

‘What Do You Do When a Criminally Minded Person Is President?’

Opinion by Michael Kruse, Political Magazine 07/08/2024

There’s a lesson for a second Trump administration. "Citizens shouldn’t give [former President Donald] Trump, or this Supreme Court, the final word on the meaning of the Constitution. We’ve got to reclaim it," said Corey Brettschneider. His book , *The Presidents and the People: Five Leaders Who Threatened Democracy and the Citizens Who Fought to Defend It* explores the history of presidents who abused their constitutional power and the citizen movements that stopped them. The book couldn’t have landed at a more auspicious moment.

Brettschneider, a professor of politics and constitutional law at Brown University, writes about five past presidents who “posed great threats to democracy” by pushing the limits of legality — John Adams, James Buchanan, Andrew Johnson, Woodrow Wilson and Richard Nixon — and the citizens who responded by pushing back in an age-old American pattern of constitutional crisis and recovery.

Adams, after all, had prosecuted people who criticized him, Buchanan “colluded with the Supreme Court to deny constitutional personhood to African Americans,” as Brettschneider outlines. Johnson urged violence against his political opponents while heightening white supremacy in the wake of the Civil War, Wilson “nationalized Jim Crow” and Nixon, of course, committed criminal acts in the sprawling Watergate scandal. “When the president does it,” as the 37th president (in)famously said, “that means it is not illegal.”

In response to these executives’ attempts to weaken or outright eliminate the checks on their power, citizens fought back — from abolitionist Frederick Douglass to journalists Ida B. Wells and William Monroe Trotter to Pentagon Papers leaker Daniel Ellsberg and others — recommitting to the Constitution and stoking what Brettschneider calls “democratic recovery.”

Brettschneider reminds us that we were warned from the beginning this could happen.

“Revolutionary War heroes such as Patrick Henry predicted that the office was so powerful that a president with authoritarian ambitions could simply lay claim to the ‘American throne,’”

Brettschneider writes, noting that “the power of the presidency has always been a loaded gun, one

that threatens American democracy itself. Patrick Henry's warning has always been relevant." And it has arguably never been more relevant than it is right now.

Question to Brettschneider: What was Patrick Henry's warning, and why do you think we should be thinking about it extra-hard right now?

Many of the framers were assuming that a good person, a person of virtue, would occupy the office. Henry asked a very different question, which is essential for the current moment: What do you do when a bad person, a criminally minded person, is president?

And Henry's answer is: That person's going to realize, "Wow, there are very few checks on the office." It's going to empower them to commit even more crimes until they realize — and this is the dramatic point that I think before Monday seemed like hyperbole — that they can take power in a self-coup and basically destroy the republic and crown themselves the monarch.

There has long been a policy by the Department of Justice to keep sitting presidents immune from criminal indictment. But what no court had ever said is that *former* presidents have that immunity. Henry's warning is even more important because that criminal president will think to themselves: "If I try this self-coup thing, not only will I not be indicted now, but I won't be indicted ever, as long as I claim I did it for my official duties, that I was defending the country, or that I was taking care that the laws be faithfully executed in some broad sense."

Henry turns out not to be paranoid, but to really have hit upon something that is true to this moment.

Question to Brettschneider: You name a handful of presidents who tested the boundaries of executive power. Where in your mind does the former and maybe future president — Donald Trump — exist in this context?

I would say he has elements of all these former presidents. Adams really believed that the Constitution gave him the power, and the Sedition Act gave him the power, to shut down criticism of the president and that the First Amendment wasn't really a right to dissent against the president. And that sounds a lot like Trump's threat to prosecute political opponents, so he's a wannabe Adams, a wannabe authoritarian. In the Nixon case, I think his view is Nixon didn't fight hard enough — that if he had really threatened to not back down in the case of impeachment, as Trump

did, he would've survived and he would've seen how powerful the office is. And that's what Trump is threatening to do. It's really hard to see how we would stop him absent, of course, the citizen action that I'm describing throughout the book.

The dynamic you describe here is one of crisis and recovery, this historically repeating pattern. When there's crisis, we respond in some way with some kind of recovery. It doesn't feel like recovery right now. Why do you think that is?

Even in the hopeful moments of the past that I described where there were recoveries, it takes time in each of them. So, in the Adams period, you do get a very serious recovery. Thomas Jefferson does say, "We're all federalists. We're all Republicans." He doesn't seek the renewal of the Sedition Act, but privately he seeks prosecution of political opponents. And it's really only during James Madison's administration, more than eight years later, that you see the power of the recovery because of his refusal to prosecute dissenters even during a war.

The recovery that I described after Woodrow Wilson was decades long. Trotter and Wells have an initial resistance to Wilson's attempt to nationalize white supremacy, nationalize segregation, nationalize the idea of second-class citizenship. They confront him in the White House famously and speak out. But you need several more decades until you get the more serious recovery of the 1964 Civil Rights Act and the 1965 Voting Rights Act.

I'd say we really never did recover from Nixon. We got rid of Nixon and the Ford and Carter presidencies are certainly improvements. And we do have this legislation — the independent counsel law, the Ethics in Government Act — which is a huge improvement over what we have now.

But what we need to really make that recovery finally happen is a citizen movement devoted to the idea that presidents really are not above the law, meaning that they can be prosecuted if they commit crimes. We've got to find a way to push back against this really outrageous invitation to authoritarianism that you saw in the Supreme Court decision by creating institutions that are supported by citizens. So that might not mean returning to the old independent counsel, but it certainly does mean an office of a people's prosecutor that would be charged with investigating criminal presidents and being able to indict them.

Question to Brettschneider: Why do you think Donald Trump has been more effective at pushing the limits of presidential power than any of the predecessors you mention in this book? Is it that he's more effective, or that the people and institutions are less effective at providing a check?

I think it's all of the above. He's distinct in his ability to galvanize an anti-democratic movement. He's able to use media in a way that really goes beyond what other presidents did. And he really has become a master at manipulating anti-democratic populist sentiment through social media and through his authoritarian rhetoric. In the past, these authoritarian presidents disappear, but he's come back successfully. Think of Andrew Johnson, for instance, who doesn't even get his own party's nomination after his presidency. Trump certainly has his nomination locked up.

I think that there was a potential after Watergate to build the kind of movement that would've led to a more fundamental recovery from the dangers that Nixon showed. But it disappeared. What the pardon of Nixon did is it made everybody think this was a one-time thing. It wouldn't happen again. That was a colossal mistake. We failed to see that the Nixon danger really could reemerge.

There's a lot of blame to go around and it's bipartisan. Bill Clinton began office by praising the prosecutor law, the Ethics in Government Act, but when he faced his own investigation at the hands of Ken Starr — just or unjust — he destroyed the institution. He joined forces with Republicans to allow the independent counsel [law] to expire. So there became a bipartisan sense that presidential power is not a danger ... and that bipartisan consensus really led us away from warnings like Henry that were present after Watergate but just never really got the citizen movement behind them.

The people that I'm profiling in the book are heroes because they went out and they placed these ideas of a democratic constitution in our wider consciousness. The idea that a president could shut down free speech, even though Trump is promising to do it, there's a wide understanding that that's a violation of our First Amendment. We never really got out of Watergate. We got slogans like, "No person — or president — is above the law." But we failed to really see that the presidency itself is a danger. That should have been the lesson.

We have a president who's relentless and coming back, we don't have a citizen movement pushing back against an authoritarian idea of the presidency — this is a moment of crisis. There is a danger

of the kind of democratic collapse that Henry talks about. But these past examples of the heroes show that against horrible odds that there was a recovery. It is not inevitable that we'll have these recoveries, but it's certainly possible.

Question to Brettschneider: How possible? What are the odds?

In the book I focus on the phrase “hope” because I don't want to be mechanistic about it. We sort of think that we can make this a scientific matter, but it's a matter of will. It's a matter of whether citizens can galvanize behind an idea of constitutional recovery. So I don't think we can put it in terms of odds. We've got to put it in terms of either we fail to see the importance of restructuring the checks, restoring the fundamental criminal check on a president, or at least a former president — or we don't. And the risk continues. Even if Biden wins, it's not that we've escaped the risk. The structure is still there. A recovery means structural protection from the potential for a criminal president in the future.

Question to Brettschneider: Do you think Joe Biden has been, or has tried to be, a “recovery” president?

I would say it's certainly an absence of the kind of threat that we were facing with Trump. He's not an authoritarian or a wannabe authoritarian, but I have not seen him prioritize constitutional recovery. And what a recovery president would do is not just be the absence of that threat. They would work to create the legal structure to ensure that, for instance, the person looking into the wrongdoing of a president can't be fired.

Second thing is that the prosecutor charged with investigating a president should have the power to indict not just a former president — but a sitting president. If those would've been on the agenda, maybe Biden could have worked to find a consensus on this issue. He would've been saying, “Constrain me. I am offering myself. If I've committed crimes, if you think I've committed crimes, put me against Ken Starr or against a prosecutor, a [Leon Jaworski](#) or an [Archibald Cox](#), and I'll face off.” The problem of course with Ken Starr was that he was an overzealous prosecutor. I don't want to defend his actions — and of course Monica Lewinsky was treated horribly by him among other things — but the institution was so important. It was the institution that looked into wrongdoing during Iran-Contra. It was a functional institution. Carter went along when there was an investigation of his chief of staff. All of those things suggest that there's a trade-off. Do we fear

more an overzealous prosecutor who might hamper the functioning of the executive branch to some degree and distract it? That's what happened during Starr. Or do we fear an authoritarian president? I'd rather have 10 Ken Starrs than one Donald Trump.

Question to Brettschneider: What would Patrick Henry be saying to us today?

I think he would say he's completely vindicated.

'I told you so.'

Exactly. That he warned about the danger of a president with no formal checks who might try to crown himself an authoritarian. That's Donald Trump. When Trump started out, I wrote [a piece for POLITICO Magazine called Trump versus the Constitution](#), and it was all about how much Trump's proposals contrast with the requirements of our Constitution. He was extremely ignorant of the Constitution. And his proposals, like the proposal to torture the families of suspected terrorists, were obvious violations of due process and the ban on cruel and unusual punishment. But over time, he's learned the system, and he's manipulated it towards his own ends.

In putting three justices on the court who just found that he potentially has immunity as a former president, he has recreated the Constitution in an authoritarian image. And so the Constitution that I was writing about when he was first running has been reshaped by him. Now, that's not the end of the story. Citizens shouldn't give Trump, or this Supreme Court, the final word on the meaning of the Constitution. We've got to reclaim it. That's what all these citizens did throughout history. The newspaper editors in Adams' time reclaimed the First Amendment to make it about a right to criticize the president, the right to dissent. Frederick Douglass reclaimed the meaning of the preamble to the Constitution and of the Declaration of Independence to say it was incompatible with the enslavement of other human beings.

I think Henry would say, "This is our moment." We have to see that we have created a potentially authoritarian presidency that could collapse the whole system, and we need a movement to come back. Henry's answer was: Scrap the Constitution. That's not the way. My approach is: Let's reclaim the Constitution. Let's make it democratic again. And fundamental to that has to be the idea that no person, not even a president, is above the law. We have to make that mean something. That's been the tradition of America, of how we've recovered from authoritarianism of the past, that we've

reclaimed the Constitution, we've used its text, we've used its principles, and we've made it *become* democratic and *rescued* it.

It is, as ever, on us.

It is on us.

Question to Brettschneider: What would you say to the not insignificant number of people in this country who would say to you: “No, it’s Joe Biden who’s the authoritarian who doesn’t respect the Constitution”?

I've heard that of course. But I don't know what it is that he's doing that's the equivalent of [Trump]. The authoritarianism of Trump is found in the specifics. He did a very specific authoritarian thing: Jan. 6 wasn't just a riot, it was a coordinated, attempted self-coup to try to stay empowered despite losing the election. That's almost the definition of authoritarian action. Adams shut down the opposition party. Buchanan lobbied for the denial of literally all rights for Black people, secretly lobbying the Supreme Court while pretending not to. Joe Biden has been in legal disputes about presidential power in the courts, but he backs down when he loses. It seems to me to be the normal dynamic that political scientists describe between a president asserting his own power and courts pushing back in some instances, or Congress pushing back.

The definition, to me, of an authoritarian idea of the Constitution or a crisis presidency is when you really push the boundaries in one of the pivotal areas that define democracy. There's the right to dissent. There's the idea of equal citizenship regardless of race or gender or sexual orientation. And the rule of law, the idea that no person is above the law and that we don't have a monarch. I don't see Biden coming close to the kind of violation of those fundamental core pillars as the presidents that I'm profiling or that Trump exhibits.