goodness we have at least that. And I think the courts thus far have, I think, actually been doing more than anybody else to push back. But they can't do it alone. And the reason, Bill, why they can't do it alone is because they're not set up for this kind of wholesale pushback.

BILL KRISTOL:

Yeah, no, that's very helpful. Yeah, I'm someone who spends a lot of time on calls with lawyers, some of whom you know, a few of which you've been on, warning in a way, don't count too much on the courts for the reason you just said. But I've got to say, in the first 50 days, both the lawyers in terms of the lawsuits and bringing the lawsuits, the public interest law world, if you want to call it that, and the courts themselves have done a lot more than anyone else. So I somewhat retract my... Well, I still think ultimately you can't depend on it. It's not enough. But I feel like I've been a little unjust to them.

STEVE VLADECK:

I mean necessary but not sufficient. Right? And I think that there's a reason why Elon Musk and right-wing media have now started attacking federal judges, because they see federal judges as the principal current obstacle to what they're doing. And I think that's probably right. But our system is designed for there to be more than one critical system on the airplane. And at the moment we're down to one.

BILL KRISTOL:

Okay, so let's get to the second bucket in a way. These things do, as you say, they slide into one another, but spending, which is also Congress, really. So what about Congress? I mean, it seems so elementary to me that Congress... There's always a right to sort of go back to Congress and say, "Hey, some of the funds you've allocated here, we don't quite need them for that. We want to move them here." Usually it was within a broad category, so there'd be adult education. And there was this much for, I'm making this up, bilingual adult education and this much for, I don't know, remedial adult education. And you'd say, actually in the Congress, the appropriators usually say okay, or they wouldn't say okay, or you do a little bit of it. But we're at a wildly different level, obviously in terms of, in effect, impoundment, which Nixon tried and failed. So, say a word about the, I mean, will the fundamental rules that we've assumed for what, 50 years at least, of congressional appropriations, which is they get to appropriate the funds. The executive branch basically has to follow those appropriated guidelines. If they appropriate Pentagon money for the B-II bomber, they have to spend it on the B-II bomber, not on cruise missiles. If they decide the B-II bomber is not effective and they don't need more cruise missiles, you go back to Congress and say, in future years we want the money for the cruise missiles and even in this year we'd like to move some of it, but they are taking the position both that they cannot spend the money, if I'm not mistaken, but also they can choose what to spend the money on. Is that right?

STEVE VLADECK:

Yes and that the Empowerment Control Act of 1974, which is the statute Congress passed in response to Nixon, is unconstitutional, which is news to everybody. What's striking here is a couple of different things, Bill. First, back to the unitary executive for a second. Control of the appropriations power has never, ever, ever been part of the unitary executive understanding of executive power. Don't take my word for it. When William Rehnquist was the head of the Office of Legal Counsel in 1969, he wrote a memo disclaiming that power. When John Roberts was a lawyer in the White House counsel's office in 1985, he wrote a memo disclaiming that power. These are not the folks who you would expect to be coming out against this power in positions where they would be most sympathetic to the claim that the power existed and they're still resisting it. So, I don't—

BILL KRISTOL:

Can I just give you one...? It's my personal experience. Iran-Contra was a big scandal that people forget. This really almost did in the Reagan administration near the end. It was [inaudible] near the end, so it just ended up being a report and all that. Certainly people were fired and there were prosecutions and so forth. Literally, that was what this was about too, also of course though, right? Reagan was spending money that hadn't been appropriated for the Contras.

STEVE VLADECK:

And then lying about it, but details. Man, those were the days.

BILL KRISTOL:

All I'm saying is, no one thought in Reagan's White House counsel office to say what we did was fine and right and all these restraints are unconstitutional. It was all, "we didn't do it. We didn't mean to do it. We didn't quite realize we were doing it."

STEVE VLADECK:

That's what I mean when I say those were the days because the whole scandal was the effort to avoid the fact that what they did was illegal, as opposed to saying it wasn't illegal. If we can fast forward to the end, I think where this ends is this Supreme Court is never going to say that the president has the unilateral power to impound. I'm not even sure there are three votes for that on the current Supreme Court, but there's a lot of wiggle room and that's what we're seeing. In some of the foreign aid cases, for example, at least some of those appropriations, Bill, are not mandatory, right? At least some of those appropriations gave the executive some ability to control how much it was spending and what it was prioritizing and so forth. Maybe the answer is, Congress in the future is going to give future executives less of that discretion, that we're going to have more and more mandatory appropriations.

The other thing about the spending is that what we're talking about right now, Bill, is money that was appropriated for 2025. As you know, the Constitution requires appropriations to be annual. It's the only thing the Constitution requires Congress to do every year. Part of what's happening politically right now is the fact that Congress has to appropriate for 2026 and as opposed to everything Trump's been able to do in the first 50 days where he was acting against an existing body of appropriations. Now he needs new ones. We've reached the point where Trump has started to run out of the ability to do everything by himself and where now he actually needs some affirmative buy-in from Congress and I think that's part of what the showdown over the continuing resolution and potential government shutdown is really about, is anyone in Congress going to take this first critical moment in which there's unquestionable leverage over the President to actually assert it?

BILL KRISTOL:

And going forward, let's just say at the end of the year, whether there's a CR or appropriations bills or whatever, it's the 30th. I suppose Congress could also go the other direction, the Republican Congress, rather than constraining the President and it could explicitly allow even more latitude in the kind of cases you mentioned. You spend this money as you deem wise or don't spend it all on whatever, not Education.

STEVE VLADECK:

But Bill, it's striking that's not what the White House has been fighting for. At least publicly, we have not seen efforts to say, "okay Congress, we want you to open up. Give us a big pool of money..." The White House isn't even trying and I think the reason for that, Bill, is the filibuster. Unless you're doing it through reconciliation, you need Democrats in the Senate or else that legislation's never going to get through and so this is part of why I think, even though it's only been 50 days, we might look back on these first 50 days as the most aggressive 50 days of the administration because we're increasingly reaching the point where Congress to this

point, I don't think it should have sat on its hands, but it was able to sit on its hands. We've reached the point where Congress has to do something and the something I think creates a lot of interesting political dynamics.

BILL KRISTOL:

That's interesting. So you think in some way the system still is the system and kicks in at some point to constrain this kind of attempt to run roughshod over the system, to be simple minded about it.

STEVE VLADECK:

I think two things are true and they're going to sound like they can't both be true. The first is that yes, I think the system is at least in the most skeletal way, holding and that there's an awful lot of chaos and discord and frankly ugliness and to my mind, evilness that's happening within the contours of those broad skeletal outlines. The question now is, is Congress going to affirmatively acquiesce as opposed to just sitting on its hands, the way that the Senate did in the confirmations of some of the president's most controversial nominees? Or are we going to see some number of House Republicans and some number of Senate Republicans who actually realize that this is their first chance to lay down a marker and say, actually no. We're not going to keep letting you hollow out the entire federal government. We're not going to let you turn it into your own personal gift machine. I think that's, Bill, part of the stakes of not just the next couple of weeks, but as you say, all the way up to September 30th and the end of the fiscal year.

BILL KRISTOL:

Let's talk about, so many things to talk about, the courts. This sounds like you think, well you tell me what you think, the Supreme Court at the end of this term and maybe a year from now, unless there is a big change in its composition, doesn't pick fights with Trump, but doesn't give in, doesn't go all-in on sort of overturning 50-year-old statutes or in the case of the Administrative Procedures Act, I don't know, 80, 90-year-old statutes, 80-year-old, I guess, that constrain in some ways presidential prerogative.

STEVE VLADECK:

Yeah. Jack Goldsmith had I think a really helpful piece where he talked about the Supreme Court, at least thus far temporizing and basically sort of ruling against Trump in the two very technical, very procedurally fraught emergency applications that have come so far, but in ways that didn't really do that much either on the ground or in broader, longer-term strokes. The court's not going to be able to temporize forever and eventually these cases are going to start making their way to the justices, in postures in which they can't dodge. I think and again, we'll check the tape and see how the Mets did, but I think that there are at least five votes and I'm horrified that I can't say a number higher than five in this sentence, to really actually stand up for those skeletal outlines of our institutions and the problem is that, even if that's true, that gets you the skeleton, it doesn't get you the guts, it doesn't get you the internal organs, quite the way that we need them.

BILL KRISTOL:

You think that's true generally for the most obvious and I'm not even being critical and they boast about it, challenges to existing understandings of the Constitution, like the birthright citizenship executive order and there too you think the court, we don't get radical changes in the understanding of what—

STEVE VLADECK:

But Bill, I think they believe that too. I think the Trump administration believes that too. Look at which cases they've taken to the Supreme Court. The government has some ability to control the timing of this because the government can decide at what point do we go to the Supreme

Court for emergency relief? Which case did they take first? They took Hampton Dellinger first. Why? Because of all of the firings across the entire executive branch, his was the one where they had the strongest argument that the statute protecting Dellinger against being removed was unconstitutional and even then they didn't get exactly what they wanted from the Supreme Court. Why haven't they taken birthright citizenship up yet because they know they're going to lose and they'd rather sort of have this out there as a political issue for as long as possible before they get slapped down by the court.

Birthright citizenship, I think the court's going to push back when it gets there. I think the court might give Trump some wins on some of those higher level officers. Bill, you know well, although the folks watching may not, the Humphrey's Executor case from 1935. This is the old precedent that created or upheld the idea of independent agencies within the executive branch. Maybe Humphrey's Executors days are numbered in the Supreme Court, although the court has resisted to this point efforts to go after that, but Bill, all that gets Trump is controlling who's on the NLRB or the FTC. It doesn't solve the civil service question. When the court gets to the merits on firing civil servants, on impounding funds, on birthright citizenship, I think Trump loses those cases. The problem is that one, that's going to take some time and two in the interim a lot of stuff is going to happen that's bad, while there's other stuff also that isn't quite as foreordained in the Supreme Court.

BILL KRISTOL:

We'll just talk about two policy areas for a minute, since one is related to birthright citizenship, more than related, embraces that issue, which is immigration and the other national security, let's just call it generally. Those two courts have been more deferential to the President than in normal, so to speak, domestic policy, partly in immigration because I guess trade would be a third, certainly where Congress has given the President so much power. National security, maybe that's a little more intrinsic power of the President. Do you feel like in those areas, the degree to which it's not... You wrote about this, it's not 100% clear that there is an illegal basis. It may not be factually correct that this guy in Columbia is a threat to our national security or something but if Rubio says he is, is the court going to get in the business of second guessing every determination by a Secretary of State, which is in a law from 1952, that I guess has never been overturned? I don't think it's been used very much, that part of the law. It was kind of—

STEVE VLADECK:

There's been one lawsuit about it, and it was assigned to Maryanne Trump Barry, Trump's sister.

BILL KRISTOL:

Isn't that amazing?

STEVE VLADECK:

How's that for small world?

BILL KRISTOL:

That is amazing. Yeah, this law is kind of written so they could throw out a Soviet spy without going through like endless hearings and now they're throwing out some kid who's agitating on college campuses, who hasn't been charged with any crime, but they don't have to be charged, that's the point of... In these areas of immigration, well, let's just go through each of them, just curious in general. How much of the court's constrained ultimately what Trump wants to do in immigration, in trade or in national security?

STEVE VLADECK:

Sure. Let me do trade first because I think that's actually the most straightforward. The president's power over tariffs is not constitutional, it's statutory. And even the White House, I think, acknowledges this. The tariffs, however stupid they are, are tied to two different statutes.

One called the Trade Expansion Act of 1962, one called the International Emergency Economic Powers Act. I think it's the International Economic Emergency Power, whatever it's IEEPA. And Bill, historically, courts have given the president fairly broad latitude in interpreting his authorities under those statutes, including during the first Trump administration, Trump's first stupid Canadian steel tariffs, which were upheld by the federal circuit, by the weird federal appeals court that hears those kinds of lawsuits.

What has changed, is that that tradition of deference has really taken a healthy hit from the Supreme Court in the last couple of years and so I think that's going to be an interesting question of whether the current Supreme Court applies its same hostility to deference, someone like a Justice Gorsuch, for example, in the tariff space, that it's applied elsewhere. Bill, those are more conventional types of lawsuits. Is this a good reading of the statute or not? That's not, I think, a system breaking.

BILL KRISTOL:

At the end of the day, Democrats in Congress or Republicans who are pro-free trade can introduce legislation that would pretty unambiguously overturn either the general grant of authority or particular uses of it, right? There's no question that Congress has the ability to do that and the courts wouldn't stand in Congress's way.

STEVE VLADECK:

I think that's exactly right. Within that third amorphous bucket of policy cases, I think there are the cases that we might call just conventional statutory debates and disputes. On immigration, that is also at least usually conventional statutory interpretation. There is this very, very obscure provision that it seems to let Rubio do what he did. I think there's a good first Amendment response that if the secretary's doing it specifically in retaliation for political speech, that ought to be unconstitutional, but Bill, that would of course just be as applied in that one case. That wouldn't be a categorical rule.

The larger thing I worry about and we haven't seen it yet, is the noise that the Trump administration has made about using more militaristic authorities in the immigration space. Whether they're going to use this really, really old statute called the Alien Enemies Act of 1798 or the Insurrection Act to try to have the military supplementing ICE's immigration enforcement efforts. Until we get to that point and maybe we're going to get there sooner than we think, but until that point, Bill, a lot of this is just sort of relatively typical, if more politically toxic immigration law litigation, much like we saw during the first Trump administration with asylum bans and the travel ban and so on. National security more generally, I think this is, to me, the real question. We're 50 days in and we haven't had a real crisis.

You mentioned Iran-Contra in the Reagan administration. I think back to Hurricane Katrina and the Bush administration or the financial crisis or to the Covid pandemic, five years ago this week and what it did to the first Trump administration. It seems to me that, as chaotic and bad and troubling as everything Trump has done so far is, how's he going to react when we get a crisis? I think there, one of the things that we're probably going to see, but it's hard to predict, is courts are going to be much less deferential to Trump this time around and to the president this time around, especially if his actions don't seem to be carefully thought out, especially if it's a knee-jerk kind of thing. The problem Bill is that it's going to take a crisis for that to happen and bad things are going to happen in the interim.

BILL KRISTOL:

In national security, just to take a second on that, so Hegseth fires the Chairman of the Joint Chiefs. No one doubts he has the power to do so, brings in a three-star and all this. Fires the three JAGs for the three services and going to hire whoever he wants, I suppose, but I take it there's not much... These are norms and customs and pretty important ones and pretty well-established ones, I've got to say, but I guess he can have panels come in and review all the three and four stars. He can change the promotion panels for the one and two stars or for lower officers.

I talked to someone, a young officer, trying to figure out what to do with his life, whether he should stay in or not because he likes it, but talking about what he sees as a kind of mid-level officer, ahead of him and above him, if I can put it that way in the military. This is within the military, leaving aside the civilian side of DOD, which is also important, and I was a little amazed at how worried he is about just his actual life. That two years from now he'll have a commander who will be Trump-friendly, he will become a commander for that reason and this person will be in turn interested in the political views of the person I happen to be talking to who was a friend of a friend, I don't really know him and that that person has to be careful. I mean, he never would have volunteered political views on the job, obviously, but he'd be careful about anything else he says.

The degree of that I found a little surprising. I've been as alarmed as anyone, obviously in general and about the national security side and I remember well November and December 2020 and being super alarmed about what was happening there, but I guess I'm struck... People aren't focused on that much, but you could change quite a lot of civil-mil relations and intra-military norms, couldn't you? I mean...

STEVE VLADECK:

You could, and I think we already are and that's bad too. The Senate has some role to play here, Bill. So the Senate confirms officers who are nominated to those senior positions. Obviously, the Senate has not done a lot to this point to actually push back. But maybe that would be a place where you might see, for example, Republican members of the Armed Services Committee find a little bit of gumption. So this to me is, I think, the part that is depressing, which is, I'm energized by the public response to what's happening. I'm energized by the legal response to what's happening.

But there is so much that is getting sort of rewritten in the cultures of these institutions that no amount of litigation is going to fix, that no court can stop and that it's going to take a very long time to heal when it comes to getting back to a place where these institutions are trustworthy Bill, where you can't just say, oh, they've become tools for exercising partisan political grudges. And that's just a deeply unhealthy universe— even if we get to a moment where I'm less bothered by the folks who are in charge. And that's the real sin to me of all this.

BILL KRISTOL:

Yeah, that's so important I think for people to really think about. And the domestic use of the military, whether it's National Guard, which is one set of issues and laws or procedures, and for the active duty military, I mean, I do think so much of this did depend on a certain kind of trust system, right? I was in the first George H.W. Bush administration and Bush called out the National Guard, and maybe it was even active duty military, I can't remember—

STEVE VLADECK:

It was the army.

BILL KRISTOL:

The army in Los Angeles during the riots.

STEVE VLADECK:

But Bill, but that was the last time. I mean, it has been thirty two years since.

BILL KRISTOL:

And no one thought that was because he had a political agenda with California or anything like that. It was a very bad situation and it seemed like the LAPD was just overwhelmed, etc. Yeah, I mean, the degree to which a lot of this can just slide. I'm struck by that. And I do feel like Trump blunders a lot, but they're also pretty clever. You mentioned their litigation strategy in terms of appeal to the Supreme Court, they seem to be laying the predicate for a lot of things



kind of quietly. So I was very struck, Trump said, I think those attacks on the demonstrations, not demonstrations, but even the destruction of property at Tesla dealerships, which is presumably against the law and people could be arrested for destroying property. That's domestic terrorism.

Now, I don't believe he actually signed an executive order saying that being anti-Musk, anti-Tesla is being part of like being part of a terrorist Hezbollah or something like that. But a friend of mine pointed this out to me, isn't he kind of laying the groundwork for expanding domestic terrorism? And there are... You know much more, Steve, than I do, but there are statutes where if you're part of an organization that has been labeled a terrorist organization, you don't have all kinds of rights or I mean, the government can do certain things against you that it can't do otherwise. I just feel like generally the kind of collapsing of all these limitations and the notion that no one has to make a factual showing also about anything.

So maybe you don't have to say, "this person I'm deporting and here's the evidentiary basis for it." It's just like I read a news account and this guy seems like a really bad guy here and the Academy of Columbia was kind of ... a lot of people didn't like it, including me. And so he's gone. I mean, I guess there really aren't that many legal barriers though, to sliding down that path.

STEVE VLADECK:

I mean, there are, but again, the barriers are specific and they're technical. So just to take one at a time, right? So in the context of terrorist organizations, there's no authority for labeling groups that are domestic as such. I mean, the relevant statute, it's eight US Section 1189 for those who want to play along at home. But it's the Secretary of State's power to designate foreign terrorist organizations.

BILL KRISTOL:

That's the dispute about Hezbollah and Hamas and all that kind of stuff, right?

STEVE VLADECK:

And those designations can be challenged in court. So one of the things that's happening is the effort to label Tren de Aragua a foreign and Mexican drug cartels, foreign terrorist organizations because of all the downstream consequences. I'm more worried in the Musk and Tesla dealership context about efforts to try to build a narrative that local law enforcement's inadequate. You mentioned the Los Angeles example in 1992. So historically, the Insurrection Act, the statute that I think a lot of folks are rightly worried about, which is the source of the federal government's authority to use the military for ordinary domestic law enforcement, which is otherwise prohibited by a statute called the Posse Comitatus Act. The Insurrection Act has been used historically for disasters and other disorders that have overwhelmed local law enforcement where the idea is that we're sending in the military to supplement—not supplant—local civilian authority. And the Rodney King riots in LA in 1992 are a great example of that. It was not especially politically controversial. If anything, I think it actually helped to calm things down that it was the Army and not the LAPD in the middle of that.

We've never... I mean, I won't say never, but it has not been the norm that you invoke the Insurrection Act for political purposes. And my concern is trying... I mean, there were pictures over the weekend of the Chicago Police Department Riot Police standing in front of the Tesla dealership. I actually think that's clever on Chicago's part because it's trying to send the message that we can take care of this federal government. Like we'll deal with property crime, you run the country. So I worry about sort of keeping silos separate and making sure that each conversation happens in each of its own spaces.

But I also worry, Bill, as you say, about how much this administration, or at least some of the folks inside of it, not all of whom are that smart, but at least some of whom are, are trying to build the sort of foundation for bad things to come. It's part of why I think it's so important that these First Amendment issues get litigated now, that these spending issues get litigated now, because as bad as things have been over the first 50 days, if the message that the president and

his advisors receive is, "keep calm and carry on," things will get worse. And that's why this is I think in many respects an inflection point, not just for Congress for the reasons we've discussed, but for our political culture more generally.

BILL KRISTOL:

Yeah, that's great. I was going to actually kind of close by asking about the inflection point issue and the sort of climactic points or whatever. What do you see going on? I guess I was struck that you said you thought in some way this might be the ... if I could maybe oversimplify what you're saying, the high watermark of the president's authority and that the courts are going to ... he's running into now some real obstacles in courts, but also then Congress to come. I mean the other way to look at it I suppose, which I've kind of been looking at it is he's laying the groundwork for so much. The rhetoric is so extreme, it's only rhetoric at this point. Elon Musk calls a United States senator a traitor. Ed Martin, your buddy there who's the interim DC. US attorney is calling speeches by members of Congress. I don't know, presumably-

STEVE VLADECK:

Crimes.

BILL KRISTOL:

What?

STEVE VLADECK:

I mean, he's accused, right? He accused Representative Ocasio-Cortez of breaking the law, right?

BILL KRISTOL:

Yeah. He's accusing of breaking the law for their Congressional... for giving speeches. And so all this kind of craziness, the domestic terrorism on Tesla is kind of... One could see it being more extreme 18 months from now. A lot would depend on the courts and the Congress. I mean everything would depend I suppose, on the courts and Congress. Courts, of course, are a bit of a changing thing because Trump gets to make appointments, maybe not at the Supreme Court, depending on whether people retire but at the appellate and district court level. So I'm just curious, I mean, A, what do you think about the next, let's say this term of the court? I think that's an obvious moment to think about. And then more broadly the next year and a half in terms of sort of risks, what worries you the most? What kind of encourages you a bit, et cetera?

STEVE VLADECK:

So just one note on the courts. I mean, it's interesting Bill, that we're 50 days into the administration and we have not seen a rash of judicial retirements. Usually, when you have a political turnover, a partisan turnover, a whole bunch of judges who were waiting for the next president from their side of the aisle to be elected come right to the front the line and say, "I'm stepping down." We haven't seen that, which I think is an interesting data point.

So there are two ways that things go from here, right? One is better and one is worse. And the worst way is, as you say, that this just keeps escalating, that the rhetoric keeps dividing us, that Trump tries to do ever more and more controversial stuff, that the courts are not able to fully block it, that Congress completely rolls over, and that not 18 months from now, but six months from now, we're starting to see more violence on the streets. We're starting to see sort of controversial cases like the Khalil case that we saw over the weekend. And that's terrifying.

BILL KRISTOL:

And vigilantes acting at the President's encouragement or encouragement of someone from the US from the government, sort of protected by the expectation of the pardon power mean and

merging in a way with some aspects of local law enforcement and even federal, isn't that? That's not impossible.

STEVE VLADECK:

And what terrifies me the most, Bill, is that this isn't actually that preposterous a future to envision based on where we are right now. But for as much as folks think that is inevitably where we're heading, I guess my hopelessly optimistic Met's fandom, I have a little more faith. I have a little more faith in the courts. I have a little more faith in not Congress as an institution, but enough members of Congress to think that there has to be a line somewhere. I have faith that as Trump's disastrous economic policies take root, at least some of the folks who voted for him start to regret it, which of course will have massive implications as we start thinking toward the midterm elections next November.

And I have at least a lot of faith that more and more folks on the ground who might not be troubled when it happens to other people, start to see for themselves the real world effects of hollowing out the VA, of hollowing out Medicare and Medicaid enforcement, of hollowing out the folks who make sure our social security checks come on time. I mean, yes, it is to some degree hope as opposed to confidence. But I do think it is possible that we look back on, Bill, not this moment specifically, but sort of this period. And so maybe it's the first 75 days of the administration or maybe it's the first hundred days really as when things went the most off the rails and that the sort of pushback starts in the middle of that.

BILL KRISTOL:

That's so interesting and somewhat encouraging, a little more encouraging than encouraging than I've been, I guess. But it sounds very plausible. I mean it has struck me so much in these first 50 days that what people like me were honestly so alarmed about in terms of re-electing Trump has happened. That is we underestimated even in retrospect how much difference having the Mattis and the McMasters and even the Sessionses and Bill Barrs, even people I at least criticized vehemently at the time, people who had some lines, people in White House Counsel's Office, et cetera, some FBI, Chris Ray ... they were all there and they did stop a lot, honestly, I think. And Mark Milley and we know that especially at the end in November, December. But even before, I think, and the degree to which that's all gone. I mean, the internal guardrails which are not legal obviously, in fact they're slightly contrary to unitary executive you might say, but they are real in the real world, have been real, have just collapsed.

And so once those go, you then depend on other guardrails. The courts, Congress, civil service in general, balking at doing things, junior officers saying, "I won't obey illegal orders." But man, that's a tougher... Anyway. I am sort of struck that... Even I... I don't mean that I had some perception, but even I in the sense that as someone who really thought a lot about the importance of people like Mattis and McMaster and Sessions and Rosenstein, all these characters, I underestimate what it looks like when none of them is there. And I think it's almost literally true that no one like that is there in the power agencies... is really ... That's been a wake-up call. And then the question becomes even if there is a reaction among the public, which I think there most likely will be, does it catch up to sort of the momentum of the internal destruction of norms and checks?

STEVE VLADECK:

And the answer sadly is going to be, it will never fully catch up. And we're going to no matter how things go from here, even on the optimistic account, we're going to look back at this period with a lot of regret and a lot of woe. But the critical point, and I think this is a point that is underscored by history, is the time to sort of lay down the marker and stand up is earlier rather than later, right? You fight the war, not when it's best for you to fight it. You fight the war when you can minimize the damage. And minimizing the damage isn't going to make everybody whole, but we should be all invested in minimizing the damage at this point as opposed to any scenario where Trump is given more of an opportunity to make it worse.

BILL KRISTOL:

No, that's so well said. It's a good note to end on. You need Dunkirk before you have D-Day, right? I mean, you need to sort of save what is salvageable and also prevent further damage. I mean, the question of how much damage will have been done both internationally and domestically is of course we don't know. And it's an empirical question. Some of these things can be rebuilt faster than one thinks. From my experience. Other things, the... I don't know, will NIH be what it has been 10 years from now? I don't know.

STEVE VLADECK:

But Bill, maybe we come out of this and maybe this is now getting way too optimistic, but maybe we all come out of this with more of an appreciation for why the federal government matters. I mean, President Reagan said the most terrifying words in the English language are, "I'm from the federal government, I'm here to help you." The federal government actually is here to help us in all kinds of ways that we don't see. And maybe finally, Americans who have spent decades, persuaded that that was the right way of thinking about the world will actually start to have second thoughts.

BILL KRISTOL:

Yeah. And from a sort of more political theory point of view, maybe we also got to appreciate why sort of boring liberal concepts, liberal in the broad sense, is like the rule of law and due process and procedure are kind of important actually. And they're not just things that we either scorn a little bit or at least ignore as we hurry to whatever substantive thing we wish to accomplish in the world, right?

STEVE VLADECK:

One of my favorite Robert Jackson quotes is from his dissent in the Mezei case where he says, "If put to the choice between living in a world with Soviet substantive rules and American procedures and American substantive rules and Soviet procedures, we would all choose the former." The sort of point he was trying to make is fairness and neutrality when it comes to government is what separates the rule of law from the rule of men. And the more that everyone can remember that basic principle of our founding generation, I think the sooner we will be able to rebuild what we've lost.

BILL KRISTOL:

Well said. A good note to end on. And so, Steve Vladeck, thank you so much for joining me today. We could have gone for two or three hours on this. We'll need to get back together maybe at the end of term and really see where we stand, right? Do you think that will be a moment, right? I mean, that we'll have a real sense perhaps of what will have happened and more.

STEVE VLADECK:

Maybe. I think that the Supreme Court's going to experience this in two ways, right? There's going to be the continuing emergency applications where the court has these quick-hitting cryptic rulings that are hard to parse. I don't know that we'll get a full-throated merits case by the end of this term, but certainly by next term.

BILL KRISTOL:

Okay, well, we'll get together whenever that happens. Maybe before it happens even. So, Steve, thanks so much for joining me today.

STEVE VLADECK:

Thank you.

BILL KRISTOL:

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