

ROBERT W. KASTENMEIER LECTURE
**AMERICAN DEMOCRACY AND THE RULE OF
LAW IN PERIL**

HON. J. MICHAEL LUTTIG* & CHARLIE SYKES**

*The Robert W. Kastenmeier Lecture****
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Sykes: Thank you, Dean Tokaji, for that kind introduction. Judge Luttig, it is good to talk with you again, to be here at the University of Wisconsin talking about weighty constitutional issues, and to be talking about a former President who paid hush money to a porn star, who absconded with documents, and who faces a legal reckoning for January 6th.¹ I want to tee that up first. It's been more than three years since the attempted overthrow of the government on January 6th. Where are we now?

Judge Luttig: First, thank you Dean for that introduction—it means the world to me. It's an honor for me to be here for the Robert Kastenmeier Lecture.

I had the great privilege of working with Congressman Kastenmeier many years ago, when I began my service in Washington, D.C. with Chief Justice Warren E. Burger. I was an intern for the Chief Justice before I went to law school. The Chief Justice and I became fast friends beginning in 1976, almost forty-eight years ago.

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1. Amy O'Kruk & Curt Merrill, *Donald Trump's Criminal Cases, in One Place*, CNN, <https://www.cnn.com/interactive/2023/07/politics/trump-indictments-criminal-cases/> [<https://perma.cc/Z9ZF-NQNN>] (Sept. 13, 2024).

The Chief Justice loved Congressman Kastenmeier. The Chief Justice was very active in the administration of the courts² and at that time, the Congressman was chairman of the Subcommittee on the Courts. The Chief Justice and the Congressman struck up a friendship, as they worked together to provide for the needs of the Federal Judiciary.³ Together, the two men accomplished much of what the Chief Justice wanted to accomplish for the administration of the federal courts, including establishment of an annual meeting of the three branches of government in Williamsburg, Virginia, to discuss the needs of the federal courts.⁴ The Congressman and Chief Justice were very proud of this interbranch meeting of the Judiciary and the Congress.⁵

The Dean did not know about all of this when he asked me to come today, but of course I did, and when I received the Dean's kind invitation, I knew that I had to be here today to honor Congressman Kastenmeier and to honor my mentor and former boss, Chief Justice of the United States Warren E. Burger, and the warm and enormously productive friendship of these two public servants.

Now, just a word before we get started. I understand that all of you are here to hear Charlie Sykes, not me. I just want to confess that I, too, am here today to hear what the great Charlie Sykes has to say!

So, with that, Charlie has thrown the first ball.

I told Congress in my testimony before the House Select Committee to Investigate the January 6 Attack on the United States Capitol that "Donald Trump and his allies and supporters" were and "are a clear and

2. Adam Clymer, *Robert Kastenmeier, Liberal Voice in House for 32 Years, Dies at 91*, N.Y. TIMES (Mar. 26, 2015), <https://www.nytimes.com/2015/03/21/us/robert-kastenmeier-liberal-house-voice-dies-at-91.html>; NCC Staff, *Examining the Legacy of Chief Justice Warren Burger*, NAT'L CONST. CTR.: CONST. DAILY BLOG (June 9, 2024), <https://constitutioncenter.org/blog/examining-the-legacy-of-chief-justice-warren-burger> [<https://perma.cc/WRN2-T92D>].

3. Congressman Kastenmeier chaired the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice. Michael J. Remington, *Robert W. Kastenmeier: Copyright Legislator Par Excellence*, 55 LAW & CONTEMP. PROBS. 297, 297 (1992); see also Clymer, *supra* note 2.

4. Mark W. Cannon & Warren I. Cikins, *Interbranch Cooperation in Improving the Administration of Justice: A Major Innovation*, 38 WASH. & LEE L. REV. 1, 1-2 (1981).

5. See *id.*

present danger to American democracy.”⁶ It is obvious for you lawyers, but for you nonlawyers in the audience, that was a reference to Justice Oliver Wendell Holmes’s famous statement.⁷ In any event, a year after January 6th, *The New York Times* asked me the same question that Charlie just asked: Where are we now?⁸ And I said that, if anything, the former President and his allies are a clearer, more imminent danger to American democracy that day than they were a year prior.⁹

So where are we today, Charlie? The threat is upon us. It’s not just imminent—it’s upon us, for all the reasons we all know. The former President of the United States of America committed possibly the gravest offenses against the United States of America by an incumbent President other than treason when he attempted to overturn the 2020 presidential election and he has denied that dark January day for almost four years now, bringing himself to the upcoming presidential election.¹⁰ For those four years, he’s categorically denied that he lost the election, notwithstanding that every single recount, review, and audit showed that he lost fair and square.¹¹ He’s denied it all to this day. And today, millions of Americans no longer believe in our elections and many millions of those Americans will never again believe in American elections.¹² Many Americans have even begun to question whether democracy is the best form of self-government for America.¹³

6. SELECT COMM. TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE U.S. CAPITOL, FINAL REPORT, H.R. REP. NO. 117-663, at 40 (2022) [hereinafter JAN. 6TH COMM. FINAL REPORT].

7. See *Schenck v. United States*, 249 U.S. 47, 52 (1919).

8. See J. Michael Luttig, Opinion, *The Conservative Case for Avoiding a Repeat of Jan. 6*, N.Y. TIMES (Feb. 14, 2022), <https://www.nytimes.com/2022/02/14/opinion/electoral-count-act.html>.

9. See *id.*

10. See Daniel Dale, *Fact Check: Trump Lies that Jan. 6 Was ‘an Insurrection Caused by Nancy Pelosi,’* CNN (Feb. 8, 2024, 2:22 PM), <https://www.cnn.com/2024/02/08/politics/fact-check-trump-january-6/index.html> [https://perma.cc/4Z2D-B84C].

11. See *Results of Lawsuits Regarding the 2020 Elections*, CAMPAIGN LEGAL CTR., <https://campaignlegal.org/results-lawsuits-regarding-2020-elections> [https://perma.cc/8LQH-35AQ].

12. See Ben Kamisar, *Almost a Third of Americans Still Believe the 2020 Election Result Was Fraudulent*, NBC NEWS: MEET THE PRESS BLOG (June 20, 2023, 11:50 AM), <https://www.nbcnews.com/meet-the-press/meetthepressblog/almost-third-americans-still-believe-2020-election-result-was-fraudule-rcna90145> [https://perma.cc/5ZMH-DXSN].

13. See Craig Helmstetter & Terrence Fraser, *Poll: A Strong Majority of Americans Endorse Democracy, But Some—Especially Among Younger Generations—Are Skeptical*, APM RSCH. LAB (Jan. 18, 2023), <https://www.apmresearchlab.org/motn/poll-americans-belief-in-democracy>.

The former President pushed the Constitution of the United States beyond its limits: not *to* its limits, *beyond* its limits. So, not surprisingly, in a prevail of the rule of law, at least for the moment, the United States of America has prosecuted the former President for those grave offenses that he committed against the United States on January 6th.¹⁴ Incidentally, along the way, the former President of the United States purloined the nation's secrets from the White House, refused to return them to the custody of the United States when he was caught with the classified documents, and then obstructed the investigation into the theft of those classified documents—all on the fatuous argument that the nation's secrets belong to him personally and that he had declassified them in his own mind.¹⁵ Never before, since the founding of the country, has anyone even thought to make such a preposterous argument.

He is being prosecuted for that taking of state secrets and he is also being prosecuted in several states both for his attempt to overturn the 2020 presidential election on January 6th and for incidental crimes to those committed against the United States; for defrauding the State of New York and his businesses; and for paying hush money to Stormy Daniels.¹⁶ And today, he is the presumptive Republican nominee for the presidency in 2024. It could not be any more perilous for America's democracy, for the Constitution, and for the rule of law.

Sykes: Let's come back to some of that in a moment, including what the U.S. Supreme Court recently did about his disqualification under the Fourteenth Amendment.¹⁷ I believe you have some thoughts about that. And if people have not seen it, there's a new piece in *The Atlantic* that came out this morning by Judge Luttig and Laurence Tribe.¹⁸ The only thing that's surprising about this article is that it did not burst into flames the moment it was printed out.

14. O'Kruk & Merrill, *supra* note 1.

15. *Id.*; see also Andrew Goudsward, *US Pushes Back on Judge over Trump Claim that Classified Records He Kept Were Personal*, REUTERS (Apr. 3, 2024, 5:29 PM), <https://www.reuters.com/world/us/us-pushes-back-judge-over-trump-claim-that-classified-records-he-kept-were-2024-04-03/>.

16. O'Kruk & Merrill, *supra* note 1.

17. *See Trump v. Anderson*, 144 S. Ct. 662, 666 (2024).

18. J. Michael Luttig & Laurence H. Tribe, Opinion, *Supreme Betrayal: A Requiem for Section 3 of the Fourteenth Amendment*, ATLANTIC (Mar. 14, 2024), <https://www.theatlantic.com/ideas/archive/2024/03/supreme-court-trump-v-anderson-fourteenth-amendment/677755/> [<https://perma.cc/J8MP-6YV6>].

It occurs to me that as bad as January 6th and its aftermath were, and as bad as what it might indicate will be coming in the future, it could have been worse on January 6th. I want to go back to January 6th, a pivotal moment for the country but also for you personally. The morning of January 6th, you put out what has been described as “the tweet heard round the world.”¹⁹ Keep in mind, at this point, you had no thought that you were going to have the strange new respect with the strange new folks you’ve been hanging around with lately. You were known as a very conservative rock-ribbed friend of Justice Scalia. You put out a tweet saying a message to Vice President Mike Pence: The Vice President has no power to alter election results.²⁰ You wrote that “[t]he only responsibility and power of the Vice President under the Constitution is to faithfully count the electoral college votes as they have been cast.”²¹ I know you’ve told the story before. But this is kind of an extraordinary moment because I think we only realized after the fact how close a run this was, that there were people whispering in Mike Pence’s ear on January 6th, telling him he could refuse to count the electoral votes.²² Walk me through how you got involved in that and how the tweet came to be.

Judge Luttig: Charlie, I’m going to give you, first, the final chapter of the answer to that question, the final chapter that I didn’t know and the country didn’t know until a year ago, when details emerged from Special Counsel Jack Smith’s investigation about handwritten notes by the Vice President of the United States of America, Mike Pence, in which Pence wrote that he had decided he would not preside over the Joint Session of Congress on January 6th.²³

Let that settle in for a moment. The most important role for the Vice President prescribed in the Constitution is that he or she preside over the Joint Session in which the electoral votes for the American presidency

19. Charlie Sykes, *Judge Luttig Has a Warning for America*, BULWARK (Mar. 29, 2023), <https://www.thebulwark.com/p/judge-luttig-has-a-warning-for-america> [https://perma.cc/SLN8-MMQ4].

20. @judgeluttig, X (Jan. 5, 2021, 8:53 AM), <https://x.com/judgeluttig/status/1346469788231454722> [https://perma.cc/6VGW-5NVQ].

21. @judgeluttig, X (Jan. 5, 2021, 8:53 AM), <https://x.com/judgeluttig/status/1346469787329646592> [https://perma.cc/FLM5-RVM8].

22. JAN. 6TH COMM. FINAL REPORT, *supra* note 6, at 456–61.

23. Katherine Faulders, Mike Levine & Alexander Mallin, *Pence Told Jan. 6 Special Counsel Harrowing Details About 2020 Aftermath, Warnings to Trump: Sources*, ABC NEWS (Nov. 28, 2023, 10:27 AM), <https://abcnews.go.com/US/pence-told-jan-6-special-counsel-harrowing-details/story?id=105183391>.

are counted. Then—Vice President Mike Pence wrote a note to himself that he had decided that he would not preside over the Joint Session of Congress on January 6, 2021.²⁴ When I read the Vice President’s handwritten note, I told my wife that we came within that much [motioning]—a whisker—of a civil war in America.

Sykes: What would have happened if Mike Pence had caved to Donald Trump’s demands? In the alternate reality where you didn’t speak out and Mike Pence refused to count the electoral votes, what would that have meant? You told the House January 6th Committee that the nation “would immediately have been plunged into what would have been tantamount to a revolution within a paralyzing constitutional crisis.”²⁵ What would that look like?

Judge Luttig: Charlie, even as I hear those words today, they are frightening beyond words. I essentially went into isolation for three or four months to prepare myself for my congressional testimony, because I understood the gravity of the moment and therefore the gravity of my testimony. Every day, I would get up and, for three hours, read every single word that had been written overnight about January 6th, including all of the long form journalism and all of the brilliant writing that was done by scholars of the Civil War period.

Then, sure enough, that was the first question asked of me the day of my testimony by the Vice Chairwoman, Representative Liz Cheney.²⁶ I steeled myself, slowly moved up to the microphone, and spoke those words from memory—verbatim—that I had written in my prepared testimony, which I had released that morning to CNN, unbeknownst to the Committee.²⁷ Liz Cheney asked me that very question, and you can rest assured that I had put hundreds of hours of thought into each and every deliberate word of my answer to that question.

I had been asked for months by all of the national media what would happen if Vice President Pence refused to count the electoral votes as

24. *Id.*

25. *Hearings Before the Select Committee To Investigate the January 6th Attack on the United States Capitol*, 117th Cong. 657 (2021–22) (statement of Judge J. Michael Luttig) [hereinafter *Jan. 6th Hearings*].

26. *Id.* at 620–21 (statement of Rep. Liz Cheney).

27. *Exclusive: Read Judge Luttig’s Statement to January 6 Committee*, CNN (June 16, 2022, 7:58 AM), <https://www.cnn.com/2022/06/16/politics/read-luttig-statement/index.html> [<https://perma.cc/AX9B-TGU4>].

they had been cast by the states and instead yielded to President Trump's demand that he overturn the election in his favor. In my response, I told the Committee that there would have been no government official or branch of government that clearly had the constitutional power to address that moment.²⁸ Literally under the Constitution, no one in the government of the United States of America would have had the authority to decide what to do. Of course, all three branches would have denied the power of the other branches to decide. The result would have been governmental paralysis. A paralyzing constitutional crisis.

The Constitution of the United States never contemplated such a circumstance and therefore does not provide for it. The paralysis of the three branches of government is a constitutional crisis, from which the country would not have been able to extricate itself for months and months, if even then. All the while, no one would have known who the leader of the free world was.

Sykes: Well, as you know, in the last three years, there's been a lot of wishcasting that the courts would come and save us. So, let's fast forward to this moment right now, where the U.S. Supreme Court ruled nine-to-nothing that Section 3 of the Fourteenth Amendment does not disqualify Donald Trump from the presidency, or anyone else involved in the insurrection.²⁹ You were one of the leading advocates for saying that the plain language of the Fourteenth Amendment applied to what Donald Trump did on January 6th,³⁰ and the Court obviously had a different opinion. You have a piece in *The Atlantic* today, in which you described the Court's ruling as a grave disservice, a stunning disfigurement of the Fourteenth Amendment.³¹ You said the Court impressed a historical misinterpretation that defies both the plain text and its original meaning. Those are the milder words you used to describe the decision and what you actually think about this.

So, let's talk about the Supreme Court. You talked about the lessons of the Civil War, post-Civil War, and the Fourteenth Amendment. Why do you think the Supreme Court got it so fundamentally wrong?

28. *Jan. 6th Hearings*, *supra* note 25, at 622–23.

29. *Trump v. Anderson*, 144 S. Ct. 662, 670–71 (2024).

30. Devan Cole, *Retired Conservative Federal Judge Urges Supreme Court to Disqualify Trump from Office*, CNN (Aug. 19, 2024, 1:02 PM), <https://www.cnn.com/2024/01/29/politics/luttig-conway-supreme-court-trump-insurrection/index.html> [<https://perma.cc/5YTR-JP6S>].

31. Luttig & Tribe, *supra* note 18.

Judge Luttig: Charlie, the Court didn't get it fundamentally wrong. The Supreme Court of the United States refused to decide the question. I had previously said that there was no legitimate off-ramp to deciding whether the former President is disqualified under Section 3 of the Fourteenth Amendment and no legitimate way to say that the former President was not disqualified from holding the presidency again under Section 3 of the Fourteenth Amendment.³² The case was argued on February 8, 2024, for two hours.³³ It was the most remarkable oral argument ever had in the Supreme Court of the United States for this reason: For two hours, not one Justice, and certainly not the Court collectively, evidenced any serious interest in any one of the four or five momentous constitutional questions presented.³⁴ Interestingly, one of my former law clerks argued the case—Jonathan Mitchell.³⁵

During that day, the Justices, individually and repeatedly, would ask Jonathan questions like, “If you take this provision of the Constitution and this one and this one, seems to me, Mr. Mitchell, that the way these provisions intersect and overlap pretty much resolve the case, in favor of your client.”³⁶ The Justices were pinpoint specific with the constitutional provisions they referenced. Every single time my law clerk said to the Justice posing the question, “Well, Your Honor, actually that's not helpful to my client.”³⁷

He also faced this line of questioning from two Justices: “Mr. Mitchell, we're (they didn't say mystify, but that was the import) mystified that you haven't really spent any time at all on your leading argument, which is that a President, and therefore the former President, is not an officer of the United States within the meaning of Section 3.”³⁸

32. Brief of Amici Curiae J. Michael Luttig, Peter Keisler, Larry Thompson, Stuart Gerson, Donald Ayer, et al., In Support of the Anderson Respondents at 1, *Trump v. Anderson*, 144 S. Ct. 662 (2024) (No. 23-719), 2024 WL 382473 at *1 [hereinafter Anderson Amici Curiae Brief]

33. Oral Argument, *Trump v. Anderson*, 144 S. Ct. 662 (2024) (No. 23-719), <https://www.oyez.org/cases/2023/23-719> [<https://perma.cc/6KFH-Y699>].

34. See Publius, “Trump v. Anderson”: *How a Divided Supreme Court Delivers a Unanimous Opinion*, ASHLAND CHRON. (Mar. 4, 2024), <https://theashlandchronicle.com/trump-v-anderson-how-a-divided-supreme-court-delivers-a-unanimous-opinion/> [<https://perma.cc/DL93-U4KH>].

35. Transcript of Oral Argument at 1, *Trump v. Anderson*, 144 S. Ct. 662 (2024) (No. 23-719).

36. E.g., *id.* at 59.

37. E.g., *id.* at 59–60.

38. See *id.* at 36–40 (paraphrasing).

To which Jonathan said, “Your Honors, that’s because that argument is a heavy lift for my client, very difficult to make.”³⁹

So, the world knew, even before the end of that two-hour argument, that the Supreme Court of the United States was not going to decide whether Donald Trump was disqualified under the Fourteenth Amendment. Not the day of the argument, not the day of its decision, not ever. So, what did the Court say and do? It said that not only will Donald Trump never be disqualified, but that no other insurrectionists will ever be disqualified under the Fourteenth Amendment, either.⁴⁰ And it did so in a short, per curiam, nameless opinion.⁴¹

Sykes: I believe you described it as a confused, muddled, nameless, per curiam decree palpably contrary to the text, history, and purpose of the Fourteenth Amendment.⁴² Let’s walk through some of the arguments here, because you and Professor Lawrence Tribe go through them.⁴³ The decision was unanimous, and you wrote online that the Justices were persuaded by the appeal of a fatuous argument featured prominently in the brief supporting Donald Trump, the former President.⁴⁴ That argument was that no single state should be able to disqualify a candidate for the presidency.⁴⁵ This was the argument—if you let Colorado do this, you’re just going to have chaos. Why was that a fatuous argument? Nine Justices appeared to have bought into it.

Judge Luttig: The argument as it was made to the Court, not as it was accepted by the Supreme Court of United States, was ignorant of the Constitution of the United States. I’ll let Charlie or someone else say whether it was ignorant of the Supreme Court to have accepted the argument, but this was like Constitutional Law 101. Of course, it was also Constitutional Law 101 for the Supreme Court of United States, but the Court was not ever going to decide the question, so that was the fatuous argument that it seized upon to avoid deciding whether the former

39. *See id.* at 37–38 (paraphrasing).

40. *See Trump v. Anderson*, 144 S. Ct. 662, 670–71 (2024).

41. *Id.* at 104.

42. Luttig & Tribe, *supra* note 18.

43. *Id.*

44. *Id.*

45. *Id.* (“Nothing about letting an individual state initiate the disqualification process ever threatened to create what the unanimous Court called a “patchwork” of divergent state resolutions From the outset, the hand-wringing about how no state should be empowered to rule over its sister states on the national question as to who might run for president was all smoke and mirrors”).

President was disqualified. It was an illegitimate off-ramp to deciding the case.

Why was it illegitimate? For the reason Professor Tribe and I say in *The Atlantic* article, which every first-year constitutional law student understands. Namely, the Supreme Court sits atop the federal judicial system and also the state judicial system. In this case, the challenge to the former President's qualification for office came up through the state system, not the federal system.⁴⁶ Every day of the week, the Supreme Court of the United States decides whether a state supreme court's decision is consistent with the Federal Constitution. That's how the judicial system works. In the Colorado case, all that the Justices were asked to decide was whether the case was consistent with the Federal Constitution, in this instance, Section 3 of the Fourteenth Amendment.⁴⁷ That's what the Court granted certiorari on and, of course, that was all the Court had to decide.

If the Court *had* decided that question, there would have been uniformity across America.⁴⁸ If the Court had decided that the Colorado Supreme Court's masterful, majestic decision was correct, then the former President would be disqualified in every state in the Union. And to the extent that the Supreme Court would have said that, its decision would have been binding on all the states.⁴⁹ There would have been national uniformity on the question. Everyone in the law knows that doesn't necessarily mean that another state could not do exactly the same thing. But the Supreme Court would tell the states what they would need to do in order to disqualify the former President from the ballot. By the same token, if the Supreme Court had just reversed with an opinion and some reasoning, then there would also have been uniformity throughout the nation.⁵⁰ Namely, Trump would not be disqualified in any state in the Union, at least from the primary vote. So, it was a fallacious, and frankly embarrassing argument to make, whether it was ever accepted by the Supreme Court or not. I wouldn't have even made the argument, it was so silly.

46. See *Trump v. Anderson*, 144 S. Ct. 662, 666 (2024) (explaining the Supreme Court granted former President Trump's petition for writ of certiorari to review the Colorado Supreme Court's ruling).

47. See *id.* at 664–66.

48. Luttig & Tribe, *supra* note 18.

49. *Id.*

50. *Id.*

Sykes: Let's talk about another one of the key issues for the Court, which was that, in order to be disqualified under the Fourteenth Amendment, Section 3 requires some sort of congressional legislation to become operative.⁵¹ You and others argue that the Fourteenth Amendment was self-executing and no other qualification for office requires congressional action.⁵² Let's discuss this because obviously this is where the Court went. The Court did not simply rule on this case, it also then established the doctrine that henceforth, absent congressional authorization, no one can be disqualified under the Fourteenth Amendment.⁵³

Judge Luttig: You're scarily smart and I should have never agreed to this conversation! But seriously, Charlie, that's right. It was a completely legitimate argument that Section 3 is not self-executing, which means that it takes congressional implementing legislation to enforce. That was really the argument. Did the Court take that off-ramp? No. It said that the states, under Section 3, can disqualify candidates for state office,⁵⁴ but they can't disqualify a presidential candidate from the Office of the President of the United States.⁵⁵ That is the narrow holding of the Court. Call it the "result." Result is a pejorative term in the law. There were nine Justices only for that result.⁵⁶ There were only five Justices for the reasoning of that result.⁵⁷ The only opinion was "We're not going to disqualify Donald Trump from the presidency, okay? Period."

Sykes: Well, let me just read what you and Professor Tribe wrote. The question is: Why? What was the core thinking? Why did the Court refuse to rule on the merits of this? You wrote:

Whether born of a steel[ed] determination *not to disqualify* the presumptive Republican nominee from the presidency, or of a debilitating fear of even deciding *whether* the Constitution disqualifies the presumptive Republican nominee because he *is* the presumptive Republican nominee, this step that all nine [J]ustices took represents a constitutionally unforgivable

51. *Anderson*, 144 S. Ct. at 670–71.

52. *Anderson Amici Curiae Brief*, *supra* note 32, at *8.

53. *Anderson*, 144 S. Ct. at 670–71.

54. *Id.* at 667.

55. *Id.* at 670 (specifically, "federal officeholders and candidates").

56. *Luttig & Tribe*, *supra* note 18.

57. *Id.*

departure from the fundamental truth of our republic that “no man is above the law.”⁵⁸

So, what do you think? What do you really think? What was the motivation? Was the Court afraid of disqualifying Donald Trump or deciding the question? Are the Justices afraid to make decisions?

Judge Luttig: Yes. Yes, they were. This is the case in point, the exemplar of that. The Court’s indecision just happened to come in perhaps the most important constitutional and political case in American history. That is why the Court betrayed the Constitution and the nation.

Let’s parse it. The Court did what it did, either out of a steeled determination that it would not, under any circumstance, disqualify the former President, or it did so because it feared even deciding whether, under the Constitution of the United States, the presumptive Republican nominee for the presidency was disqualified under the Constitution. There’s not a doubt in my mind that it was for one of those reasons or the other.

Sykes: This is part of the mystery, because America is sitting in March 2024 wondering what is going through the mind of the Justices, especially given the way they handled the Fourteenth Amendment case. Your thoughts on the way they are handling the case about presidential immunity? Donald Trump is arguing and has argued that he has absolute immunity; that he can hire SEAL Team 6 to go and murder his political opponent and not face criminal prosecution.⁵⁹ The D.C. Circuit Court of Appeals issued a very, very strong unanimous opinion that, no, the President is not above the law.⁶⁰ The Supreme Court has decided to wait until April 22 to hear the oral arguments⁶¹ and, as a result of that, the

58. *Id.*

59. *E.g.*, Transcript of Oral Argument at 24, *Trump v. United States*, 144 S. Ct. 2312 (2024) (No. 23-939).

60. *United States v. Trump*, 91 F.4th 1173 (D.C. Cir.), *vacated*, 144 S. Ct. 2312 (2024).

61. Oral argument was set for the *week* of the 22nd and held on April 25. See Michael R. Sisak, *Judge Rejects Trump’s Request to Delay Hush-Money Trial Until Supreme Court Rules on Immunity*, L.A. TIMES (Apr. 3, 2024, 4:26 PM), <https://www.latimes.com/world-nation/story/2024-04-03/judge-rejects-donald-trumps-request-to-delay-hush-money-trial-until-supreme-court-rules-on-immunity> [<https://perma.cc/FFD7-WM6Y>].

prospect of an early ruling and a trial before the election is dim.⁶² When the Court wants to do something quickly, it does something quickly. They clearly are not moving with speed. What do you think is going on? And I know it's speculation, but what do you think is happening?

Judge Luttig: Well, I'm willing to speculate.

Sykes: Go for it.

Judge Luttig: Judicial speculation, if not judicial notice. Well, first, the fun part. Nicolle Wallace on *Deadline: White House* for MSNBC had asked me to come to New York for a forty-minute interview on all of these issues and I grudgingly agreed to do so.⁶³ So, I'm sitting there in the studio live with Nicolle Wallace and she was introducing what was to be our forty-minute segment. If you haven't ever been in a television studio, don't ever enter one. It is the most frightening thing to any human being on Earth, except for the likes of Charlie Sykes.

Sykes: I would think a courtroom where you are the judge would rank right up there.

Judge Luttig: Well, come to think of it, that is much more comfortable to me. Anyway, Nicolle is in the middle of introducing the segment. I am this close to her [gestures] and I see her [gestures to his ear], and then she looks at me and then the country, and she says, "Ladies and gentlemen, we have breaking news. The Supreme Court of the United States has just agreed to hear Donald Trump's immunity case."⁶⁴ And then she turns to me and says, "Judge Luttig, we're so glad you're here with us at this moment. What are your first reactions?"⁶⁵

My first reaction was that I was so scared I didn't even know what to say and I didn't want to say anything. So I bought a few seconds by

62. See Harry Litman, *Jack Smith's Latest Push To Get Donald Trump's Jan. 6 Trial Moving Before the Election*, L.A. TIMES (Apr. 10, 2024, 1:39 PM), <https://www.latimes.com/opinion/story/2024-04-10/donald-trump-jan-6-trial-jack-smith-supreme-court-immunity-harry-litman> [<https://perma.cc/D8W5-B65A>].

63. *Luttig: There Was No Reason for SCOTUS To Take Trump's Case. Today's Decision Is Momentous.*, MSNBC: DEADLINE: WHITE HOUSE (Feb. 28, 2024) [hereinafter MSNBC Clip #1], <https://www.msnbc.com/deadline-white-house/watch/supreme-court-agree-to-hear-trump-immunity-case-judge-luttig-and-andrew-weissmann-react-live-205129797993> [<https://perma.cc/G6GJ-FMF7>].

64. See *id.* at 00:17 (paraphrasing).

65. See *id.* at 00:35 (paraphrasing).

saying, “Well, of course Nicolle, I’m just hearing this news myself,” to which she said, “Yes, but what’s your answer?”⁶⁶ I took a deep breath and I said something to the effect that: “Nicolle, there was no reason in this world for the Supreme Court to take this case and hear it.”⁶⁷

Meanwhile, one of the studio people has slipped me the Court’s order so I could at least lay eyes on it, and I saw that the Court had set the argument in April. My mind was working as fast as it’s capable of working, doing the timetable, and then my next words were: “With the Court having agreed to hear this case in April, two months thence, and, two months before the end of the Term, it’s exceedingly unlikely that the former President will be tried before the election in November.”⁶⁸

Then, MSNBC brought in two other chairs—not people, two other chairs—and Nicolle asked me the next question. By the time I answered that question, two people were brought to the table and three more people appeared remotely on the television screens in the studio. Nicolle essentially jettisoned the entire show she had intended with me and the entire show became all about the Supreme Court taking the immunity case.⁶⁹ Let me say this, Charlie: There was no reason at all for the Court to take this case unless the Court intends to reverse the D.C. Circuit opinion, which held that the President does not have immunity from prosecution for the offenses he committed on January 6th.

Sykes: You think that is possible? Because one scenario is that they are simply slow walking it. You are saying there is a possibility that they might say that Donald Trump is above the law under certain circumstances?

66. See *id.* at 00:44 (paraphrasing).

67. See *id.* at 00:55 (paraphrasing).

68. Judge Luttig: ‘It Is Unimaginable to Me the Former President Will Be Tried Before November’, MSNBC: DEADLINE: WHITE HOUSE (Feb. 28, 2024) [hereinafter MSNBC Clip #2], <https://www.msnbc.com/deadline-white-house/watch/judge-luttig-it-is-unimaginable-to-me-the-former-president-will-be-tried-before-november-205130309562> [<https://perma.cc/6N2R-HNNJ>].

69. See MSNBC Clip #1, *supra* note 63 (interviewing Andrew Weissman virtually); MSNBC Clip #2, *supra* note 68 (interviewing Tim Heaphy in studio); ‘I’m Very Troubled’: Lisa Rubin Reacts to Timeline of SCOTUS Hearing Trump Immunity Case, MSNBC: DEADLINE: WHITE HOUSE (Feb. 28, 2024) [hereinafter MSNBC Clip #3], <https://www.msnbc.com/deadline-white-house/watch/-i-m-very-troubled-lisa-rubin-reacts-to-timeline-of-scotus-hearing-trump-immunity-case-205131845960> [<https://perma.cc/85Q5-EN5N>] (interviewing Lisa Rubin in studio and Neal Katyal over the phone).

Judge Luttig: That's the way to put the question, Charlie. All I'm saying—but this is saying a lot—is that the only reason to have taken the case other than to slow-walk it, which we don't ever want to impute to the Supreme Court, is that there are at least four Justices who intend to reverse the D.C. Circuit opinion. It takes four to grant the case, so we know there are at least four Justices who voted to grant it. We are never told who or how many Justices voted to grant the case or what the reasoning was. We only know for a fact that four Justices agreed to take the case. Now, the other technical point; there needed to have been five Justices who voted to grant the stay of the D.C. Circuit's decision.⁷⁰ There apparently were not five to grant the stay and so the Court maneuvered around that by ordering the D.C. Circuit to stay its own opinion until the Supreme Court rules.⁷¹ So, that tells you a lot of what's going on, but it only tells you that perhaps there are four that want to reverse.

Sykes: I remember the day when this happened. I was actually walking my dog listening to your appearance on Nicolle's show, and I will just say that my reaction scared the dogs when I heard what you said about the trial.

Judge Luttig: People say that about everything that I say, Charlie!

Sykes: Let's just talk about the specific back-and-forth between you and Neal Katyal, the former Acting Solicitor General, on the question of timing. You suggested that you did not think the Supreme Court would come down with its decision until the last day of the Term, which would really put things back.⁷² He was slightly more optimistic, saying that they might come up with a quicker decision.⁷³ That now becomes very, very important in terms of whether or not you can get this trial going before the election.

70. *Supreme Court Procedures*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> [<https://perma.cc/U7VJ-3KBY>].

71. *Trump v. United States*, 144 S. Ct. 1027 (2024) (mem.) (order granting certiorari) (“Without expressing a view on the merits, this Court directs the Court of Appeals to continue withholding issuance of the mandate until the sending down of the judgment of this Court. Application for stay dismissed as moot.”).

72. MSNBC Clip #2, *supra* note 68, at 00:02.

73. MSNBC Clip #3, *supra* note 69, at 02:42.

Judge Luttig: Yes, so let's talk about that. Neal is a very dear friend, and he has argued over fifty cases in the Supreme Court.⁷⁴ He knows the Court as well as anybody, but here was my thinking, and of course I could be wrong. The Supreme Court is capable of moving very quickly. I would like to think that the Supreme Court of the United States could turn around a landmark opinion within two, three, four days. And I do know for a fact that the Court is capable of that. But, in this case, like I have said, the Court did not even schedule the argument for two months. And when it scheduled the argument in April—it turned out to be April 25—the Court knew, as the rest of the world knew, that that is the busiest time of the year for the Court.⁷⁵ The Court is always trying to push out the door the biggest cases of the Term and it does not even have the time to do those cases. Introduce the immunity case, which is, in some ways, bigger than all the other cases they have pending, like the *Chevron* case⁷⁶—

Sykes: And politically radioactive—

Judge Luttig: —and politically radioactive. I'll put it this way: We do not want the Supreme Court to decide that case with a full opinion before the last day of the Term. Because in ordinary circumstances, the Court works on the biggest cases of the Term for six or eight months and releases them on the last several days of the Term. The Court can serve the nation well in six months.⁷⁷ It cannot serve the nation well with an opinion in this case in less than two months. The district judge, Judge Chutkan, had previously said that Donald Trump will be given eighty-eight days once the clock starts to run again.⁷⁸ So, on my timetable, as I said to Nicolle, if the Court decides the immunity case on the last day of its Term, call it July 1, then there will only be three months for the trial to be had. That's the first week of October. At that point, Jack Smith has

74. Biography of Neal K. Katyal, GEO. L., <https://www.law.georgetown.edu/faculty/neal-k-katyal/> [<https://perma.cc/U8FD-PDSN>].

75. See Abby Vesoulis, *The Supreme Court Is About To Have a Very Busy Week*, MOTHER JONES (Apr. 21, 2024), <https://www.motherjones.com/politics/2024/04/supreme-court-homeless-trump/> [<https://perma.cc/V8XP-GHRZ>].

76. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024).

77. E.g., *Biden v. Nebraska*, 143 S. Ct. 2355 (2023) (argued Feb. 28, decided June 30).

78. Ryan J. Reilly & Lawrence Hurley, *Supreme Court's Immunity Hearing Leaves Prospect of Pre-Election Trump Jan. 6 Trial in Doubt*, NBC NEWS (Feb. 28, 2024, 10:24 PM), <https://www.nbcnews.com/politics/supreme-court/supreme-courts-immunity-hearing-leaves-prospect-pre-election-trump-jan-rcna141056> [<https://perma.cc/6DTV-C6QU>].

to decide: Do I really start this, the first trial in American history of a President of the United States, who, by happenstance is the Republican nominee for the presidency, who will either be elected or not elected in one month? Do I begin that trial knowing that I cannot complete it, and that it will be completed only after Donald Trump is elected President of the United States, or not? No man or woman should have to make that decision. That is the position that the Supreme Court of the United States knowingly put Jack Smith in.

Sykes: Okay, so this is the one question I really wanted to ask you today: What does it actually mean if Donald Trump does not go on trial until after the election? You describe January 6th in words “that would be tantamount to a revolution within a constitutional crisis.”⁷⁹ I am not asking you to apply those words, but what happens to the rule of law, to the credibility of the courts, and to the stability of the political system if someone is elected President of the United States and only afterwards convicted on multiple felonies? Has our legal imagination caught up with this real possibility?

Judge Luttig: Mine has. And it is possible that those words would be as apt after the election as they would have been on January 6th. It would be tantamount to a revolution within a paralyzing constitutional crisis. Pull out each of those words as I described them, but start with the word “revolution” because that was the most important word that I used. Many, many of Donald Trump’s supporters talk in terms of a revolution, and much of the intellectual bulwark for the January 6th effort to overturn the presidential election is explicitly and expressly grounded in the idea of a revolution against the United States. Many of these people—brilliant thinkers—put that idea of a revolution in writing before January 6th and have continued to do so since.⁸⁰ And some of them, including my former law clerk, John Eastman, stand on that today.⁸¹ What I say to them and what we all should be saying to them is: No, no,

79. *Jan. 6th Hearings*, *supra* note 25, at 657.

80. See Jeffrey C. Isaac, *The MAGA Crowd May Venerate 1776 but They Idolize a Would-Be Monarch*, BULWARK (Aug. 17, 2022), <https://www.thebulwark.com/p/the-maga-crowd-may-venerate-1776-but-they-idolize-a-would-be-monarch> [https://perma.cc/4TDY-YQ24]; Bess Levin, *Rudy Giuliani’s Hair Dye Melting off His Face Was the Least Crazy Part of His Batshit-Crazy Press Conference*, VANITY FAIR (Nov. 19, 2020), <https://www.vanityfair.com/news/2020/11/rudy-giuliani-hair-dye-press-conference>.

81. See Ross Douthat, *Why Would John Eastman Want to Overturn an Election for Trump?*, N.Y. TIMES (May 25, 2022), <https://www.nytimes.com/2022/05/25/opinion/john-eastman-claremont-trump.html>.

no. We had a revolution two hundred fifty years ago against the Crown in order that there would never be another revolution in the United States of America. It is not an option to have a revolution against America today.

Sykes: Well, let's turn it around though. Let's say that Donald Trump is elected President and is then convicted of felonies. As President, can't he just make it all go away? Do you believe that the President has the power under the Constitution to pardon himself?

Judge Luttig: There was a time, Charlie, before January 6th but right around then, when the rumors were that the former President had pardoned himself.⁸² You remember that? Well, *The Washington Post* called me and asked: "Judge, would you ever write on this?" I said, "I have never thought about it, but I will look into it and let you know." I started looking into it and researching it and indeed, no one had ever addressed the question. So, I wrote an op-ed in *The Washington Post* back then that said the then-President could not pardon himself and explained why he could not.⁸³ But, to answer your question, no one cares what I think today and you can be assured that if Donald Trump is convicted he would pardon himself—

Sykes: —of the federal charges.

Judge Luttig: Of the federal charges. He cannot pardon himself of any state convictions.⁸⁴ That self-pardon issue would be tested in front of the Supreme Court of the United States. Now, there is a mind bender. The Supreme Court just categorically refused to decide the constitutional question of his disqualification. Now, under this hypothetical, he would be the President of the United States of America and would pardon himself. We can probably say with confidence that the Supreme Court would say there is nothing in the Constitution that says he cannot pardon himself, and therefore he can. And so he would pardon himself. But remember, before we get to the pardon question, he is not going to be

82. See Michael S. Schmidt & Maggie Haberman, *Trump Is Said To Have Discussed Pardoning Himself*, N.Y. TIMES, <https://www.nytimes.com/2021/01/07/us/politics/trump-self-pardon.html> (Mar. 21, 2021).

83. J. Michael Luttig, *No, President Trump Can't Pardon Himself*, WASH. POST (Dec. 7, 2020, 7:10 PM), <https://www.washingtonpost.com/opinions/no-president-trump-cant-pardon-himself/2020/12/07/774c7856-38d9-11eb-98c4-25dc9f4987e8>.

84. *Legal Fact Check: Pardons*, A.B.A. (Dec. 20, 2020), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/dec-2020-wl/legal-fact-check-pardons-1220wl/.

convicted before the time when he would become President of the United States. That is just not going to happen, ever.

Sykes: You do not think he would be convicted between November and January 20?

Judge Luttig: No. In fact, my point was going to be that, if he is elected, as soon as he takes the oath of office on January 20, 2025, then he would stop any ongoing trial and pardon himself.

But to come back to your original question. I have no idea, but I do not believe Jack Smith will start the trial before the election and, therefore, I do not believe Donald Trump will be convicted before he would be President if he were elected in 2024. But, to the issue of a revolution and to the paralyzing constitutional crisis, this is what the nation really has to be concerned about: namely, that Donald Trump loses the election in November and refuses to accept that loss and calls his supporters and allies, first, by the way, not to the streets, but to the Congress, and he turns to his allies in Congress—

Sykes: Almost inevitable.

Judge Luttig: —and they invoke the Constitution/Electoral Count Reform Act⁸⁵ now and he has the votes in the Congress of the United States to deny Joe Biden his election victory and to hand the presidency to Donald Trump.⁸⁶

Sykes: Well, Judge, on that bright and cheery note, I want to thank you for joining us today.

85. Electoral Count Reform Act of 2022, Pub. L. No. 117-328, Div. P, Title I, 136 Stat. 5233 (codified at 3 U.S.C. §§ 1-22).

86. On July 21, 2024, President Joe Biden dropped out of the 2024 presidential race and endorsed his Vice President, Kamala Harris, who secured the Democratic nomination two weeks later. Nicholas Nehamas, *Harris Officially Secures Democratic Party's Nomination for President*, N.Y. TIMES (Aug. 6, 2024), <https://www.nytimes.com/2024/08/06/us/politics/kamala-harris-president-campaign-2024.html>.

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