

# Rule of Law under Threat: The Trump Presidency

A Conversation with Joel Richard Paul

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**Ellen Hinsey:** Joel Paul, thank you for speaking with me today. We are going to try and tackle a rather extensive subject: the question of rule of law during the Trump presidency and the January 6 attack on the United States Capitol. I would like to begin, however, with a quote by János Kis, one of Hungary's most respected figures and a participant in Hungary's 1989 Round Table negotiations: "In order to have a working Constitution, you need two kinds of agreement: the parties should agree on the constitutional design itself. But second, they should also agree that they are not just parties competing for power within the bounds of the Constitution, but partners in maintaining those bounds [...] and that they represent equal members of the Republic."<sup>1</sup> This question of a shared commitment to uphold—or not—the constitution will be a theme running underneath our conversation, so let's start there—

**Joel Richard Paul:** The Trump moment isn't uniquely about Trump. It is about the mistrust that has built up in the United States in recent years and the breakdown of consensus. There was a political consensus in America that we would abide by certain basic constitutional norms. We would accept the outcomes of

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1. Kis, János. "Constitution-Making in Two Stages," lecture, Central European University, Budapest, March 24, 2011.

elections and the democratic process by which laws were made and decisions were reached. There was a shared idea that our courts must remain independent and autonomous, and that judges—even though they have their own political values—would base their rulings not on the interests of their parties, but on a teleological view of the purposes that underlie our constitutional system.

In recent years, even before Trump, this consensus has broken down. In part, this reflects the global rise of ultra-nationalism and fundamentalism as a response to globalization, and the displacement of the working class, which now feels permanently trapped at the bottom of the economic ladder. What Trump did was to exploit class, racial, and religious divisions in ways that no one had foreseen.

**EH:** As you are a constitutional historian, perhaps we could place this in a longer-term context—

**JRP:** Yes, it's important to remember there are historical precedents for this, and one of them is Trump's favorite president, Andrew Jackson. When Trump ran for president he, like Jackson, was famous for being famous. He was not a professional politician. He ran for the Republican Party's nomination, but he never shared the traditional values of the Republican Party. He, like Jackson, presented himself as a strong autocratic leader known for his impulsive behavior and cruelty. Trump, like Jackson, lacked intellectual curiosity. He did not understand public policy, and he was not interested in learning. Both men were very rich, but they campaigned as populists and won by demonizing cultural elites, aliens, and minorities.

Populism is toxic for democracy. Populists divide people, usually by attacking elites and foreign influences and claiming that they alone are the authoritative voice of the people. If you're the authoritative voice of the people, however, you don't have to pay attention to the democratic process because you alone speak for the "real" nation, the "good" people. So why then would you need an election? What happens with populists is that they seize extra-constitutional powers that threaten the constitutional balance. They refuse to listen to others or engage in consensus building. Instead, they sow division to maintain power. They tell their constituents that they alone can save the nation from despair. In the end, they will use any means to hold onto power, which is precisely what Trump did.

**EH:** You've mentioned the issue of the independence of the judiciary. Concerning rule of law, one of the emblematic events from the early years of the Trump presidency was his Executive Order 13769 of January 27, 2017, the so-called "Travel Ban," and his subsequent treatment of the judiciary during the ban's enactment. In particular, how he famously called US District Court Judge James Robart—a President George W. Bush appointee who ruled in favor of the attorneys general of Washington State and Minnesota—a "so-called judge"—

**JRP:** That is one example of his contempt for judicial independence, but let's back up a bit. Even before that, as a businessman Trump had shown contempt for the legal process. He routinely breached contracts by refusing to pay contractors and was involved in more than 3,500 lawsuits. He learned from his attorney, the infamous Roy Cohn (who persecuted dozens of innocent people as alleged communists during the McCarthy Era in the 1950s) how to distort the legal process by stonewalling, refusing to comply with court orders, withholding information, and driving up the cost of litigation to exhaust your opponent.<sup>2</sup>

As president, Trump appointed Alabama senator Jeff Sessions, a fierce opponent of civil rights for African Americans, as attorney general. Trump wanted a ruthless attorney general like Roy Cohn, who would pursue his enemies and protect his friends and family. Almost immediately, Trump turned against his attorney general when Sessions explained that he was not Trump's personal attorney and could not do the president's bidding without regard for the law.

To return to the Muslim travel ban, this was an appalling example of Trump's disrespect for rule of law. First of all, before a president can issue a regulation, he is required to engage in reasoned fact-finding. Of course, no genuine fact-finding could have supported a blanket ban on Muslims, but Trump had no patience for legal process. He simply wanted to deliver on his promise to ban Muslims from the United States. Then, when the federal courts struck down the ban as illegal, he heaped scorn on the judges, as if to say, "you're not doing your job, you're supposed to work for me!" That contempt for the independence of our judiciary is anathema to the rule of law. But he continued to deride judges as "Obama" judges. Trump's disdain has infected our political system and undermined respect for the judiciary and the rule of law.

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2. Zirin, James D. *Plaintiff in Chief: A Portrait of Donald Trump in 3,500 Lawsuits*. All Points Books, 2019.

**EH:** Watching this unfold at the start of the Trump presidency was, I believe, a watershed moment for many Americans. It was something very particular in US history to witness a sitting US president carry out an attack on the spirit of the rule of law in this way. And yet, one might emphasize that the system of checks and balances held. In the end, Trump met with strong resistance, especially in the federal courts—

**JRP:** He did, for the moment. But he tried two more times to ban Muslims. The first two bans were struck down by the courts, but the third one was upheld by the Supreme Court in *Hawaii v. Trump*. In upholding the ban, the Supreme Court refused to consider Trump's explicit statements about excluding Muslims. They chose not to question the legitimacy of his claim that somehow Muslims posed a national security risk.

**EH:** And as you point out, this somehow reinforced the idea that this kind of approach to executive orders was somehow permissible. But there is a bit more to it—

**JRP:** Yes, in the same opinion Chief Justice Roberts reversed one of the Supreme Court's most notorious decisions, *Korematsu v. US*, which upheld the internment of Japanese-American citizens during World War II. *Korematsu* had relied on a completely unfounded claim by the Defense Department that Japanese-American citizens posed a national security threat. While Chief Justice Roberts was willing to question the lack of evidence in *Korematsu*, he did not apply the same scrutiny to Trump's motives or the lack of evidence against Muslims.

**EH:** Before we turn to the question of the media, we could perhaps raise here another important aspect of Trump's violation of constitutional norms in the early days of his presidency—

**JRP:** Perhaps the clearest violation of the Constitution at the very start of Trump's presidency involved the domestic and foreign emoluments clauses. Article II(7) says that the president cannot receive any emoluments from the government apart from his compensation. Article I(9)(8) provides no office holder can accept any emolument from a foreign state or sovereign.

From the outset of his presidency, foreign governments and their agents curried favor with Trump by paying top dollar to use his hotels and resorts. Trump ordered the US military to land planes at a remote airfield near his failing Turnberry golf resort in Scotland and pay full price for service members to stay over at his luxury resort. He also arranged for Vice President Pence and his large entourage to stay at his hotel in Doonbeg, Ireland, during meetings with the Irish taoiseach. These are unambiguous constitutional violations, but Trump disdained the Constitution. He claimed publicly that Article II of the Constitution, which enumerates the president's very limited powers, is "where I have the right to do whatever I want as president."<sup>3</sup>

**EH:** Right from the start of Trump's presidency we also have his attack on America's free press. As we have recently witnessed, countries such as Poland and Hungary have holdover structures from the Soviet period that, in the hands of autocratic-leaning parties, can enable what amounts to a re-nationalization of the media, especially television. America, on the other hand, has a very broad and robust independent media. To circumvent the role that the press plays in a free society, Trump had to find another way to eliminate it. As we know, he did this by simply announcing that any media that didn't agree with him was "fake news," thus delegitimizing any media outlet that might hold him accountable.

**JRP:** Delegitimizing the free press is another tactic of populists. We see Putin repeating the same lie against the free press. Trump could attack the *New York Times*, the *Washington Post*, and all the major networks, because he had other rightwing sources media sources, like Fox, One America News Network, and Russia Today, who were happy to repeat Trump's lies if it improved their ratings. This could only occur in an era no longer dominated by the four big television networks—CBS, NBC, ABC and PBS—that everyone watched before cable television. Now, with so many news sources on cable and social networks, we can isolate ourselves in our own echo chambers, listening only to what we already believe. This technology reinforces our assumptions and prejudices. As Trump's senior aide Kellyanne Conway famously commented, the Trump White House operated on "alternative facts."<sup>4</sup>

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3. Brice-Saddler, Michael. "While bemoaning Mueller probe, Trump falsely says the Constitution gives him 'the right to do whatever I want.'" *Washington Post*, 23 July 2019, <[www.washingtonpost.com/politics/2019/07/23/trump-falsely-tells-auditorium-full-teens-constitution-gives-him-right-do-whatever-i-want/](https://www.washingtonpost.com/politics/2019/07/23/trump-falsely-tells-auditorium-full-teens-constitution-gives-him-right-do-whatever-i-want/)> (accessed 16 April 2022).

**EH:** Then there's the matter of Trump's Twitter account. His general lack of respect for rule of law and due process was also apparent in the way he abused his executive position via his powerful social media presence—by 2019, he had some sixty million followers—to send messages and arbitrarily accuse his opponents. This was an incredibly powerful tool that we had never seen before. It was disquieting to witness the President of the United States bypassing official channels in this manner—

**JRP:** There was an ambiguity in the status of Trump's posts on social media: were these official communications or just random musings of an incoherent mind? This ambiguity permitted him to say things to his followers that he could later deny were official statements, or conversely, he could declare policies without going through the normal process of consultation and rulemaking.

There's another aspect to his use of social media. It's unclear whether anyone can control speech on Twitter or other social media. Should we treat social media as a public space, like public commons, parks or streets, where anyone can speak freely? Or is social media more like a limited public forum, like a school or university, where you can speak freely about subject matter that is consistent with the purposes for which the forum is open? Do you in a sense own your account on a social network like your home? Or does this space belong to the social media company, and does that mean the company has the right to censure your speech? Or is the social media company acting like the state, in which case your speech is entitled to all the protections of the First Amendment? The legal character of social media is unclear, and that ambiguity allowed Trump to broadcast his lies amplified by millions of followers. The social media companies did little to curtail Trump's lies until the waning days of his presidency. By then, he had already incited the mob to storm the Capitol.

**EH:** And Twitter is not, in fact, even a "shared" public space—

**JRP:** Twitter's algorithms curtail the possibility that people encounter competing ideas on Twitter. Most of us only read what we agree with already. Free speech theory relies on the idea that the remedy for bad speech is more speech. According to the *Washington Post*, Trump made 30,573 false or mislead-

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4. Jaffe, Alexandra. "Kellyanne Conway: WH Spokesman gave 'alternative facts' on inauguration crowd." CBS News, January 22, 2017. <<https://www.cnn.com/2017/01/22/kellyanne-conway-wh-spokesman-gave-alternative-facts-on-inauguration-crowd.html>> (accessed 17 April 2022).

ing claims during his presidency.<sup>5</sup> The answer to Trump's lies was to counter him with facts. But that presumes that there is a competing marketplace of ideas; that when someone proposes a false idea, it will be countered by others. There must be a dialogue for free speech to succeed, but dialogue doesn't exist on Twitter. Twitter is a monologue, and that's true for all social media. Trump's followers ate up his lies; they did not read mainstream media sources, because Trump told them that was "fake news." The lies took on a dangerous life of their own.

**EH:** We have been talking about the first two years of the Trump presidency. We now come to Trump's relationship to Russia and the first impeachment trial. This is something that, in the end, was never really resolved—whether or not involvement could be proved—although there was obviously a clear expression of affinity with an autocratic government.

**JRP:** Trump's relationship with Russia goes back a long way. Russian oligarchs own many of the apartments in Trump Tower and in Trump's other high-priced buildings. After Trump declared bankruptcy for the sixth time, his credit rating was non-existent, yet he nevertheless was able to borrow up to \$2 billion over two decades from Deutsche Bank. Deutsche Bank has a reputation for laundering Russian money. Even after Trump defaulted on \$45 million that he owed to Deutsche Bank, the private wealth division loaned him another \$300 million. This would be difficult to explain, but it's hard to ignore the fact that Deutsche Bank was under investigation by the US Department of Justice for laundering \$20 billion of Russian money.<sup>6</sup> Trump also famously held the Miss Universe contest in Moscow and negotiated to build the largest tower in Moscow, Trump Tower, while he was running for president.

During Trump's first meeting with the Russian ambassador in the Oval Office, he disclosed secret intelligence information provided by the Israeli government. He embraced Russian claims to Crimea. He raised no objections to Russia's invasion of the Donbass region. Most troubling, in violation of US law he withheld

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5. Kessler, Glenn, et al. "Trump's false or misleading claims total 30,573 over 4 years." *Washington Post*, 24 January 2021, <[www.washingtonpost.com/politics/2021/01/24/trumps-false-or-misleading-claims-total-30573-over-four-years/](https://www.washingtonpost.com/politics/2021/01/24/trumps-false-or-misleading-claims-total-30573-over-four-years/)> (accessed 16 April 2022).

6. Harding, Luke. "Deutsche Bank faces action over \$20bn Russian money-laundering scheme." *Guardian*, 17 April 2019, <[www.theguardian.com/business/2019/apr/17/deutsche-bank-faces-action-over-20bn-russian-money-laundering-scheme](https://www.theguardian.com/business/2019/apr/17/deutsche-bank-faces-action-over-20bn-russian-money-laundering-scheme)> (accessed 16 April 2022).

\$400 million worth of military assistance to Ukraine appropriated by Congress. Trump held up the funds for months during a critical period of the war in eastern Ukraine, while he tried to extort from the Ukrainian president a promise to investigate Trump's rival, President Biden.

The Mueller Report examines Trump's connections with Russia and the attempt to blackmail Ukraine. In the end, the Special Counsel stated that "while this report does not conclude that the President committed a crime, it also does not exonerate him."<sup>7</sup>

**EH:** The technical inconclusiveness of the Mueller report in a certain regard emboldened Trump and paved the way for what would come at the end of his presidency. Mueller's report concluded that it was not possible to make a traditional prosecutorial judgment as to whether Trump was guilty or not. This was left up to Congress.

**JRP:** The only reason that the Special Counsel apparently did not indict Trump is because the Justice Department has had a policy in place since the Nixon administration that it would not indict a sitting president. The Justice Department prefers to leave it up to Congress to impeach and remove the president before it indicts. The Constitution does not say that you have to remove the president before you indict him, but of course it is within a prosecutor's discretion not to indict someone.

**EH:** What we are discussing here with the Mueller report is very important. It points to a critical aspect of the Trump presidency, which is that gray zones were constantly being exploited. We quickly came to understand that we had entered an unknown territory with regard to rule of law. And the technical inability to reach conclusions—although noble in many respects—also had a damaging effect on America, because there were things that were proved to have happened but which were not punished or clearly ruled on.

Everything we have been discussing sets the stage for the second part of Trump's presidency. In discussing the January 6 assault on the Capitol—and obviously there are many steps that led to that—we know that already during a White House press conference in September 2020 Trump refused to clearly

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7. Mueller, Robert S., US Department of Justice. "Report On the Investigation Into Russian Interference In the 2016 Presidential Election", Volume I of II, Special Counsel Robert S. Mueller, 111, Submitted Pursuant to 28 C.F.R. 59.600.8(0), Washington, DC, March 2019.



state whether he would allow for a peaceful transfer of power.<sup>8</sup> But even before that—and here I'm thinking of the April 3, 2020 storming of the Michigan State Capitol—the climate of violence was building. Throughout the summer there was a growing number of clashes between citizens and militias and a very particular environment in the runup to the elections. Let's start with the question of Trump refusing to say whether he would accept a transfer of power.

**JRP:** I think there are a couple of ways to understand Trump's statement that he might not accept the election outcome if he lost. One way is to view Trump as a populist autocrat living in an echo chamber, where he only hears how great he is and sees these huge crowds of people showing up at his rallies. No one dares to tell him that he's behind in the polls. He thinks, well of course I'm going to win, and if I don't win, there must be something wrong with the election. That would be the most innocent way to explain Trump's thinking.

More likely, Trump thought that if the election didn't go his way, he had other levers of power at his disposal: he had appointed three justices to the Supreme Court, he had a majority in the Senate, he had a very complacent Congress and a complacent cabinet that was prepared to facilitate whatever he wanted. He believed he had control over the military and he had already used the Black Lives Matter protests to inflame his supporters.

**EH:** The militias are a very complex subject that need to be carefully addressed. Let's first start by looking at them in their American historical context—

**JRP:** The militia movements didn't start with Trump. They really took off during the Obama years, as a white supremacist reaction to an African-American president.

To European readers, the idea of militias may seem odd. The concept of a citizen militia comes from a distrust of a standing army, which early Americans viewed as a threat to civil liberty. Our Constitution envisioned that the states would form militias from ordinary volunteers to defend the state's authority. The Second Amendment was never intended to authorize private citizen militias coalescing around a populist figure to engage in sedition.

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8. McMurtry, et al. "President Donald Trump Declines to Commit to Peaceful Transfer of Power: 'There Won't Be a Transfer.'" ABC News, 24 Sept. 2020, <[abcnews.go.com/Politics/president-trump-declines-commit-peaceful-transfer-power/story?id=73205708](https://abcnews.go.com/Politics/president-trump-declines-commit-peaceful-transfer-power/story?id=73205708)> (accessed 16 April 2022).

**EH:** Closer to the present, it is important to discuss the growth of these militias, and the specific role they play in the breakdown of democracy. For a European audience, the idea of militias brings to mind Hitler's Brownshirts, and other similar paramilitary groups prior to World War II, but we also have Putin's private army, the National Guard, which now has over a quarter of a million men.<sup>9</sup> During the summer of 2020 in America, it was worrisome to witness the interaction between the executive and the militias. This call and response famously dominated the evening of the September 29 presidential debate when Mr. Trump told the Proud Boys to "stand back and stand by."<sup>10</sup>

If I might add a word here, I would say that there is still a lack of conceptual understanding about the use of militias, above all the specific role of the Proud Boys. There are still those who believe that the Proud Boys were an independent group acting alone on January 6. However, we now know that in November 2018 Enrique Tarrio took over the organization's leadership in Florida together with Joseph Biggs,<sup>11</sup> who had formerly worked for Alex Jones's Infowars. Biggs and Ali Alexander and others collaborated with Stone during a "Stop the Steal" type campaign in Florida during the 2018 midterms<sup>12</sup> and Tarrio and Biggs were present to support Stone at his February 2019 sentencing for impeding the Russia investigation. During his deposition, Stone spoke of his close ties with Tarrio.<sup>13</sup> Finally, Tarrio appeared next to Stone at an impromptu rally in Washington on the night of January 5, 2020.<sup>14</sup> These were not unknown "fringe" individuals,<sup>15</sup> but people intimately connected to those close to the president.

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9. *The Moscow Times*. "Putin's Personal Army: Analysts on Russia's National Guard," 7 April 2016, <[www.themoscowtimes.com/2016/04/07/putins-personal-army-analysts-on-russias-national-guard-a52445](http://www.themoscowtimes.com/2016/04/07/putins-personal-army-analysts-on-russias-national-guard-a52445)> (accessed April 15, 2022).

10. Ronayne, Kathleen, and Michael Kunzelman. "Trump to far-right extremists: 'Stand back and stand by,'" 30 September 2020, <[apnews.com/article/election-2020-joe-biden-race-and-ethnicity-donald-trump-chris-wallace-0b32339da25fbc9e8b7c7c7066a1db0f](http://apnews.com/article/election-2020-joe-biden-race-and-ethnicity-donald-trump-chris-wallace-0b32339da25fbc9e8b7c7c7066a1db0f)> (accessed 16 April 2022).

11. Weiner, Jeff. "Who is Joseph Biggs, Ormond Beach man and Proud Boys organizer arrested in Capitol riot?" *Orlando Sentinel*, 21 January 2021, <[www.orlandosentinel.com/news/crime/os-ne-proud-boys-joe-biggs-capitol-arrest-20210121-ciuvkep7gfkcpo2lee3yssb72e-story.html](http://www.orlandosentinel.com/news/crime/os-ne-proud-boys-joe-biggs-capitol-arrest-20210121-ciuvkep7gfkcpo2lee3yssb72e-story.html)> (accessed 16 April 2022).

12. Atena, Sherry, and Will Sommer. "Roger Stone Cheers as Conspiracists Descend on a Florida Election, Again, to Stop 'Radical Leftists' From Counting Votes." 10 November 2018, <[www.thedailybeast.com/roger-stone-cheers-as-conspiracists-descend-on-a-florida-election-again-to-stop-radical-leftists-from-counting-votes](http://www.thedailybeast.com/roger-stone-cheers-as-conspiracists-descend-on-a-florida-election-again-to-stop-radical-leftists-from-counting-votes)> (accessed April 15, 2022).

13. Iannelli, Jerry, and Meg O'Connor. "Roger Stone Admits Extensive Ties to Extremist Group Florida Proud Boys in Court." 21 February 2019, <[www.miaminewtimes.com/news/roger-stone-admits-ties-to-florida-proud-boys-jacob-engels-enrique-tarrio-11093554](http://www.miaminewtimes.com/news/roger-stone-admits-ties-to-florida-proud-boys-jacob-engels-enrique-tarrio-11093554)> (accessed 16 April 2022).

14. Bump, Philip. "The question of Roger Stone's ties to extremist groups grows more salient." *Washington Post*, 9 March 2022, <[www.washingtonpost.com/politics/2022/03/09/question-roger-stones-ties-extremist-groups-grows-more-salient/](http://www.washingtonpost.com/politics/2022/03/09/question-roger-stones-ties-extremist-groups-grows-more-salient/)> (accessed 16 April 2022).

**JRP:** Speaking of Stone, you could find a precedent for the “Stop the Steal” rallies in the violent Republican response during the 2000 election to the hand recount of the ballots in the contested presidential race in Florida.

**EH:** The so-called “Brooks Brothers Riot”—

**JRP:** Yes, this refers to an episode when, during the counting of the 2000 presidential ballots in Miami-Dade County there was a “spontaneous disruption” by individuals, many of them in suit jackets and button-down shirts who later turned out to be congressional aides that had been flown down to Florida for that purpose. There were accusations that ballots had been thrown out and that people were punching holes in ballots. Of course, none of that was true. The ballots were counted under the glare of television cameras and in the presence of both Democratic and Republican officials as well as the news media.

**EH:** It will take time before all these interrelationships are fully understood. But in the lead-up to the elections what we were able to clearly observe was that the militias were being politically instrumentalized, and that by the time of the elections they were indeed “standing by” and at the ready. I'd even suggest here thinking about the term “election militia,” a known tool of anti-democratic regimes. We usually associate election militias with images of armed men on the backs of trucks who are there to secure the vote during an election. But when you think of it, we weren't that far from something similar on January 6, except that our version involved disrupting the electoral ratification process.

But we are getting a bit ahead of ourselves. After the election on Tuesday November 3, when Trump loses to Biden, we see almost immediately afterwards various groups forming that would be instrumental in mobilizing for the January 6 insurrection. On Wednesday November 4, a “Stop the Steal” Facebook page was launched, then shut down the next day after gaining over 360,000 followers.<sup>16</sup> Two main groups, Women for America First (which started the Facebook page) and Stop the Steal—led by Ali Alexander, among others—began large-scale, nation-

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15. Kirkpatrick, David D., and Alan Feuer. “Police Shrugged Off the Proud Boys, Until They Attacked the Capitol.” *New York Times*, 23 August 2021, <[www.nytimes.com/2021/03/14/us/proud-boys-law-enforcement.html](https://www.nytimes.com/2021/03/14/us/proud-boys-law-enforcement.html)> (accessed 16 April 2022).

16. Romm, Tony, et al. “Facebook bans ‘STOP THE STEAL’ group Trump allies were using to organize protests against vote counting.” *Washington Post*, 5 November 2020, <[www.washingtonpost.com/technology/2020/11/05/facebook-trump-protests/](https://www.washingtonpost.com/technology/2020/11/05/facebook-trump-protests/)> (accessed 16 April 2022).

wide organizing. Women for America First held a 20-city bus tour that ended up in Washington on December 12, two days prior to the electoral college vote. The tour's organizers were the same people who applied for permits for the January 5 and 6 rallies. The same names reappear at these rallies as at the Willard Hotel.<sup>17</sup> Jamie Raskin has suggested thinking in terms of rings of involvement. All this is to say that there was extensive coordinated mobilization prior to January 6.

**JRP:** And on the executive side, leading up to January 6 there are all sorts of half-baked notions about how one might circumvent the counting of the electoral votes. There were the fake electors who voted in places like Wisconsin and sent in fraudulent ballots to be counted, and the idea that the vice president somehow had the power to throw out actual ballots by the real electors. At the same time, the President was demanding that various Republican office holders somehow reverse Biden's victory in their state. Perhaps Trump's most outrageous demand was that the Georgia secretary of state find him another 11,000 votes so he could claim victory in Georgia. Then, there are Trump supporters demanding that ballots be recounted or audited by private Republican groups. After an audit of the vote in Arizona, the Republicans found that Biden actually won by an even larger margin than the official vote count.

And, of course, there were all the bizarre conspiracy theories: the election had been stolen by undocumented aliens; Venezuela had rigged the voting software; China had stuffed the ballot boxes with ballots printed on bamboo paper. Each of these crazy allegations were thoroughly investigated both by Trump's own Justice Department as well as the Republican secretaries of state. Sixty-two separate federal or state courts found absolutely no evidence of fraud in the election. Of those 62 courts, a majority were judges who had been appointed by Republican presidents, including the three supreme court justices that Mr. Trump himself had appointed. The only judge out of 62 courts who suggested that there might possibly be some basis for Trump's allegations was Supreme Court Justice Clarence Thomas, and we have since learned that his wife, Virginia Thomas, had attended the Stop the Steal Rally on January 6.<sup>18</sup>

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17. Alemany, Jacqueline, et al. "Ahead of Jan. 6, Willard hotel in downtown D.C. was a Trump team 'command center' for effort to deny Biden the presidency," *Washington Post*, 23 October 2021, <[www.washingtonpost.com/investigations/willard-trump-eastman-giuliani-bannon/2021/10/23/c45bd2d4-3281-11ec-9241-aad8e48f01ff\\_story.html](https://www.washingtonpost.com/investigations/willard-trump-eastman-giuliani-bannon/2021/10/23/c45bd2d4-3281-11ec-9241-aad8e48f01ff_story.html)> (accessed 16 April 2022).

18. Alfaro, Mariana. "Ginni Thomas, wife of Supreme Court justice, says she attended Jan. 6 'Stop the Steal' rally before Capitol attack." *Washington Post*, 14 March 2022, <[www.washingtonpost.com/politics/2022/03/14/ginni-thomas-jan-6-rally-capitol-attack/](https://www.washingtonpost.com/politics/2022/03/14/ginni-thomas-jan-6-rally-capitol-attack/)> (accessed 16 April 2022).

**EH:** In all this, it is important to point out that Vice President Pence was very much in disagreement with any kind of plan that would involve him in dismissing any of the electoral ballots. He makes this clear in a letter dated January 6, 2021, in which he wrote, “It is my considered judgement that my oath to support and defend the constitution constrains me from claiming unilateral authority to determine which electoral votes should be counted and which should be not.”<sup>19</sup>

**JRP:** Right, and one can either see that as either courageous or self-interested. Pence knew that to toss out ballots would lead to an unprecedented constitutional crisis. It would be an act of sedition, and the vice president’s lawyers warned him that he would be a fool to do so.

But consider how close we came to losing our republic. If Pence had thrown out the ballots, would the Republicans in Congress have gone along with that? I fear that they probably would have. The Democrats in the House would have objected, but what would have happened then? I don’t know. We would have had to rely on the Supreme Court. That’s how close we came to losing our republican form of government.

**EH:** The January 6 Committee has been gathering massive amounts of evidence on what happened on that day. What will be the result of this?

**JRP:** The committee’s function isn’t to prosecute. It’s to investigate and clarify the historical record. The hope is that the information they’re gathering may be of use to the Department of Justice in prosecuting those responsible, but as a practical matter, whether the committee refers the record to Justice for prosecution or not, Justice is already investigating and will have access to any materials that Congress has gathered. The committee is wise to keep some distance from the Justice Department investigation. The congressional investigation is inherently political, while the Department of Justice investigation is not.

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19. PBS News Hour. “Read Pence’s full letter saying he can’t claim ‘unilateral authority’ to reject electoral votes.” PBS News Hour, 6 January 2021, <[www.pbs.org/newshour/politics/read-pences-full-letter-saying-he-cant-claim-unilateral-authority-to-reject-electoral-votes](https://www.pbs.org/newshour/politics/read-pences-full-letter-saying-he-cant-claim-unilateral-authority-to-reject-electoral-votes)> (accessed 15 April 2022).

But these are not the only legal proceedings that Trump now faces. At one point there were as many as 29 different investigations taking place at the state, federal and congressional level concerning Trump and his associates. We don't know how many of these investigations are still ongoing, but it's quite possible that one or more will lead to civil or criminal actions against Trump, his family, or his businesses.

Here I'd like to stress that one of the things that Trump has done to undermine the judicial process at every stage of each investigation, going all the way back to the Russia probe, is his insistence that neither he nor his associates needed to comply with court orders or congressional subpoenas. Trump's attorneys spun all sorts of fallacious theories of immunity that had no basis in the Constitution. Documents that other presidents had routinely provided were refused. Witnesses called to testify were publicly pressured by Trump not to talk. Some were offered a promise of a presidential pardon. Trump's advisers, Roger Stone and Paul Manafort, for example, refused to cooperate with prosecutors against Trump. They were convicted and then pardoned by Trump, who was no doubt grateful for their silence. This is the behavior of a mob boss, not a president.

**EH:** And once again, this question of immunity kept us in the grey zone—

**JRP:** Yes, these assertions of immunity have made it very difficult for Congress and the courts to do their jobs. Before and after Trump left office, he made extravagant claims of executive privilege that have nothing to do with the legal doctrine of executive privilege.

The doctrine of executive privilege protects private communications between the President and his closest advisors from discovery in a court proceeding. There's no executive privilege for communication with Trump's friends outside the White House, like Steve Bannon or Roger Stone. Moreover, executive privilege is not absolute. It must be weighed against the public's interest in a judicial proceeding. With regard to the January 6 investigations, there is no valid claim for executive privilege in a criminal investigation. That's what the Supreme Court held in *Nixon v. US* regarding the Watergate tapes. Trump has asserted not only that his communications are privileged, but that he himself is somehow immune from having to testify or comply with subpoenas from Congress or the courts. There is no basis in law for such claims, and Trump's attorneys must know that. He is simply stalling for time.

Executive privilege is not the only frivolous argument Trump has made. After Trump left office and was impeached for inciting the January 6 riot, he argued that he could no longer be impeached once he was out of office. Indeed, that was the only defense offered by his attorneys, and Senate Republicans refused to convict him on that basis. In fact, in drafting the impeachment clause, the Framers of our Constitution repeatedly cited Parliament's impeachment of Warren Hastings, the former Governor General of Bengal, who was impeached for his abuse of power two years after he had retired. Indeed, the US Senate has convicted at least three former federal judges after they left office. If it were true that you cannot impeach a former president, that would mean that any lame duck president in his last months in office could do whatever he wanted without fear of impeachment. To be clear, the value of impeaching and convicting Trump would be not only to hold him accountable in the eyes of history, but to bar him from holding any office in the future. If Trump escapes accountability for his crimes, that, more than anything else, threatens the rule of law.

**EH:** Thank you, that's a perfect place to end.

## About the Authors

**Joel Richard Paul** is the Alfred and Hanna Fromm Professor at the University of California Hastings Law School where he teaches constitutional law and international economic law. Paul has also taught on the law faculties of Berkeley, Yale, the University of Connecticut, Leiden University (Netherlands), and American University. His most recent books are *Indivisible: Daniel Webster and the Birth of American Nationalism* (Penguin/Riverhead), *Without Precedent: Chief Justice John Marshall and His Times* (Penguin/Riverhead) and *Unlikely Allies: How a Merchant, a Playwright and a Spy Saved the American Revolution*, (Penguin/Riverhead), which was named one of the best books of 2009 by The Washington Post.

**Ellen Hinsey** is the author of nine books of poetry, essays, dialogue and translation. Her most recent books are *Mastering the Past: Contemporary Central and Eastern Europe and the Rise of Illiberalism* and *The Illegal Age* (UK Poetry Book Society Choice). A Former Berlin Prize Fellow of the American Academy in Berlin, her work has appeared in publications such as *The New York Times*, *The New Yorker*, *Der Tagesspiegel* and *Poetry Review*. She is currently working on the question of new forms of authoritarianism.



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