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David Levi: Hello, and welcome to Beyond COVID, a podcast and video series that explores how our legal system and social institutions are changing in a post-pandemic world. I am David Levi, director of the Bolch Judicial Institute and president of the American Law Institute.

We had an election in November that was very different because of the pandemic. More Americans voted than ever before, which was quite amazing in the circumstances, and it was peaceful. Now we have seen an appalling, violent attack by a mob on the United States Congress, which was in the very process of tabulating the Electoral College votes of that presidential election.

What will be the legacy of this presidency and this belligerent president? Was the Trump presidency uniquely threatening to Democratic values and institutions because of this president's unusual personality and ideology? Or are there other external forces or circumstances at work that might suggest a repeat of this dangerous experience in the future?

Joining our discussion today are leading experts in history, law, and politics. David Kennedy is a Pulitzer-prize winning historian and Professor of History, Emeritus at Stanford University. Among his many accomplishments, he is the editor of the Oxford History of the United States.

Daphna Renan is a Professor of Law at Harvard Law School. She served in the US Department of Justice during the Obama Administration. She studies the norms and legal constraints that apply to the president.

Terry Moe is a Professor of Political Science at Stanford University and a senior fellow at the Hoover Institution. He has written extensively on the presidency and is a co-author with William Howell of a new book "President's Populism and the Crisis of Democracy."

Levi: Jack Goldsmith is a Professor of Law at Harvard, where he studies presidential power, terrorism and international law. He served as Assistant Attorney General in the Office of Legal Counsel during the presidency of George W. Bush. His latest book with Bob Bauer is titled "After Trump: Reconstructing the Presidency."

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Levi: What a distinguished group you are and how lucky we are to have you here today. Thank you so much for joining us. Perhaps we could start with the history, that's always a good place to start, gives us some context. Sometimes it gives us comfort, sometimes not, but let's try to place President Trump in a historical context and who better than David Kennedy? David, have we seen a president like this before and what do you make of this presidency?

David Kennedy: Well the short answer to the first part of your question is no, and the answer to the second part of your question is, it's too early to tell. Look, I'm the historian on this roster and just want to make clear that historians have a few operating premises. One is that everything has a history, including the institution of the American presidency. A second, touchstone for all historians is that history is about change. So I'm going to try to attempt in the ten minutes I have allotted to take us through two-plus centuries of the institution of the presidency by laying down some framework in which the rest of the discussion can go forward.

Kennedy: I guess if there's a thread that runs through all of my brief presentation, it has to do with directing your attention to the incommensurate pace and character of the evolutionary pathways of the institution of the presidency on the one hand and all the ambient changes in society and the economy on the other. Let's start with some numbers.

As of roughly two weeks from now, there will have been 46 presidencies. Joe Biden will be number 46, only 45 presidents due to the peculiar way we count the two non-contiguous or non-sequential presidencies of Grover, Cleveland. All but three presidents, all but three, have been white, Protestant males. Only 17, barely one-third, have been re-elected to a second term, which on the face of it suggests something about the instability of our political system. Five presidents have been elected without popular majority vote, or I should say technically where the popular vote and the Electoral College vote were not counted. But of all those numbers that we through the prism of which we might think about the presidency, there's one number that is the most important and that is the number one. One, because the president is the single national elected official, whose constituency is the nation at large. I'm treating president and vice president here as a single unit just for purposes of simplicity.

Kennedy: All the other elected officials in Washington D.C., there are 435 in the House, 100 in the Senate, are elected by local constituencies and have local responsibilities and obligations. But the presidency is the institutional place where responsibility for the country as a whole, the nation as a whole, is invested. Precisely for that reason, the institution of the presidency from the moment of its conception in the Philadelphia Constitutional Convention of 1787 has been controversial.

A modern-day quipster with some depth on that controversy, Theodore White, famous journalist who wrote those several volumes on various presidential races,

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beginning with Kennedy/Nixon race in 1960. Theodore White once summed up a lot of this controversy, two centuries' worth, when he said, the supreme duty of the president is to protect us all from each other's congressmen. Again, it's a jocular way to put it, but it sums up a lot of the structural issue about the presidency. To repeat what I just said, the president is the one officer in our system with national responsibilities, by definition, and the other 535 people in Washington D.C. have some responsibility for the nation as a whole to be sure, but really are answerable to quite local and I dare say in many cases parochial constituencies.

Precisely because of this structural issue, the structural difficulty, the presidency has been controversial, to repeat, from the beginning. James Wilson, along with Alexander Hamilton, the two most prominent spokespeople for the strong executive in the Constitutional Convention in 1787. Wilson once said that nothing was more perplexing in that convention in 1787 than trying to figure out the method for choosing the president. Madison's notes on the Constitutional Convention reaffirm that, those of you who read them, a lot of ink was spilled and oxygen was consumed trying to figure out the various and sort through the various proposals that were made for the election of the president.

Kennedy: Wilson and Hamilton supported a strong executive. You'll see here on the screen what Hamilton had to say in Federalist Number 70 about a feeble executive implies a feeble execution of the government and a government ill executed whatever it may be in theory, must be in practice a bad government. A very robust statement of the desirability of having a strong executive.

Kennedy: That's not exactly what we got, at least not in the early days of the presidency. I'm sure we'll have further discussion about how strong or not the presidency as an institution is today, but here's another clue. Go back and see further numbers about what our founders, what the framers thought about the relationship of the legislative and executive branches.

Kennedy: Article I, notice the sequence, is the first Article of the Constitution, deals with the legislature. It has 51 paragraphs. Article II addresses the executive, again, note its placement, it comes after the discussion of the legislature, has 13 paragraphs. And just on the face of it, the disparity in those numbers I think gives us some clue as to how agonized and, in the end, poorly resolved were the discussions at that Constitutional Convention about the relationship of the legislature to the executive.

Again, if we go back to the question or the matter I just mentioned about how Wilson remarked about the nothing was more puzzling to them than how to figure out the election of the president, nominations for the presidency for the first four decades or so of the young republic's existence, down into the 1830s, nominations for the presidency were made by congressional caucuses. It was some version, at least for the few decades, of a parliamentary system, where the

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president would thought to be, we agree we now find it a little archaic and strange, but to some degree, a creature of the legislature. That all changed in the 1830s.

Kennedy:

It changed, interestingly enough, the first convention that nominated a presidential candidate, which would be something called the Anti-Masonic Party in 1831. A harbinger, it seems to me, of a theme that has surrounded the presidency and indeed our political culture generally for the last two centuries is the conventions were thought to be a way, nominating conventions to the presidency were thought to be a way to democratize the process to deliver decision-making into more hands than just those people in the Congress and to let all who were affiliated with a party meet in convention and nominate a candidate.

Conventions right down to the present day have been at least a formal way we've brought presidential candidates forward. Although, the last convention that went to a second ballot to nominate a presidential candidate was in 1952; the Democratic Convention took two ballots to get Adlai Stevenson nominated. Then I'm getting ahead of the story, I'm sure I'll have more time to discuss it, but conventions have long since outlived whatever political function or utility they had in our political system.

I'm skipping through a lot of history here, but let me just go forward about a century, almost, from the founding convention to a doctoral thesis written by a young student at Johns Hopkins University, Woodrow Wilson publishes a book of "Congressional Government" in 1885, which was the first of several, turns out, rather cogent and focused attacks. I think Terry Moe's work, in some ways, is a recapitulation of a lot of the arguments that Wilson made updated for our own time. I think it's possible to read the title of Wilson's work "Congressional Government" as an oxymoron. That he thought Congress was incapable of coherent government and he wanted more power vested in the executive and he's famous for having said, among other things, "The president is at liberty both in law and conscience to be as big a man as he can." Again, I'm using this as a capsule reference for a whole body of criticism and literature and political practice that emerged in Woodrow Wilson's time which was directed toward strengthening the executive as distinguished from the Congress as a potent force in our governmental system.

Kennedy:

In the couple of minutes that I have left, I just want to very quickly go through some big changes, all which have their origin in the so-called Progressive period, two decades or so, the first two decades or so of the 20th century and, just for purposes of keeping it all in mind, I'm going to organize these as three P's, three changes, each of which begins with the letter P. They have to do with programs and publicity and primary.

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Kennedy: What do I mean by programs? It's really only with Theodore Roosevelt's bringing forward this platform called The Square Deal, when he ran on the Progressive Party ticket in 1912. We can take that as the point of origin where modern presidents become the voices, and the voices for coherent policy programs and the vessels into which hopes are poured for the actual accomplishment of those programs. That kind of coherent political program campaigning and promising in the 19th century was relatively absent, but it becomes a standard feature of politics in the 20th century and 21st century. We get The Square Deal from Theodore Roosevelt, The New Deal of the 1930s, and The Fair Deal in the 1940s, some would say today we get The Ordeal.

The point is simply that we see in the early 20th century the beginnings of something that's been with us ever since where the presidency becomes the focus of all kinds of political aspirations for coherent across-the-board policymaking to a degree that was not true in the 19th century.

Kennedy: Second, publicity. Here there's, again, a thread that tracks the evolution of technology. Wilson was famous for using publicity to mobilize public opinion, to end run or overrun congressional opinion to pass that famous set of progressive reforms that he did in his first administration. That was facilitated, of course, by the emergence of mass circulation newspapers, like those of William Randolph Hearst and Joseph Pulitzer.

The next technology to come along was radio and of course Franklin Roosevelt is the person who mastered the radio as an instrument of political communication and mobilization of public opinion, superseded by the television, of course. John F. Kennedy renders obsolete, essentially, press conferences as a method of informing print journalists how to communicate with the public by televising the press conferences. So who needed to read the morning newspaper or look at the evening news if they'd seen it live on television already? We see the progressive obsolescence of various ways of political communication. Then of course in our own time, we have the absolutely exponential explosion of instruments of communication thanks to social media and the fragmentation of the mainstream media.

Kennedy: The combination of the presidency has evolved is the place where we invest our major political hopes, and yet at the same time, we have dis-intermediated a lot of the ways the president communicates with the public at large through the evolution of various technologies and I'll add the third P now, primaries. The first binding presidential primary, I believe, was held in Oregon in 1910. For the next 50, 60 years or so, maybe another dozen states got into primary election business, but beginning in the 1970s, now virtually every state has a primary or a caucus-nominating system, which has further democratized the presidency and moved it in a plebiscitary direction as James Wilson and Alexander Hamilton dreamt about two and a half centuries ago.

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In an odd sense, we've come full circle back to the idea that the presidency should be the single most potent actor in our system and should be the creature of the people at large, not intermediating institutions, like the press, the fourth estate, and the Congress itself.

Kennedy: That's a journey with, what's the famous boots? The Ten League Boots through two centuries' worth of presidential history, and I'll yield the floor.

Levi: Well, that was a great set up for us. I think you've hit on many of the themes that we're going to cover here today.

Levi: Daphna, you've written about what you called the president's two bodies, drawing on a term that's often applied to the medieval king or kingship. This is the idea of the charismatic individual leader, a person versus the Office of the President or the presidency. You've also written extensively about the norms that, at least before this president, have applied to the president and the presidency. Where do we go from here?

Daphna Renan: Great. Thanks so much, David. And thanks so much to you and to the ALI and to the Bolch Judicial Institute for having us all together for this conversation.

Renan: I thought I'd follow up initially on David's historical context and offer some conceptual context for the constitutional office of the presidency and then get at your question about this particular president in our current moment.

My argument is that American constitutionalism consists of two quite foundational, quite conflictual, but ultimately interdependent understandings of the presidency and that's what I've suggested we could think about as the president's two bodies.

On one view, the presidency, the office, is an individual. It's a he, maybe one day a she. This understanding of presidential power is individualistic along three dimensions. It's personal. The individual arrives in office with a particular set of ideological and political and moral commitments and his constitutional obligation is to execute this particular vision of policy and governance. It's temporary or present-ist. The characteristics of the office are ephemeral. The commitments that one President makes shouldn't disable the governance and policy discretion of his successors. It's singular or unitary.

Renan: On the other view, the presidency is an institution. This view is more impersonal. It's more permanent, or at least, indefinite and it's composite. As an institution, the constitutional office of the presidency is comprised of certain features. These are deliberative practices or norms, substantive commitments, institutional restraints that aren't fully within the control of any one occupant. This also means that the characteristics of the office are more stable and continuous.

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Internal practices and executive branch precedents that form under one incumbent continue to govern successors. And statutes enacted under one president are then defended in court by his successors. It's composite or collective. These other actors protect and even augment presidential power, even as they also entrench limits on the will of the sitting president.

Renan: Ever since George Washington embodied the idea of an institution that was still in the making, we've had this deep tension, these competing impulses between a personal or charismatic president on the one hand and a more impersonal and deliberative presidency on the other. As you say, these two understandings of the presidency, they have a pre-history in the doctrine of the king's two bodies; in recognizing the person of the king as distinct from the institution of kingship, the king's duality provided what we all know today was a crucial building block in the creating of the modern state.

Renan: But there's also this unfinishedness, this enduring inseparability to the two bodies that I think we see reenacted in different terms in the context of the U.S. presidency. The two bodies plays a role in how we understand the legitimacy of presidential power by equivocating an idea of the president.

Renan: The president means two different things. It has these two different bundles of attributes. That makes it possible for constitutional and political argument to obscure ways in which each body creates some real unease by emphasizing attributes that adhere in the other body and by suggesting or implying that those attributes pertain to the constitutional president as a whole.

Even as it obscures presidential power in this way, the two bodies is also constitutive of a presidential office that actually embodies aspects of each. So it orients practice toward these two intractable but ever-present impulses for what the constitutional office should actually entail.

Renan: We see across constitutional history and across constitutional law different variants on the same basic tension or struggle. A key debate at the Constitutional Convention is, how do we construct an office that creates some space for individual responsibility and personal judgment while resisting self-dealing or the corruption of public power. This tension recurs in a different form for progressive thinker-reformers in the debates about how do we structure the executive Office of the President?

On the one hand, to facilitate policy leadership through the person without making the office too contingent on any one man's whim or fancies. We see it throughout our public law doctrine. So even within the same case, the Court's separate opinions are often proceeding from what are incommensurable and often unarticulated starting points relating to the individual president and the institutional presidency.

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Now my argument is that there's no final answer between these two bodies. Public law theory can't somehow solve or move beyond the president's duality, but it can make it central. In doing that, we can better understand the nature of the problems and the structure of our disagreements and the constituted reality of the office.

Renan: If that's my conception of the presidential office, what does it mean for this particular president in our current moment? I'll offer a few thoughts.

At one level, I think Trump has tried to disrupt a long-standing precept when it comes to the duality that some conceptual and constitutional space for the person's moral and policy leadership not collapse into the use of power for purely private gain. Ever since the framers debated term limits and presidential impeachment, the disagreement has been over how we institutionalize a space for personal judgment for charismatic leadership, while resisting self-dealing, or the use of public office for private ends.

Renan: In Trump's insistence over and over again in his actions and his rhetoric that this is a distinction without a difference, flies in the face of constitutional and political development over the centuries. At the same time, the Trump presidency brings into view some problematic developments of the duality if this continues to be a constitutional goal. Public law has become ever more protective of the personal charge of the president in controlling administration even as there's this deep reluctance to adjudicate the personal responsibility of the president. And it takes different doctrinal forms.

Renan: The result is a potentially potent mix of personal control and personal impunity when it comes to presidential power and I think that's a legal possibility that we've seen, in some ways, realized in the actions of the sitting president, and in some ways, a court starting to cabin this problem in its recent decisions.

Renan: Relatedly, I think at the crux of the Trump presidency, is what we might think of a problem of acoustic separation with respect to the two bodies or the separation between the anti-constitutional commitments that the incumbent as a human being conveys — so policy and furtherance of religious animus or retaliation for political dissent — and the official conduct that courts or Congress are expected to check. There's a danger for a working system of legal and political accountability and the president who can avow one thing as the person and then purport to do something different entirely as the institution.

I think one thing we've seen in the last couple years is a court really coming to appreciate this danger, both for the legitimacy of the Office of the President and also for the legitimacy of the court itself in ways that we might get into further in our discussion.

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Renan: Finally, I think the Trump presidency illuminates a more structural change, if we think about it in relation to the king's two bodies. With the king, there was the real person and the fictive, immortal body. This second body becomes a way for lawyers and for jurists to justify constitutionalism as a custodian of a perpetual public good.

An impersonal, even continuous public interest in turn is what creates a space for legal incursions on the mystical crown. It allows constitutionalism to check the personal power of the monarch. With the American presidency, the impersonal, the immortal body, it's become institutionalized. It's real. It's populated by thousands of individuals, but the fictive or mythical idea of sovereignty has become deeply personalized. Public law theory and doctrine justifies a profound re-imagining of our national commitments every four years through the charismatic legitimacy of the president.

Renan: In that, since the Trump presidency, is really of a piece, with a much more long-term development in the presidential office, even as it illuminates for us what happens when you take this vision to its quite horrifying extremes. Thanks.

Levi: Thank you, Daphna. That was so interesting. We're getting a lot of good history here and structure.

Levi: Terry, you've written a new book with William Howell, on the presidency and populism, and you've written about a tension that both Daphna and David have talked about, which is how to have an effective president — programmatic in addressing the problems of the nation on the one hand without having a president that's going to destroy the democracy on the other hand, or that we might fear would have so much power that that's a possibility. So how do we negotiate that tension?

Terry Moe: Okay. Let me start a buildup to that. I should emphasize that as I talk here, I'm going to be channeling some of the basic ideas that William and I set out in our book. Look, when you first gave us our charge for this presentation, you talked about whether what has happened over the last four years during the Trump Administration is really due to Trump himself and his personality or to these bigger factors and what it all means for the future of American democracy? Let me start there.

Moe: I think that there's no doubt that Trump's personality, which is bizarre in many different ways, influences his behavior and has helped to explain some of the threat he poses to American democracy. But I also think it's important, in general, not to over-personalize politics and not to over-personalize the presidency. It's the natural thing to do. There's only one president. There's this one person and it's natural to think that this person's unique characteristics are going to have a big effect on what that person does as president. But that's often a mistake and it completely misses the bigger picture of what's going on.

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Moe: In particular, it misunderstands why we face a crisis of democracy in this country. To see that, let's consider how Trump became president in the first place. His rise to power was propelled by white backlash to diversity but also by disruptive socioeconomic forces, globalization, technological change, immigration that brought economic harm and cultural anxiety to tens of millions of Americans. These are serious problems that our government has for decades been entirely ineffective at dealing with.

Moe: The result has been a surge of populist anger against the system, a system that just doesn't work for them, in their view, and their support for a strongman who can attack that system, our democratic system, and get things done on his own, democracy be damned. These are the conditions that Trump took advantage of in getting himself elected president, and these are the conditions that have shaped his populist, anti-democracy presidency.

The way to understand Trump is not simply as a bizarre personality. He's a populist demagogue, and he does what populist demagogues do across histories and across nations from Juan Peron to Huey Long to Victor Orbán to George Wallace, populist demagogues rely upon a very common playbook. They all do basically the same kinds of things. They embrace the role of strongman. "Only I can fix it," is what Trump said immediately. They attack democratic institutions, the media, the courts, the integrity of our electoral system. They lie and they wage war on the truth. They demonize the other, minorities, immigrants, foreigners, and they use them as scapegoats to blame for our country's problems. They threaten to put their opponents in jail. They purposely create anger, division and grievance.

Moe: Sound familiar? These are all things that Trump has been doing for four years, but the fact is, they all do these kinds of things. These things are not unique to Trump. They're not just due to his personality. Why do all populist demagogues do these kinds of things? They do them because they work in stirring up populist support at a time of growing populist anger. It's a formula. It's a formula that works and it's a formula that Trump has been following.

Moe: This formula is dangerous to democracy and populism itself is inevitably, ultimately dangerous to democracy. Here's the big problem for the United States: Trump has been defeated, but his populist base, which is big and angry and anti-system and powerful is still there, so are the disruptive socio-economic forces, globalization, and all the rest that gave rise to that populist anger.

Other populist leaders are going to come along and take advantage of all that. They will continue to wage war on democracy. Josh Hawley, Ted Cruz and others are doing that right now, already, and it's just going to continue. Our crisis of democracy is not over, just because Trump lost this election. So what can be done?

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Moe: The solution lies in having a government that can do a more effective job of meeting the needs and concerns of its people, but especially those people who are the most alienated. We need to win those people back. One way to pursue that is through new programs for immigration reform, for job training, healthcare, childcare, infrastructure, investment in rural communities and so on. All of these things can help to diffuse some measure of the populist anger and win some people back, but more fundamentally, we need institutional reforms that will give our government a greater capacity for effective performance.

Moe: Our government is inherently ineffective. It's ineffective for reasons that go back to the Constitution. People don't like to hear this, but our Constitution was designed 230 years ago by people who had absolutely no idea about what a modern society would look like and the kinds of challenges a government would need to face, the kinds of problems it would need to solve. And what we need are modernizing reforms that can give us a government for modern times that can take on modern problems.

For that, the presidency is the key. Presidents alone have the national focus, have a national focus and they are obsessed with their legacies. They want to be great. Trump aside, the way to be great is to solve big, important, national problems in ways that work. That's why, traditionally, presidents have been champions of effective government. This is the great promise of presidents: they can make government more effective, and we need to take advantage of that in our institutional reforms.

Moe: Now today, people think the lesson of the Trump years is that presidents need to be much more constrained. Well, that's true. We do have reason to fear presidential power because it's very dangerous in authoritarian hands. Trump has shown that vividly time and again.

In our book, we propose some major constraints. Among them, drastic restrictions on the number of presidential appointments. Certain insulations of the Department of Justice and intelligence agencies from direct, total presidential control; restricting the president's emergency powers; and totally eliminating the pardon power. But we can't just constrain presidents. If we tie presidents up in knots, what we're going to get is a less effective government. What the nation needs is effective government to diffuse the populist threat to democracy.

Moe: For that, we need to take advantage of the promise of the presidency, not just react to the fear. How can we do that? Well, we can expand presidential power in careful, selective, non-dangerous ways. The one big way that we propose in the book is universal fast-track as a means of legislative decision-making. The way that would work is presidents would have the authority to craft legislative proposals, and because they are the champions of effective government, they would have incentives to craft coherent, intellectually, well-justified proposals that actually promise to address, effectively, social problems. They would craft

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proposals, they would send them down to Congress and Congress would be required to vote up or down on those proposals without changing them, and they would be required to vote in a majoritarian fashion in a set period of time, say 90 days. This would really streamline the legislative process. It would make legislation much more central to our government. Congress could still have the authority to pass its own legislation, which the president could veto, if he wanted to, but universal fast-track would really make a difference for the way our government functions.

Moe: Now, politically what the defenders of democracy need to do then, new programs, new reforms, will be very difficult; let's face it. The biggest obstacle is the Republican Party, which will be dedicated to blocking all these things. It's got to be the Democrats that do it, and we don't say that out of partisanship, this is just reality.

Moe: What the Democrats need are big majorities in the House and the Senate, and Biden doesn't have that, but there isn't any substitute for trying to move in this direction. Populism and the socioeconomic sources of populist anti-system anger are the key challenges of our time. They really are, and they need to be diffused if our democracy is going to survive.

Moe: So that, in our view, is the bigger picture. Trump's personality, bizarre and perverse though it is, tells us almost nothing about all that and hides the fundamental forces that are really driving America's crisis of democracy. This crisis isn't, first and foremost, about Donald Trump; it's about populism and about populism's threat the democracy.

Levi: Thank you, Terry. That was very powerfully stated.

Levi: Jack, you've written from a different point of view as a government lawyer and as one of the top people thinking about the legal arrangements around the presidency and the departments. You've written this new book with Bob Bauer called "After Trump," and you proposed a series of reforms to address some of the problems that we've talked about and that have become evident during the Trump presidency.

Levi: Can you talk about your proposals and what you see as the most critical things that we need to do?

Jack Goldsmith: Sure. Thank you very much, David, for having me on. I'm honored to be in this great group.

Goldsmith: I want to start off by agreeing with most of what Terry said, because we share most of his premises. We do and say that Trump is a classic populist demagogue and he evinces all of the classic characteristics of a populist demagogue. I would disagree a little bit about — I do think Trump has some unique personality traits

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that go along with his demagoguery that have been consequential, but I fundamentally agree that Trump is a classic demagogue and he evinces that behavior. And it's been a shock to the system because the system, for some of the reasons Terry talked about and some of the reasons I'll talk about, was not prepared for that.

Goldsmith: I also agree, we also agree with Terry that there's a danger of over-constraining the presidency, and we're very much not in favor of fundamentally weakening the presidency for related reasons to what Terry said. We believe that the president and the presidency and modern separation of powers is the engine — we agree here with Schlesinger — is the engine that makes separation of powers grow, work and that the fundamental problems that populism present is going to require strong presidential leadership or is going to only be fixed with strong presidential leadership.

We have a different focus. Our focus is not on — we accept that populism is going to be with us. We don't propose ways to fix the populist problem as Terry does, we assume for purposes of our argument that there are going to be populist presidents potentially as far as the eye can see, or at least populist pressures on the presidency. Could be right, it could be left. It's not clear which way that will shake out. And we ask ourselves, given that, what can be done to fix some of the abuses and sex some of the abuses that populist presidency present to our government.

Goldsmith: I think it's important to be clear on the type of challenges Trump presented to presidential accountability and the rule of law. Trump did not commit the abuses of his predecessors. Unlike President Obama, he wasn't engaged in super aggressive exercises of administrative power with imaginative theories about the Take Care Clause, about why he could regulate more aggressively in the face of congressional recalcitrance.

Goldsmith: Trump did a little bit of that, but not as much as Obama. He was not as aggressive, in terms of war powers innovation as his predecessors Bush and Obama. He did not engage in Commander in Chief override of statutes, a very aggressive use of constitutional power the way George W. Bush did. In general, in many respects, Trump was actually quite incompetent at exercising the powers of the presidency and quite weak in exercising some powers of the presidency.

What Trump did in terms of his characteristic abuses were abuses of lawful power that violated norms, by which I mean non-legal constraints on the presidency. The famous 1970s reforms of the presidency following Watergate and the Church Commission, and the Vietnam War, the cluster of reforms there, they did lots of legal reforms, but a lot of reforms of the presidency were norm-based. In other words, not by law, not in terms of legal restrictions, but by non-legal restrictions that work through informal social sanctions.

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Goldsmith: These things were — Trump just ran through these. He did so in a way, this is Daphna talked about this, in ways that kind of mixed his public duties with his private self-interests. These were his characteristic norm-breaking moves. Not disclosing his taxes or finances, mixing his business with, profiting off his business and mixing that with public office. Intervening in cases in the Justice Department to protect himself. Urging the Justice Department to prosecute his political opponents. Using control over diplomacy and law enforcement to nudge foreign powers to help him win the election. Exercising the pardon of power in ways that are, in some respects, not unlike the extreme abuses of prior presidents, but in other ways, far beyond what the prior presidents have done.

These are all things that really, frankly, were under-regulated and who had been under-regulated because and as a scholar of the presidency for the past 25 years, one of the things I've learned from the Trump presidency is just how much... We kind of knew this, but he's really called into stark relief just how much norms and assumptions about the general reasonableness of a president, were kind of assumptions for the system we had in place.

Goldsmith: One might think that all of these abuses Trump committed will just simply, we don't have to worry about it once he's gone. I don't think Joe Biden is going to present these problems at all, and to the extent he does a little bit, it won't be to nearly the same degree, perhaps on DOJ independence norms and things like that, all presidents tend to skirt that a little bit.

Goldsmith: We don't think that this is a problem that shouldn't be fixed. It's not a problem that's just going to snap back. We don't think that we can rely on the norms snapping back.

The book presents a series of reforms, dozens of them. We get into the details, and I'm not going to get into the details here, but the reforms take basically two forms. One is, making statutory reforms to regulate things that used to be regulated by norms, but they can be regulated by statute, by legal restrictions, enforceable legal restrictions.

Goldsmith: For example, we believe that tax disclosure can be mandated. Every president has complied with the norm of tax disclosure in candidates for 50 years. We believe that that can be constitutionally mandated. Same with conflict of interest rules. Presidents have complied with the conflict of interest rules as a matter of course, even though they weren't required. We think that can be made into — can and should be made into a statutory restriction.

Goldsmith: We think that the rules on foreign interference and elections need to be, there are many loopholes that need to be tightened up there. We had two elections in a row where that was a problem, and as the Mueller Report showed, that the law is full of loopholes. The pardon power can be, in its extreme cases, regulated, at least to

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the extent it's being used for bribery and obstruction of justice. We think that should be done.

The one set of reforms are statutory reforms and all of the reforms I just mentioned are reforms that, in theory, have bipartisan support. I mean these are basically norms that have been supported in a bipartisan way for 50 years. So they're at least conceivable, it's at least conceivable that we could see statutes on these matters. And there's actually interest in Congress, mostly on the Democratic side, for this.

Goldsmith: The second set of reforms are internal to the executive branch. One challenge of the executive branch is that you can't — it's hard with regard to some matters to statutorily regulate the presidency because the constitution gives the president control over these matters. So most issues related to DOJ independence, special counsels, non-politicization of law enforcement, we propose a series of reforms to strengthen the norms there.

We agree with Terry's premises, we have a completely different focus. I'm actually skeptical, or at least I don't think I have the capacity to see how we're going to bring about the changes that Terry contemplates, precisely because we're in this populist moment so it's hard to see how we get through it, but there are quick changes in American historical life and it's conceivable.

Goldsmith: I'll just end on an optimistic and a pessimistic note. The optimistic note is, I just want to emphasize that there's not a lot of skepticism about the operation of norms and about how legal constraints constrain the presidency. We're really interested in constraining the president, but also his subordinates through whom he has to carry out these actions. I just want to say that these norms have operated with much more consequence than people have realized. All you have to do, I'll just give this one example, is to read Volume 2 of the Mueller Report, where Trump was trying to get all of his senior subordinates to basically fire Mueller, stop Mueller, get Sessions to un-recuse and the like — one after the other after the other just refused to do so through a combination of norms and legal constraints, obstruction of justice statutes. In that and other contexts, norms are much more consequential and can be made more consequential than we realize.

Goldsmith: The pessimistic conclusion is, and we don't have any illusions about this in the book, at some point the law runs out. If Trump had in 2017 surrounded himself with the lawyers he surrounded himself with now and if he were a more clever president, which he wasn't, and if he were more sophisticated in wielding executive power and not so self-defeating, he could have been much, much, much more destructive.

Goldsmith: At some point, law is not going to prevent a more clever president from getting more compliant who is elected on a populist platform and who has the support of

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a large chunk of the country who insists on these populist mandates. At some point, the law is going to run out and so we have no illusions that law can ultimately fix this program.

Goldsmith: I agree with Terry that ultimately, there are larger, structural things that need to be done to get the right kind of president exercising the right kind of powers in office. That's not our focus and I have to say, unfortunately, very pessimistic about that project.

Levi: Thank you. Thank you. That was really interesting and you have different takes on the issue that we're facing, although, there were a lot of points of overlap. I think what I might do is ask you, as a group, to address three things I think we haven't really talked about yet and then give you a little bit of time at the end each one of you to say anything that has been on your mind that may have been prompted by the discussion.

Levi: I'm thinking of three things. First, we haven't said much about the political parties and that's, David, you've said something about them, but traditionally, that's been a really important part of our governance system and it's been one of the ways in which disparate peoples under one banner have come together. There's been kind of a melding process through the parties where there were conservative Democrats and there were liberal Republicans so maybe we don't see so much of that anymore, but let's talk about that.

Levi: The phenomenon of the internet, I think, is important. I know, Jack, you've done a lot of thinking about this, but this has opened up our public discourse to a lot of mischief. It's difficult.

Levi: Then could we talk a little bit about federalism? Some of us are seeing in other contexts, just as an example, the state attorneys general have become a real force in this country in a way that they weren't, say 10, 20 years ago. They're all very well organized now. They're organized in there's the Democratic attorneys general and the Republican attorneys general and the states are big. A state like California is a big state that can do a lot.

I'm just wondering, and Terry might want to address this a little bit, if we can't have super effective government at the federal level, at the national level, maybe we can have it more at the state level, is that a possibility? At least I think some people think that's part of our tradition.

Levi: Why don't we start with political parties? What's happened here and why aren't they helping us more [to] deal with some of the problems of effective government and bad presidents? Who wants it?

Kennedy: Well, David, I'll take the cue, just by way of dilating a bit on something I said earlier about the role of primaries. Primaries are an artifact or relevantly recent

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historical artifact in our political culture. Though I agree with others that a demagogue populism is a familiar political style for centuries, not only in this country but in a lot of places, seems to me that the deterioration of the intermediating role of political parties as players in our political discourse and practice is a relatively recent development and it has to do with this spasm of shifting from party nominations to primaries as a way of nominating political candidates that really dates to the 1970s.

Kennedy: So if political parties — which have dubious, if any, constitutional standing — if they were a version of a norm or a normative practice that channeled and guided and contained and made responsible political impulses of one sort or another, that function is seriously diminished in the last half century or so. And well, Terry said it's heretical to cast any aspersions whatsoever on the founders, even though they were 200 and some odd years back and couldn't envision the society we live in.

Kennedy: It's even more heretical to say what I'm about to say, that primaries, defended in the name of direct democracy, may be an illustration of the fact that there is such a thing as too much democracy. It makes for more volubility and passion in the system and makes governments [inaudible 54:33].

Moe: Yeah, I'd like to say something too just about the Republican Party. Again, this is not a partisan statement, the Republican Party has become a threat to democracy. It goes back to Newt Gingrich, who really got the Republicans off on this path of demonizing their opponents and saying that politics is war. All is fair in love and war. No kidding.

Moe: Along the way, this was in the midst of the Southern Realignment where the South became Republican. The South is very conservative; it's populated heavily by evangelical Christians. There are many people there who are racists. Not everyone, of course, but there are many. This is a major part of the populist base of the Republican Party. This base is ultimately anti-democratic.

Plus, the Republicans face a demographic threat going forward as this country is increasingly filled with minorities. Minorities are overtaking whites, slowly but surely. There is a white backlash. This backlash is occurring within the Republican Party. The Republican party has electoral incentives to suppress the vote and that's what they're doing very aggressively with voter ID laws, purging the voter registration rolls, trying to do away with early voting, trying to do away with mail voting, all this stuff. You wait, in the next several years, they're going to be very aggressive about that following up on this "stolen election" narrative, which is completely false.

Moe: If you have a party in a two-party system that is itself threatened by democracy, is anti-democracy, that is a formula for taking democracy down and that is a theme of the Levitsky and Ziblatt book, "How Democracies Die," which I think

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is one of the best books on politics that's been written in recent times. Everybody should read that.

Moe: What's happened to the Republican Party is a really unfortunate thing for the whole country. It's a terrible thing for this party, which has such a proud tradition. They've destroyed conservatism and they've destroyed the Republican Party and turned it into something that's actually dangerous.

Levi: Speaking of the rhetoric, I don't think she would mind me saying this, I recall once that Justice O'Connor told me the Court had had a meeting with some members of Congress, some of the leadership. This is going back now some years when she was still on the Court. They were attempting to have a discussion, because the branches, obviously, need to work together and to understand one another. They're not only constantly pushing back on one another, they're also intended to collaborate, to some degree, while maintaining their independence.

Levi: At a luncheon at the Court, she said that Tom DeLay, who was then I think the Speaker or very high up in the leadership of the Congress, he leaned over the table and he said to her, "Justice O'Connor, you don't understand, you and I are enemies," and she said to me, "David, can you even imagine that he thinks that we are enemies?" I think that does illustrate your point. That rhetoric is really frightening.

Levi: Let's talk about the internet a little bit because the two things are related. The internet provides a space for people to anonymously and sometimes maybe it's a robot or it's not even a person and they say just the worst things. All of us probably have an internet presence and I think we've trained ourselves never to look at the comments because it's just like dealing with road rage or something of that sort.

Levi: Jack, you're an expert on this, I mean is the internet part of this picture or is it just, again, kind of a symptom?

Goldsmith: I think it's more than a symptom. I think it's accelerated and exaggerated all of the tendencies we're talking about for a whole bunch of reasons. It allows the population to separate itself into like-minded bubbles. I think it's the rise of the internet and social media and the ability to organize what my colleague, Cass Sunstein, 20 years ago called the Daily Me, which you get things you like and you exclude things you don't like, really permits citizens to create alternate realities that I think is at least related to this basic cleavage in this country about what the facts are.

I mean there's so much disagreement among different groups on what even reality looks like. That of course it also exacerbates or it allows for churning this idea of the evilness of the other. It lets in or fosters or enhances all of the worst aspects of human nature. You talked about anonymous comments that allows

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people with no voice to think that they're participating and a lot of them do so in ways that are very destructive. It allows for injurious speech because people can gang up on others in ways that we used to not be able to do.

Goldsmith: For these and other reasons, I just have no doubt the nature of speech these days has exacerbated all these problems. It's hard to know what's cause and effect, but it's definitely been an accelerant.

Renan: I want to add one note on the internet. I agree completely with Jack's diagnosis and one other thing that I would add is that the internet is also really driving a personalization of presidential power. In some ways, the president no longer needs the institutional apparatus of the presidency to communicate and to create a lot of, at a minimum, confusion about what is official conduct? When is it official conduct when the president speaks through Twitter? That creates, I think, a host of problems for both political and legal accountability as well.

Moe: I obviously wanted to point out that, so Jack is at Harvard and you may know these guys, there are three guys at Harvard, Benkler, Faris and Roberts, who have produced what I think is the single best book on the political impact of the internet called "Network Propaganda." It's recent. It's based upon this gigantic study of millions of stories, literally, and a sophisticated analysis of them. What they show is that the media ecology really consists of two parts. It's not symmetric. It's not like misinformation and propaganda comes from both sides. It comes from the right. There's a right wing propaganda network, with FOX News at the center, and then there's everything else, including the Wall Street Journal. Then everything else is governed by professional norms of truth and verification and sanctions for people who say things that aren't true, whereas the right wing propaganda network is not. They spew out misinformation and propagate it.

Moe: The result is that there's a disproportionate impact on people on the right who are siloed. Many of these people are just watching FOX News, and that message, however untrue, just gets pounded home and you have tens of millions of people who believe these things, and that's exactly what's happened during this election with this election fraud narrative, which is entirely untrue, yet 70% of Republicans believe it. Why is that? They're getting it from their political leaders, but also from FOX News and Newsmax and One America and all the others that make up the right wing propaganda network.

Moe: I think it's important for all of us to understand what this media ecology looks like and not to think, well yeah these things happen on both sides. They don't. There's a structure to it and that structure is really devastating for democracy because we have so many people who believe things that aren't true, and the war on truth is taking a toll on America.

Levi: Let's turn to federalism. Is that one of the ways that can we be somewhat more effective in our governance in a way that perhaps people would accept if it were

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more closer to them at a lower level than what it is now, a very large and complicated society? David.

Kennedy: Well, I would say I agree with you emphasizing the word you used, somewhat. As it happens, about two weeks ago, I sat through the day-long meeting of the Western Governors Association, by Zoom, of course. At one level, it was really inspirational. These 17 plus governors, because some of the Pacific Islands were represented as well, the spirit of mutual respect and regard and seeking for grounds for collaboration and so on was just palpable through the whole day-long exercise.

At that level, to repeat, it was quite inspirational, but if we think in the frame of how to make the institutions of government commensurate with and scale up to the character of the issues that we need governments for, the limits on federalism are obvious. No state can make monetary policy. States can't conduct either individually or in concert foreign policy. They're no good whatsoever as has just been demonstrated in coordinating public health policy in the face of a pandemic. And they can only do very limited things — here in California we think we've done a lot but it's still, in the great scheme of things, very limited — about climate change, which is the single greatest existential threat to us today.

Kennedy: I think we can wax rhapsodic about how governors have to govern and balance their budgets and seek grounds for cooperation. That's all good. But the states are just not political vehicles commensurate with the kinds of issues we need good governance for.

Levi: We're sort of at the witching hour. Why don't I go around the room, so to speak? Terry, I'll start with you. Parting reflections? It's always good to end with a little bit of optimism, if we can, and — go ahead. Parting thoughts.

Moe: Me? Optimism? I don't know that I can do that. Look, I think the reality is, it's a wonderful thing in my view that Donald Trump lost this election. God help us if he had won. I think that we were on a downward slide. I don't know that American democracy could have survived four more years of Donald Trump, so we dodged a bullet, and that's great.

Moe: But I do think that the path forward is very difficult because his populist base is still there. The problems that gave rise to that base are still there and we need to have a government that can step up and help these people and reduce the populist anger, but what we have is a closely divided government that has a very difficult time acting and doing anything. So I'm afraid that these conditions will continue and as people get more and more frustrated with a government that can't act, it really just bolsters the populist case.

Moe: So I don't look forward and see a lot of sunshine.

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Levi: Daphna.

Renan: Well, a couple thoughts. One is just I think both Terry and Jack have put on the table legislative visions of where to go, if we're thinking about this reform project. Terry's talked about the substantive programmatic policies that need to occur. Jack's talked about reforming the office of the presidency. I would put a third bucket on the table that, in some ways I think should be at the forefront of where legislative priorities go and that's democracy reform and voting rights reform. Because I think part of the problem is a real broken system of democracy that is not letting the issues where there is common bond really drive the agenda of American government.

Renan: In some ways where I would like to see Congress exercising its political capital is on democracy reform and voting rights reform and I think that will rebound to the problems of the presidency that we've been talking about as well.

Levi: Jack?

Goldsmith: I'll try to say something optimistic, perhaps not going forward but about the last four years. Look, I've just written a 420-page book about how bad Donald Trump was and how much we need to fix things, but I think it's really worth reflecting about how well the system held up. I'm not saying it operated perfectly and I'm not saying Trump didn't do enormous damage, but just think about the assault on the electoral system leading up to the election and especially since the election. Think about the president of the United States using every coercive tool at his disposal to effectively try to break the law and steal the election. Think about the institutions, the independent courts, and think about people in the states, including Republicans, who withstood the pressure. It really is a remarkable thing that the institutions worked as well as they did.

It's also remarkable, in my view, that Trump didn't cause much more damage. That he wasn't able to prosecute his opponents. That he wasn't able to shut down Mueller and a whole bunch of other things that he tried to do and he couldn't do because the institutions, even though again he did great damage, they still held.

Goldsmith: I don't know, that doesn't give me optimism for the future, but I don't think we should be entirely pessimistic about our constitutional system and how well it's worked in the face of what has been literally the greatest stress test it's ever experienced, in my judgment, outside of something like World War II.

Levi: David?

Kennedy: Well, I'm going to give my last word to the greatest of all American historians, Henry Adams. Daphna, you made me think of this as you were speaking. He wrote, I'm quoting from here, "The great object of terror and suspicion to the people of the 13 provinces was power. Not merely power in the hands of a

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president or a prince, of one assembly or several, of many citizens or few, but the power in the abstract, wherever it existed and under whatever form it was known."

Kennedy: If you go back to those notes on the Constitutional Convention, among the phrases that you'll encounter repeatedly, whenever people like Wilson and Hamilton advocated for a more robust executive, they were taunted with the notion that they were advocating, if they were successful, they would give birth to what was called the fetus of a monarchy. Now that's just a rhetorical rendition of that fear that Adams is talking about, about power concentrated in any place.

Kennedy: Going back to notion of the fetus of monarchy, thinking of that and thinking about your two-body problem and how it comes from the tradition of two bodies of the king, how about if, Terry, if we can somehow cultivate a, let's say, pubescent monarchy or maybe even adolescent monarchy. No more than that. Not a full-grown monarchy, but something that actually concentrated more effective power in a way where it could be responsibly used.

Levi: Well, thank you all very much. I'll just say in parting, I'm an optimist. I think that's maybe more based on my own personality than anything else, but I will say that for almost 20 years I was a U.S. district judge in the Eastern District of California and had the opportunity to pick a lot of jurors over the years. When you have that opportunity just to have a dialogue with everyday Americans chosen at random from the Central Valley, you hear a lot of inspirational stories from people about how they're living their lives and taking care of their parents, or their children or other people, and it's extremely moving and you get a sense of a society that has a huge amount of deep patriotism and love of country. I just don't think Americans want to see this democracy destroyed.

Levi: Whatever it takes to preserve it and protect it and make it better, I think that's what the American people want. I'll be very surprised and very disappointed, and maybe very dead so I won't be here to see the rest of the story, but I think it's going to be a good one. But we'll just have to see.

Anyway, I'm optimistic today. Yesterday wasn't so great, but today seems like a better day. Thank you. You're all so thoughtful.

Levi: I think anybody listening to the four of you has to give some consideration to the fact that our great universities and some of our institutions are just so magnificent, and that maybe out of these places, focusing on these problems that I think are solvable. We're not facing slavery right now. We have problems but they're not of that magnitude, actually. Some of them are fairly low-hanging fruit, at least from my point of view. I think we can fix them.

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Levi: This has been Beyond COVID, produced by the Bolch Judicial Institute at Duke Law School and the American Law Institute. We've just had a wonderful discussion here today. I'm David Levi, thanks for joining us.

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