

THE BROOKINGS INSTITUTION

THE STATE OF THE RULE OF LAW IN THE U.S.:
WHERE ARE WE NOW AND WHAT IS TO COME?

Washington, D.C.
Wednesday, October 3, 2018

Introduction:

NORMAN EISEN
Senior Fellow, Governance Studies
The Brookings Institution

Opening Remarks: The State of the Rule of Law in America Today:

THE HONORABLE SHELDON WHITEHOUSE (D-RI)
U.S. Senate

Panel 1: National Security and Law Enforcement:

BENJAMIN WITTES, Moderator
Senior Fellow, Governance Studies, The Brookings Institution
Co-Founder and Editor-in-Chief, Lawfare

THE HONORABLE ADAM SCHIFF (D-CA)
Ranking Member, Permanent Select Committee on Intelligence
U.S. House of Representatives

MARY McCORD
Visiting Professor of Law, Georgetown University Law Center
Senior Litigator, Institute for Constitutional Advocacy and Protection

CHUCK ROSENBERG
Senior Counsel, Crowell & Moring
Former United States Attorney, Eastern District of Virginia
Former Senior Official, FBI

A Conversation with Ken Starr (via remote video): Lessons for the Special Counsel Investigation:

BENJAMIN WITTES, Moderator
Senior Fellow, Governance Studies, The Brookings Institution
Co-Founder and Editor-in-Chief, Lawfare

KEN STARR
U.S. Solicitor General (1989-1993)

Panel 2: Congressional Government Oversight:

SUSAN HENNESSEY, Moderator
Fellow, Governance Studies, The Brookings Institution
Executive Editor, Lawfare

THE HONORABLE ELIJAH CUMMINGS (D-MD)
Ranking Member, Committee on Oversight and Government Report
U.S. House of Representatives

DANIELLE BRIAN
Executive Director, Project on Government Oversight

DAVID JOLLY
Former Member (R-FL, 2014-2017), U.S. House of Representatives

CHARLIE SYKES
Host, The Daily Standard Podcast
Contributing Editor, The Weekly Standard

A Conversation with Preet Bharara (prerecorded video): Is Accountability Inevitable?:

NORMAN EISEN, Moderator
Senior Fellow, Governance Studies, The Brookings Institution

PREET BHARARA
Former United States Attorney, Southern District of New York

Panel 3: Judicial and Law Enforcement Independence:

NORMAN EISEN, Moderator
Senior Fellow, Governance Studies
The Brookings Institution

THE HONORABLE JERROLD NADLER (D-NY)
Ranking Member, Committee on the Judiciary
U.S. House of Representatives

CARRIE CORDERO
Robert M. Gates Senior Fellow and General Counsel
Center for a New American Security

MICKEY EDWARDS
Vice President and Program Director, The Aspen Institute
Former Member (R-OK, 1977-1993), U.S. House of Representatives

PAUL ROSENZWEIG
Senior Fellow
R Street Institute

* * * * *

P R O C E E D I N G S

MR. EISEN: Good morning, everyone. You can take your seats. I'm Norm Eisen of the Governance Studies program and, together with my GS colleague Ben Wittes, I'm very pleased to welcome you to our conference on the state of the rule of law, where we are, and where we are going. I want to thank the Democracy Fund and Brookings Progress Project for supporting today's event.

I'm very grateful that we will be joined on our strong bipartisan panels by distinguished members of Congress. I want everyone to know that we invited leading members of Congress from both parties to join us. We ended up having a stronger representation from the minority party, but chairs of committees were invited to today's proceedings.

We gather at a time of great challenge to the rule of law in the United States, a level of challenge that we have not seen in our country in a very long time. We're faced with a president who has relentlessly assaulted the rule of law. He's verbally attacked judges and disputed -- he long disputed the Russian attack on our democracy before grudgingly conceding it. He's attacked the independence of his own Department of Justice, including the attorney general, the deputy attorney general, and Special Counsel Robert Mueller.

He's behaved, President Trump has, in ways that some allege transgress the rule of law, including the Constitution's statutes, ethics, and norms critically important to the functioning of rule of law in America. He's presented us of late with a Supreme Court nominee who has himself precipitated a perhaps unprecedented furor over his alleged conduct and candor.

Perhaps most fundamentally, the president and those around him, including some of his congressional allies, have assaulted truth itself. And we're presented as we gather here today with the question of whether the rule of law can

function in an environment in which truth is attacked.

Some of the questions we will be asking today are what the effects of all of this and other factors are on the rule of law, what the present and long-term damage may be, and how to repair it. It's very, very important that we not only in the best tradition of Brookings identify the problems, but look for the solutions.

There's no one better to do that than our first speaker, one of the leaders in the Congress working to address these issues. Senator Sheldon Whitehouse has served as a senator from Rhode Island since 2007. He's a member, most relevantly for us today, of the Committee on the Judiciary, as well as Budget, Environment, and Public Works, and Finance. He's also a former attorney general of Rhode Island and former United States attorney.

Thank you, Senator Whitehouse, for your leadership and for kicking off our conference on the rule of law today. (Applause)

SENATOR WHITEHOUSE: Thank you, Norm, and thank you, Brookings. And thank you all for being here and thank you for allowing me the chance to provide a little context to the day's conversation.

Years ago in his Bunker Hill speech, Daniel Webster famously described the work of our founders as having set the world an example. From Jonathan Winthrop to Ronald Reagan, we have called ourselves "a city on a hill," set high for the world to witness. President Clinton argued that the world has always been more impressed by the power of our example than any example of our power.

America has long stood before the world as an exceptional country and America's exceptional nature confers upon us responsibilities. That is not a burden that we bear. That is an asset that we command.

As the son, grandson, and nephew of Foreign Service officers, I learned young that when the chips are down there is no competition to the United States of America in the hopes and dreams of people around the world. The power of our example

draws people to our country, our ideals, and our mode of government. This tidal force has flooded in our favor for generations and helped make America the essential nation.

But if you want to be the example, you have to live the example. Back to Daniel Webster. "The last hopes of mankind, therefore, rest with us and if it should be proclaimed that our example had become an argument against the experiment, the knell," the death knell he meant, "of popular liberty would be sounded throughout the Earth."

Today we are dangerously failing to live our example. Look at America's failure to lead on climate change. We have clear scientific understanding of how carbon pollution harms the world's climate and oceans, yet we fail to act. Our fossil fuel producers knowingly cause this harm and aggressively fight political solutions to the problem, using an arsenal of political money, much of it run through dark money channels to hide their hand.

Congress has shown itself unable to resist this power, despite obvious and enormous conflicts of interest. It is corruption in plain view.

The poorest people of the world, those who live closest to the land, will suffer the brunt of the coming change. That suffering will raise resentments about a democratic system that succumbed to dark money influence and about a brand of capitalism that allowed industry to perpetuate the problem in the pursuit of profit. This failure, both of popular democracy and market capitalism, will be a lasting blot on our American example.

Another failure is our aiding and abetting of kleptocracy and corruption around the world. There is a real clash of civilizations, to borrow Samuel Huntington's phrase. It is between societies that reflect the rule of law and regimes of kleptocracy, criminality, and authoritarian abuse.

Ironically, the most successful looters of the corrupt, unstable countries in the world seek the shelter of rule of law for their stolen pelf. Rather than demand transparency, we have a whole industry to cater to the looters. As the infamous Panama

Papers and Paradise Papers revealed, American law firms, realtors, shell corporations, and financial services enable international crooks and thugs. This is another continuing blot on the reputation of American capitalism and our democratic system.

And if you live in a country robbed blind by crooked rulers, it is hard not to resent a country that helped them get away with it. Deserved discredit will fall on the institutions that we treasure, capitalism and democracy, that failed so visibly in the face of these well-known evils. We damage our brand at our peril.

As a prosecutor I look around stunned at what I see. Presidents are not supposed to supervise, initiate, or interfere with law enforcement investigations or prosecutions, not of political opponents, not of anyone. That's the way banana republics behave, not the government of the United States of America.

Today we see troubling signs that this separation is being circumvented by Tweet and other forms of pressure. The Department of Justice is ordinarily protected from this kind of pressure by long-held standards and firewalls designed to ensure its independent and integrity. But the President is a fire hose of political attack, lashing about and smashing these and other rules and norms of the presidency.

Congress has the tools to investigate this political interference with our nation's law enforcement and protect the Department of Justice from abuse, but Congress lies supine.

Finally, we are now in the process of a bitter fighter over the seating of a swing judge onto the United States Supreme Court. The very political force that is being deployed to jam this individual onto the Court is a strong signal that there is something more going on than just calling balls and strikes.

Under the tenure of Chief Justice Roberts there have been 70 decisions in which the Court split 5 to 4 with all the Republicans making up the 5, in which decisions, precedent, and principle were overridden and through which decisions, big, significant wins, were given to big Republican interests. That is not the image of America

we want the world to see.

If you believe that the world needs America, if you believe that America is the world's essential and exceptional nation, then getting rule of law right matters. Failing in moments of necessity will both and long darken the lamp America holds up to the world.

The world is watching. In the international contest of ideologies it is not assured that ours will win. We have to earn the winner's laurel generation by generation, and we have to win it by example.

America still is an exemplary nation and we have a role to play in this world, we Americans. And by god, it is time we got about it. Thank you very much.

(Applause)

MR. WITTES: So while my co-panelists are coming up here let me just give a little bit of information. My name is Benjamin Wittes. I'm a senior fellow here. I'm going to dispense with introductions. You have information about the speakers and bios in the materials. And we are a little short of time on all of these panels and I want to leave as much room as possible for people to engage with you guys.

So I will just say this is a remarkable group of people to discuss the subject of the sort of impact of our current environment on national security investigations with, and I'm very grateful to all three of my panelists for coming and joining us today. I think the issue that we're discussing has at least two major elements or maybe more than that, but I want to break out two and treat them separately.

One is the impact of the environment on national security investigations within the Executive Branch. And the second is the conduct of Congress in the conduct of its own national security investigations. Now, these two subjects overlap, but they are different. And I want to start by talking about them separately.

So, Mary, I want to start with you. In your last role at the Justice Department, you were acting director of the National Security Division where a lot of

these investigations take place. And you were there for a period that was jarring for the Department in a very profound way and I'm just interested in your sort of gestalt impressions of how the current environment is affecting no particular investigation, not asking for anything sensitive, but what is the impact of our political environment on the conduct of Justice Department national security investigations?

MS. McCORD: Sure, Ben. And thanks for having me here. It's a pleasure to be part of this panel.

For those who might not know, I left the Department in May of 2017, which means I was there for several months after the change of administration. I was a career Department attorney. I had been a prosecutor at the U.S. Attorney's Office for 20 years before spending 3 years in the National Security Division. So I had a long history of following what we call the rule of law.

And I think one of the things that's important to keep in mind in these times that we're in when there's a lot of alarmism is that by and large, despite the headlines, despite the Tweets, despite what the President may think rule of law is -- that he gets to make and others get to follow it -- the people, career and political, in the Department of Justice I think do have respect for the rule of law. They do recognize that this is a compact between the government and the governed by which there will be transparency and stability and predictability, and by which there is a fair process for the resolution of rights and responsibilities by independent nonpartisan lawyers and judges, and that they strive on a daily basis I think to ensure that that is the process that is followed.

And as I said, despite what we've seen really since this administration came into office in terms of the President, I think, at the very beginning not understanding what rule of law meant and really thinking that he could appoint an attorney general who would have his back and who would ensure that this investigation into potential Russian collusion would be deflected away from him, the career and even political men and

women in the Department have, I think, tried to really put blinders on and move forward with various investigations, whether they're national security criminal investigations, whether they're counterintelligence investigations, or whether they're other criminal or civil investigations.

That said, these kind of constant attacks on the institution, not only DOJ, but the Bureau of which, you know, these are people who work hand-in-glove day after day, the prosecutors, the attorneys, and FBI agents, that does start to wear on you. I mean, you can only block so much of it out when you're working, when you're hearing about it every single day.

And so I think it wears on attorneys at DOJ in a variety of ways. First of all, I think a lot of folks there, and I know this from people I've talked to, feel a little bit differently about saying where they work than they used to feel. And that's just a really sad thing.

I think one of the great joys of my career is when I would walk into court and say Mary McCord on behalf of the United States. I think every prosecutor wants to feel proud of saying that and I think it's a really difficult time for career attorneys to reconcile what's happening to the Department and the attacks the Department has been under to feel good about what they're doing. But I hope they will.

I also think that over time even though many people listening to the news understand the important of rule of law, understand that investigations are undertaken with purpose and by career people who are doing their job, the constant, you know, calling things "witch hunts" just day-in and day-out, it starts to -- I worry it creeps in and sinks into sort of like the subconscious of the public, who will then be skeptical of different results. I mean, even when results, investigations, indictments, cases are brought for all the right reasons, you have concerns that there will be people that say they were not brought for the right reasons.

And then, of course, there is the possibility that there will be some people

within the Department or within the Bureau who will succumb to this notion of I need to do what the President wants me to do. I think that would be a very small minority. I truly believe that. But I know human nature and those kind of things happen. I think that's, like I said, a smaller worry and the lesser of our worries.

But I'm more concerned sort of long term for the damage this does to the reputation of the Department, of the people within it as being partisan and not independent, and then the ability of the American people to have faith in decisions made, prosecutions brought, actions taken by the Department.

MR. WITTES: So, Chuck, you also ran a law enforcement agency during the period of transition into this administration. As far as I know, you are the only person who ran a federal law enforcement agency who sent a letter to the entire staff of that law enforcement agency saying the rule of law has a higher value than the words of the President. And I'm curious for your thoughts on both the question that I asked Mary and also her response to it.

MR. ROSENBERG: Yeah, thanks, Ben. And by the way, thanks for having me here. It's a real privilege.

I think Mary is exactly right. Before I ran anything I was a line assistant U.S. attorney and I smiled with Mary described the thrill of standing up in federal court and saying that you were there on behalf of the United States of America.

And Ben, I will answer your question, but I will add this first. The rule of law is just a construct. The law of gravity is not. The law of gravity is immutable. And even in countries that don't have rule of law, they have law of gravity and there's nothing that anyone can do about it. (Laughter) But the rule of law is just a construct. So in some sense, not to be overdramatic, it's always at risk, it's always under threat, if not here, then somewhere in the world.

I don't think we're blinking red. Ben and I don't want to overstate the threat, but we're absolutely blinking amber, in part for what Mary described. As well, you

know, I think about what the President has done and said.

Just taking one aspect of it, pardons. We've had a long and sort of difficult, cumbersome process in the Department of Justice on purpose to make sure that pardons are carefully considered and that they are given for the right reasons. Those tend to be mercy and compassion, and only after many years. And that the use of the pardon power can very quickly undermine the rule of law if given for other reasons, right?

And I'm not saying Dinesh D'Souza or Scooter Libby or Joe Arpaio don't deserve pardons, though I have a view on that. (Laughter) Even musings about extending a pardon to Governor Blagojevich, you know, have that tendency to undermine the rule of law because you realize that they're being done for other than mercy and compassion.

And so I think the rule of law is always at risk. I think it is particularly at risk in our country today. I also think, for the reasons that Mary, cited we're going to be okay; that the men and women of the Department do their jobs day-in and day-out. It has an effect, sure, more on morale I think than on output. But morale counts, too.

And there's another aspect to what Mary described that I wanted to share with you, which is that when we ask our agents, our cops, to go into neighborhoods and do difficult things, we also hope that they're believed and trusted. Right now we're asking the FBI to do a very difficult background investigation -- by "difficult" I mean contentious -- and that with whatever result they come up with that it should be trusted, it should be believed. But for that to happen, when they knock on your door you also have to let them in and you have to be willing to sit down and talk to them. You have to believe in their output. And if we're not doing that, then we're in big trouble.

So, Ben, to your question, and I'll be brief, I sent the letter to our entire DEA workforce because I thought it was important to iterate that we are tethered to the Constitution and through the rule of law and not to the wishes or whims of any one person. My letter to my troops came in response to a speech that the President gave in

Suffolk County, New York, in which he condoned, in my view, police brutality and police violence. We're better than that.

I don't believe for a second that anybody in federal law enforcement would change their behavior because of what he said, but there is a risk that people will perceive that we'll change our behavior because of what he said. And that is the risk to the rule of law because the whole system, again, is a construct in which we trust agents and judges and cops and prosecutors to do the right thing relentlessly.

And so part of that construct is that leap of faith, and I think that's what's under assault right now.

MR. WITTES: Congressman, you're in an interesting bridge position here because you both supervise and are doing oversight of these Executive Branch activities, but you're also responsible for the congressional oversight itself. So I want to start with the Executive Branch side and then shift to the Legislative side.

You wrote an open letter to the FBI apologizing for the conduct of your committee, in essence. I'm interested in why you did that.

CONGRESSMAN SCHIFF: Ben, thank you for inviting me to join you today.

I've written two open letters in the 18 years I've been in Congress, both of them in the last year and a half. The first was to the men and women of the intelligence community and the second, as you mentioned, was to the men and women of the FBI. For the reason that I wanted both to know how much respect we have for their work, indeed how much respect there is on a bipartisan basis in Congress for what they do; that what they see in terms of the administration and what they see from a handful of very nonetheless influential members of Congress is not reflective of the broad support for their work. And I thought it was important for the reasons that Mary and Chuck itemized that they know this.

Because I have to think that there are profound questions among many

in the workforce about whether their work is valued. I have to imagine that all around the world people that cooperate with law enforcement and American intelligence agencies have to wonder whether their identities will be protected; whether the work product that they're producing, that they are risking their lives to supply will be protected and whether it will be utilized.

And so I do think it's important to underscore that there are a great many of us who have the deepest commitment to them and to what they're doing.

There are, sadly, two categories of my colleagues in the GOP right now, the largest group of which are members who are just completely silent. They won't say anything in support of the Justice Department or the FBI. They won't defend the rule of law when it's attacked by the President. They just are hunkering down. They don't want to be in the position of defending the President or the administration, but they also don't want to incur the ire of his supporters back home.

But then you have a handful of people who are more than actively complicit in what the President is doing and undermining the rule of law. And I don't want the workforce to think that they're representative of the Congress or even of the GOP in Congress because what they're doing is singly harmful. And I do think that when this chapter of history is written that some of the most damning words will be reserved for members of Congress who looked at the assault on our institutions and did nothing or, worse, they enabled the undermining of our system of checks and balances.

MR. WITTES: So let me just have you flesh that out. Your committee has been one of two that are really kind of Ground Zero in that and maybe yours is really Ground Zero. What are the things -- I mean, what are the specific things, categories of things, that your committee has done that you believe are active facilitations of attacks on the rule of law?

CONGRESSMAN SCHIFF: Well, our bread-and-butter responsibility is to oversee the intelligence agencies. And in order to do that we need a very capable

staff, which we have, but it's a complete mismatch. We're the smallest staff on the Hill overseeing some of the largest agencies in the country and agencies that are in the business of keeping secrets, which means you have to know the right questions to ask, but also there has to be a level of trust. The agencies have to believe that they can share with you some of their most closely held information and you will not abuse that. And you will certainly not make it public and you will not make it partisan.

The single act of using a never-before House rule to selectively release classified information in the now infamous Nunez memorandum was a violation of everything that the committee has stood for. It was a naked politicization of intelligence and a fraudulent one at that. That breach of trust with the intelligence community means that that community now is deeply reluctant to share anything with our committee because they cannot trust that it will be held confidential.

The continuing assault by our majority on the Justice Department, on the deputy attorney general, on the FBI, the degree to which some of the most prominent members of our committee promulgate these deep state conspiracy theories is uniquely destructive. And, you know, sadly, I think they have forced the Justice Department repeatedly into violating its own policies, which the Justice Department will come to regret. And I've had this conversation.

And I, like my colleagues here on the panel, come from a U.S. Attorney's Office. I, too, loved representing the United States and I feel I still represent the United States. But as I explained in one of my recent visits to the Justice Department to review materials that Congress has no business insisting on obtaining, that is materials in a pending investigation and others in a closed investigation, I made the point that at some point the Mueller investigation will come to an end. And one side or the other will be aggrieved by its result.

And how am I to explain on the Democratic side of the aisle why we do not demand the same thing the Republicans demanded when they were in the majority?

Materials which the Department has a policy against providing to the Congress. And for good reason: Because we shouldn't be in the business of trying to steer pending criminal cases any more than the White House should be.

So I think we've done deep destruction to our system of checks and balances. And we are going to have to look when this ugly chapter is over at how do we legislate norms that we thought inviolate? And there's a whole list of them.

There are things within our power to do and some beyond our power to do. You know, one of the bills I introduced, and this gets to Chuck's point about the abuse of the pardon power, we can't constitutionally by statute somehow cabin the President's pardon power. But we can disincentivize its abuse. And one of the bills I introduced would provide that in any investigation in which the President is a target, subject, or witness, and they issue a pardon affecting that investigation, that the investigative files in that case will be provided to Congress.

That's a deterrent. It also allows the Congress to determine whether the President is using the pardon to obstruct justice. And we're going to need, I think, ultimately to think about new and creative ways to institutionalize norms that we thought we would never see trampled upon.

MR. WITTES: So on the subject of the document production demands, I realize that we have here on this panel a person who has run the National Security Division at Justice, a person who has served at the most senior levels of the FBI, as well as running the DEA, but the FBI is more relevant here because it's involved in the FISA process, and a ranking member of the relevant oversight committee with respect to FISA. So I'm going to pose a simple question to all three of you and I just want to start at Chuck and move down.

Are there any circumstances in which it is reasonable for Congress to be demanding materials, FISA materials, identifying sources from pending investigations?

MR. ROSENBERG: No. (Laughter)

MR. WITTES: Mary?

MS. McCORD: I would agree, no.

CONGRESSMAN SCHIFF: I can't envision the circumstances. But what we have seen goes beyond your question because it's not in this case just a matter of, as serious as it is, providing FISA materials in the pending investigation in Congress, but it's the committee's release of those materials publicly for a political purpose. It is the risk of exposure of the sources that provided information in the FISA.

So the situation we're living through goes well beyond whether Congress could ever have legitimate oversight in a FISA application. I don't know that I could answer on the spot and contemplate every circumstance, but it's hard for me to imagine where that would be appropriate. And certainly, it would never be appropriate to make a selective or fraudulent release of those materials.

MR. WITTES: Go ahead.

MS. McCORD: Following up on that, I think, you know, no is I think the right answer. But to be clear, the Department and the Bureau, they do brief the select intelligence committees about important issues of national security. So for me in answering no with respect to, you know, providing the actual FISA applications is a little different from saying will the Bureau and the intelligence community appropriately brief the intelligence committees about important national security information that the intelligence committees should know. These are two different things.

And I think, as the Congressman has indicated, the problem with turning over applications is exacerbated significantly by the use made of those materials, the partisan use made of those. The actual need to ensure that Congress is aware, or certain people in Congress with the highest levels of classification are aware, about important threats to national security I think is indisputable. It's just a matter of doing that and then what is done with the information.

MR. ROSENBERG: Completely agree. Yeah, I completely agree. The

oversight function is not only crucial, but it's actually fairly robust. We spend a lot of time not just briefing members of Congress, but there are other Executive Branch agencies that oversee our work. We have inspectors general throughout the Executive Branch that look at our work.

So I think my no stands. I think the answer is no. But those caveats are important ones and I agree with them.

CONGRESSMAN SCHIFF: And, Ben, if I could just remind people of the chronology here just to show you how absurd and dangerous the situation was. When the majority and the chairman moved to release the selective presentation of the FISA applications, the chairman himself had never read the applications. The members of the committee with one exception had never read the applications. And I moved that before you release this information which misrepresents what's in those, why don't you seek a briefing from the FBI about what went in them or access to the documents?

They were not even willing to do it. They didn't want to read it. They merely wanted to put out a political memo. And that, I think, shows you just how not only disingenuous it was, but how ultimately dangerous to our national security.

And one final point I'll put on this, recently the President ordered more of these materials declassified over the objection of the intelligence agencies and the Bureau. What ultimately caused him to walk that back is unclear, but we know from a Tweet apparently our allies weighed in to tell the President how damaging that was.

Now, you can imagine what might have gone into that that we needed our allies to persuade the President; that the intelligence agency heads would have had to reach out to their counterparts around the world and say would you please call our boss because he doesn't believe us? He needs you to tell him that this would be damaging. That's the Alice in Wonderland world we're living in.

But even after all of that and even after the President is persuaded that he should, at least for a time, rescind this order, the members of our committee still insist

on its release. They don't care that the allies say it will potentially burn them or their sources. They're still willing to do it. And in that context how can the IC or our allies ever trust what the Congress will do, much less the President?

MR. WITTES: So I want to go to audience questions, but before I do I have one more question of my own, which is that as I said before, the problem here is not merely impact on Executive Branch investigations and the sins of commission of congressional investigations. It's also sins of omission of congressional investigations, things that should be being investigated that are not.

And you have been pretty emphatic that the committee did not investigate the Russia set of matters in a fashion that was adequate to your satisfaction and that if and when you are ever in charge of that committee, things will look different in terms of that investigation. So I just want to throw out the question if the House were to flip in November, how does the affirmative oversight, not merely the defense against Executive Branch activity, but the affirmative oversight activity of the committee look different than it does now?

CONGRESSMAN SCHIFF: Well, I would say a couple things. I think, first of all, all of us are more than superstitious about presuming anything in the midterms. We all feel burned by our expectations a couple years ago. But if the House should change hands, I think priority number one has to be restoring the credibility and integrity of our committee and a comity among members of the committee.

But in terms of our oversight function, there are certainly particulars in the Russia investigation that were never done. None of it was done very seriously. And probably the most graphic illustration I can give you because it's very telling about the nature of the GOP-led Russia investigation is we know that there were calls to and from Don, Jr., and Emin Agalarov in the setup of that now infamous Trump Tower meeting. Sandwiched between them was a call from a blocked number and we know the President used a blocked number during the campaign.

So we sought to subpoena the phone records to determine did the President have prior knowledge of this meeting? Did the President approve of this meeting? And our GOP colleagues said, no, we don't want to know. We won't get those records because we don't want to know.

And this was the story of the investigation, that is we want to rely on the witnesses' denials without any effort to corroborate or refute them. So when the time comes, if the time comes, we'll have to look at what was done and what wasn't done.

I'm particularly concerned that no one has investigated the issue of whether the Russians were laundering money through the Trump Organization and this is the leverage that the Russians have over the President of the United States. To me not knowing that is negligent with our national security.

But quite separate and apart from Russia, and this I think is the big untold story of what the Russians did, and I guess, first of all, I would say that, as my colleagues on the panel have pointed out, I think is all too true, what the Russians did in meddling with our democracy is nothing compared with what this administration is doing to meddle with our democracy. The Russians couldn't cause us to distrust our own free press. They couldn't cause us to undermine the independence of the Justice Department. They couldn't cause us to denigrate and belittle our own Judiciary. Only we could do that to ourselves.

But the big picture I think, the big untold story here, and something that I would like to have us have open hearings on and private examination and oversight of, is the Russian attack on our democracy was not in isolation. The Russians have been going after democracies in Europe and elsewhere.

But more broadly than that is the fact that the whole idea of liberal democracy right now is under assault. We see a rise of authoritarianism around the world. This poses, I think, among the most significant national security threats to our country.

And that is something I would like our committee to do some oversight of. That is something I'd like to see our committee do public hearings so that the country has an appreciation for the fact it's not just our democracy here at home that's at risk, it's democracy around the world that is currently at risk.

MR. WITTES: So we can go to your questions now. Please let me see your hand and you've got to wait for the microphone. And when it comes, please keep your question brief. I have tried to do that. I will cut you off with a shocking lack of due process if you don't. (Laughter) And please introduce yourself and tell us who you are.

MS. REISER: Good morning. My name is Mindy Reiser. I'm vice president of an NGO called Global Peace Services, USA.

First a quick comment. Last night the Holocaust Museum honored Ben Ferencz, who is 99 years old, prosecutor in Nuremberg for the rule of law.

Question to Mr. Rosenberg. You talked about the concept of the rule of law. What do you think the Supreme Court will be now that it has been impugned and politicized? What kind of trust can the American people have in this damaged institution?

MR. ROSENBERG: Yes. You know, the thing that worries me the most is that we come to see our Supreme Court as nothing more than, and I don't mean this as an insult to Congressman Schiff, but we come to see them as nothing more than nine robed members of Congress; that they always vote in a particular way because they were appointed by a particular person.

I did look just last night at how we have looked at our Supreme Court over the years. Gallup has been asking this question since 1973. And the good news is that it has remained not just high, but steady; that perceptions of the Supreme Court, its ability to rule fairly and justly poll very, very high in this country.

And so I think the answer is I don't know. I worry about it deeply because this seems to be different. I don't think what we're seeing now, at least in my memory, is anything that I've ever seen before, at least not as an adult, at least not as an

adult paying attention.

And so elections have consequences. Presidents get to appoint, Senates get to confirm. But this seems to be more political than I've ever seen before, not just polarized, but political. And that worries me deeply.

MR. ADHIKARI: Thank you. My name is Gautam Adhikari. I'm a fellow with the Center for American Progress.

As a layperson I just wanted to know whether a President while in office can be prosecuted for federal crimes committed before he was in office, like tax fraud, for instance. (Laughter) And would it be possible to prosecute him for similar crimes, again, while he was not in office, after he has left office because he may have pardoned himself for those crimes?

MR. WITTES: Okay, there's actually a series of embedded questions in there. And let me just dispense with them all, if people want to chime in, feel free.

All of those questions are contested. Whether the President can be indicted at all is a contested question. The application of a self-pardon is a contested question. And whether the President can be made to be answerable for pre-presidential conduct is itself a contested question.

So I don't think -- unless people have something to say on the subject I'm -- but those are really complicated, dense issues that could take an entire panel themselves. But please.

MR. ROSENBERG: I think there was one other embedded question, which is can a President be indicted when he is out of office? And I don't think that really is contested. I think the answer is yes.

CONGRESSMAN SCHIFF: If I could just add, too, because this had me yelling at my TV set, which I rarely do. (Laughter) I know most of America's yelling at the TV right now, but I usually restrain myself.

But I was watching the other day as the question of whether you could

be impeached for prior conduct came up and it was communicated that that was an open question. That's actually not an open question. I tried an impeachment case 10 years ago. We impeached a federal judge named Thomas Porteous for corruption.

There were four articles that may be relevant to modern times. One article was purely prior conduct. Another article was lying under oath during his Senate confirmation. On an overwhelming basis the Senate convicted on all those articles, including those two. So we now, by constitutional terms, in a country that rarely has an impeachment trial, have a very recent precedent that you can be impeached and removed from office both for prior crimes and for lying under oath.

Now, whether the evidence would rise to that level in either of the circumstances under discussion is a wholly different issue. But whether it can be constitutionally done has been resolved as recently as 10 years ago.

MR. WITTES: So one of the cool things about the Brookings Institution is you get to do something like what I'm about to do. David Priess is sitting in the audience and wants to ask a question. And you all should just know David was Bob Mueller's CIA briefer for a long time, and so is unusually well-positioned to ask this group a question. (Laughter)

MR. PRIESS: And my question has nothing to do with that. (Laughter)

MR. WITTES: And yet we will read so much into it. (Laughter)

MR. PRIESS: One of the issues of the rule of law that is most interesting to me is the erosion of norms, the things we take for granted historically. One of those, and the news just came out within the last couple of days, one of those is the inviolability of *Star Wars*, that Russian trolls may have been trolling the debate on the reception of the last *Star Wars* movie. Now, that's something I don't think, Representative Schiff, you have yet introduced legislation on, but I do recommend it. But it gets to the wider --

CONGRESSMAN SCHIFF: You know, I do represent Hollywood, so that could happen. (Laughter)

MR. PRIESS: Exactly. It gets to the wider issue of norms. And one of the things that many of us are concerned about is the erosion of norms as a backlash to the erosion of norms we've seen. For example, stories about presidential advisors not giving him information that he would need to make national security and law enforcement decisions; or alternatively, not executing the policies the President has declared. These are things we've historically taken for granted.

And I'd like to hear each one of you just for a minute or two talk about the danger of the erosion of the rule of law, especially when it comes to longstanding norms about the presidency and how that could impact us going forward and how we can resist that urge to allow those norms to continue to break down.

MR. WITTES: So that is a great question on which to wrap up. And we don't have a minute or two for each panelist because we actually do have to end. But let's just have, starting with the Congressman and moving to the left, everybody address that. And then we will call it a morning.

CONGRESSMAN SCHIFF: Well, it is a great question and I think that the examples you give underscore the fundamental conundrum of people working within the administration, which is how do you ethically serve a deeply unethical man? And there's simply no good answer for that.

A lot of people have debated about whether Anonymous, this writer of the op-ed, should have written it at all or should have resigned or what not. It's all a struggle to figure out how you ethically serve both the country and nonetheless serve the President. And I don't have a clear answer to it.

I don't know that there's a way to legislate that particular norm. I would have to imagine that in the example that you gave that our intelligence agencies would give the President all the information he needs to make the decision without sourcing it; without, unless the President demanded to know, risking those sources by gratuitously telling the President what they are. And that's obviously far from ideal, but then the

situation is far from ideal.

I have been saying for some time that the flaw that emanates from this deeply immoral man is affecting the whole of government and it is. But I have to say, and I hate to leave on this bleak a note, as I watched the rally last night where the President denigrated Dr. Ford and the crowd applauded, it occurred to me that the flaw of that character is infecting the country and just what a vital role the President -- a President traditionally has in making us a more perfect union. And when you don't have a President who views that as a part of his job, how deeply destabilizing and destructive it is for the country.

MR. WITTES: Mary?

MS. McCORD: I think you also raise a really important question. I think it's very difficult for a lot of people working in government right now, particularly in the Department. I will tell you, you know, as a career person myself, I had intended to stay until my successor was appointed, and that became increasingly difficult really not only from the time this President took office, but certainly from the time Senator Sessions came into the Department as the Attorney General. Some of that was for policy reasons and some of it -- so I think ultimately I came to the conclusion that because I didn't feel that I could actively undermine policy decisions and other things that were being done, I needed to leave. Others have chosen a different course.

I have felt badly about leaving many times because I feel like everybody can't leave. If everybody leaves, you know, we're in a real problem. But for me in the role I was in interfacing with the Attorney General every single day and seeing some of the things that were happening, how national security was being used as a justification for policy actions that weren't justified by national security, for me the decision was to leave.

But I think it's a difficult one and I don't really condone purposefully trying to undermine the President, but I also understand why people would feel the need to do

that.

MR. WITTES: Chuck, wrap us up.

MR. ROSENBERG: I will. And by the way, I had the pleasure of seeing David every morning when I was on Bob Mueller's staff in 2002 and 2003 at I think 7 a.m.

MR. PRIESS: On a good day. (Laughter)

MR. ROSENBERG: On a good day, which was essentially four hours after Bob Mueller got to the office. (Laughter)

I have a rather simplistic and binary view of this, David, which is that you either -- you serve faithfully and any President is entitled to faithful service or you resign. And I've been thinking about that for a long -- well, not a long time, but since that Anonymous article came out whether I'm taking too simplistic a view, whether there should be a middle ground.

I'm still of the belief that there is not, that it is a binary choice and you do one of the two: you serve faithfully or you resign. Because I think that middle ground can be dangerous because then you have people picking their own path and that is, in a sense, what we're talking about here today. I believe in a sense that undermines the rule of law.

So, like Mary, I resigned. I could not stay in a job where I was uncomfortable doing the things I was being asked to do. And that only gave me one option and I exercised it. But I'm not sure I'm right, David. It's something that I wrestle with.

MR. WITTES: Please join me in thanking the panel. (Applause)

(Recess)

MR. WITTES: So we are, as the panel clears, go directly into a conversation with Ken Starr, who has materialized over my right shoulder. I have done a lot of interviews in my life, I have never done an interview with somebody who not only wasn't there, but who I was facing the opposite direction from. And so this is a little bit awkward,

and I apologize for that.

But, Ken, thanks for joining us.

MR. STARR: My pleasure. Thank you.

MR. WITTES: So there is a question that I have been thinking about in reference to you through this entire summer and spring as these news stories have arisen that Bob Mueller is writing a report. And you were one of the few people in the country whose name is attached to the word "report" in quite the way it is. And so as the audience may not know, I wrote a book about the independent counsel investigation under Ken Starr, in which I explored and critiqued your understanding of that role in relation to the reporting function of the office.

And so I'm interested in your thoughts about how we should understand these press reports that Bob Mueller is working on some kind of report. How do you understand that? And as an initial matter, what sort of report do you think he's likely working on?

MR. STARR: It's obviously a speculative matter. We cannot know. I have great confidence, by the way, in Bob Mueller and his professionalism and his integrity. But when we go to the regulations under which he is operating, we see a very stark difference with the regime that Congress I think unwisely inaugurated in 1978, created the then special prosecutor and the counsel provisions, because 595(c) of that statute pointed very expressly toward impeachment. It was a thumb on the scales setting forth a very modest standard requiring the independent counsel, in words that were quite obligatory, very clear, bring to the House of Representatives when there is "substantial and credible information that an impeachable offense" -- left, of course undefined -- "may have been committed". We're in a totally different regime now, and it's a better regime. That is to say Bob was appointed by the Justice Department, is an officer of the Justice Department, and is operating under the policies and directives of the Justice Department. I cannot imagine that whatever report he is working on is one that is designed to be a

public kind of document, as opposed to a document that gives an accounting to the Deputy Attorney General Rod Rosenstein, who then may do what he wants to with it, including obviously an information sharing role with the Congress.

So I think we are dealing with a much healthier and much less politicized approached. One of the many flaws of the independent counsel statute, from the appointment process, removing the appointment process from the Executive Branch and putting it into a special apparatus of the Judiciary, and putting the Judiciary in a very odd and awkward position, is that there is nothing in the regulations that refers to impeachment. So as Bernie Nussbaum, the very able first counsel to President Clinton, said -- and I'm paraphrasing -- don't sign this reauthorization of this law. This is a dagger aimed at the heart of the presidency. And that's precisely I think what it was. We are out of that and I think we've depoliticized the process by virtue of the Janet Reno regulations.

MR. WITTES: So your assumption is that when the press -- or the president's lawyers, who seem to be the sources of all of these relevant stories -- when the press talks about Mueller working on a report on obstruction, that it is not an impeachment referral at all?

MR. STARR: That would be my assumption. Now, again, Bob Mueller reports to the deputy attorney general and the deputy attorney general has to -- and Jeff Sessions' absence due to his recusal -- has to interpret those regulations. So there may be an interpretative gloss in light of the facts that in an exercise of discretion the report should be in fact be more wholesome, more complete, more thorough, as opposed to what one might contemplate is an executive summary that doesn't necessarily lay out the evidence pro and con.

And one of the reasons is that if indictments are not sought, then the Justice Department is under its traditional policies not to be holding press conferences setting forth reasons, information, why it's not taking action in terms of going to the grand jury and seeking an indictment. That's part of our protections I think as a free people.

And part of the criticisms that were directed -- I think quite properly at then Director Comey -- that he should not have been holding these press conferences explaining the reasons why he did not think an indictment was appropriate, for a number of reasons, including usurping the powers and authority of the Justice Department.

So I think we're just at a very different and healthier structural environment, much more consistent with our system of accountability under separation of powers.

MR. WITTES: If we assume that you are correct, that whatever Mueller is working on is a document to be sent to the deputy attorney general, the acting attorney general, not a document meant to be sent to Congress, and that it may not have some of the same narrative or sort of broadly elucidating material, but may be much sparer than the final reports of the independent counsel, under the independent counsel law, or the impeachment referral that you guys wrote, this puts an enormous premium on the role of Rod Rosenstein, the deputy attorney general, who -- I don't know of coincidentally or not -- cut his teeth working for you in the Office of Independent Counsel.

MR. STARR: Right.

MR. WITTES: Rosenstein has been kind of famously under enormous pressure of late, and wedged between the Office of Special Counsel, which he has, in my opinion done a remarkable job of protecting and allowing to do its work, and the President who, you know, publicly regards it as a witch hunt and decries it as 17 angry democrats, in a fashion that must have resonance for you in terms of the way people used to talk about your office.

Talk about the role of Rod Rosenstein here and the, you know, every day we wake up and there's a suggestion that today may be his last day in office. How should we understand who Rod Rosenstein is with reference to this whole process?

MR. STARR: Rod is just fraught with integrity. He is completely committed to the rule of law. He turns square corners. He will call them as he sees

them. So in terms of the report, I could see him with the exercise of his discretion. I think he has discretion under the regulations. I could see two reports being prepared, somewhat analogous to a proposed indictment. As I recount in my recently published book, we seriously contemplated the indictment of Hillary Rodham Clinton for various and sundry wrongdoings in Arkansas. That proposed indictment was supported by a very elaborate prosecution memo. I could see now, under the current circumstances, an executive summary, a much more summary document by definition, and then a very thorough report that would not in fact be submitted to Congress. But that again would be a discretionary call by Rod Rosenstein.

I think the country should have complete confidence in Rod given his impeccable record. And, yes, I did work alongside him. He was on our trial team that resulted in the jury convictions after a very hard fought three month trial in Arkansas of the president and the first lady's at the time business partners, Jim and Susan McDougal, and the sitting governor, Jim Guy Tucker. And these were serious felonies connected with the collapse of Madison Guaranty Savings and Loan. Rod came to us from the Justice Department, he returned to the Justice Department, where he had a very splendid record. And then, of course, I think as everyone in this audience very well knows, he served with great distinction as United States Attorney. In the best traditions of the Justice Department, he was appointed by a republican president and remained as United States Attorney with a democratic president with the enthusiastic support of two democratic senators. Rod is a republican, but above all he is a rule of law guy.

So I think we should have great confidence in him, including just in his courage. The prior panel talked about do you resign as a matter of conscience and so forth. Rod Rosenstein is that kind of person. He will -- if directed -- I don't think he will be -- to take action and he thinks it's inconsistent with the rule of law, he will resign.

MR. WITTES: One more question and then I'll let you go. One of the striking optical differences --when you talked about how this regime is more healthy than

the independent counsel regime -- one of the stunning optical differences between this era and the era under the independent counsel law is that whenever the Office of Special Counsel brings an indictment it is the deputy attorney general, the acting attorney general, not Bob Mueller, who is up there at the podium giving a press conference about it. And I just want your -- if Janet Reno -- if you had been serving under this regime and Janet Reno had been situation to you the way Rod Rosenstein is situated to Bob Mueller and she had had to go out and make all the announcements, or had been willing to, how would that have changed the operating environment in which you were serving?

MR. STARR: I think it would have greatly promoted public confidence in the work of the office. Just as Bob Mueller is under assault, we were under assault. Judge Walsh, when he was investigating here at the Reagan Administration, was under assault, because we were out there all by ourselves. What Bob Mueller has is essentially the insulation and the protection of the deputy attorney general, confirmed by the Senate. I wasn't confirmed by the Senate and Janet Reno, throughout -- I am partially critical of her conduct toward the very end of our investigation -- when -- she was a rule of law person, she was appointing independent counsels when she felt that the need was justified by the facts. I think she was obedient to the law. And for Janet Reno to go out and to announce the indictment of Jim and Susan McDougal and Jim Guy Tucker might have saved us a trial. We might have gotten a few more guilty pleas. We had a number. There were 14 criminal convictions and guilty pleas during the course of the investigation.

But it shows the American people that there is in fact accountability in the form of our separation of powers, checks and balances, and that a Bob Mueller cannot go wildly astray on what might be viewed as a rogue kind of roving prosecutor. Because we know -- at least those who focused on the issues know -- that he is checked under these regulations by Rod Rosenstein.

MR. WITTES: Ken Starr, thank you so much for joining us. (Applause)

MR. STARR: My pleasure. Thank you.

MR. WITTES: So, we are going to be joined by our second panel now. Give us a second to invite them out.

MS. HENNESSEY: They asked me to mention that there are a number of open seats up front. If anyone at the back wants to kind of fill in up here and grab a seat, there are open ones.

Okay. Thank you to everyone for joining us today. I'm Susan Hennessey; I'm a fellow here in Governance Studies at Brookings, and I'm the Executive Editor of Lawfare. I'm very excited to be moderating this panel, which is going to be on examining congressional government oversight and their role in preserving the rule of law.

Before I introduce our panel I will note that we have saved about 15 minutes for audience questions at the end.

With that, I am delighted to introduce our very distinguished panelists. I will go from closest to furthest. So first is David Jolly. David served in the U.S. House of Representatives from 2014 to 2017 representing Florida's 13th District. Mr. Jolly has held an impressively diverse array of positions in Congress, ranging from an intern to a member, and has worked outside of Congress as an attorney and political consultant. He is currently a frequent politics and policy analyst on MSNBC and CNN, among other networks.

Past him is Danielle Brian. Danielle is the Executive Director of the Project on Government Oversight, a non partisan independent government watchdog, whose investigations into corruption, misconduct, and conflicts of interest achieve a more effective accountable and ethical federal government.

Past her is Charles Sykes, a Contributing Editor at the *Weekly Standard*, the host of the magazine Daily Standard Podcast, and an NBC, MSNBC contributor. His most recent book, "How the Right Lost Its Mind", was released in October 2017. Mr. Sykes is currently a member of the Knight Commission on Trust, Media, and Democracy,

is on the advisory board of the Democracy Fund, and is a member of the board of Stand Up Republic.

Past him is Congressman Elijah Cummings, who currently represents Maryland's 7th District in the U.S. House of Representatives, and has since 1996. Congressman Cummings is the ranking member of the Committee on Oversight and Government Reform. Representative Cummings is also a senior member of the House Committee on Transportation and Infrastructure.

So, before we dive into what I hope will be a lively and conversational discussion, I have asked Congressman Cummings to start us off by sharing some of his thoughts on what the role of Congress is in preserving and fortifying the rule of law.

CONGRESSMAN CUMMINGS: First of all, good morning everyone. I'm sorry, good morning, everyone. I thought maybe you didn't hear me. Thank you very much. I am indeed honored to be here this morning. I want to thank the Brookings Institution for inviting me here today and Miss Hennessey for your very gracious introduction.

For the past seven years I've served as the top ranking democrat on the Oversight Committee. I've served with both republican and democratic chairman and with republic and democratic presidents. I've seen oversight work well and I've seen it work poorly. We have a very unique committee. We have a duty to conduct independent oversight and then use what we learn to propose effective reforms.

The House rules give our committee authority to investigate any matter at any time. That's a lot of authority. This is consistent with the founding fathers' intent for Congress to act as the ears and eyes of the American people, especially when overseeing how the president runs the Executive Branch.

Our obligation in Congress is not just to fund the Executive Branch, it is to get the receipts. Our obligation is to root out corruption and abuse of authority. We cannot develop reforms if we do not determine what went wrong. Unfortunately, for the

past two years the republican majority has essentially abandoned this responsibility. They have prevented our committee from conducting credible oversight on a large array of issues. And let me be very clear, this is not a normal way of doing business. It's simply not. Even for a republican chairman investigating a republican administration. For example, in the aftermath of Hurricane Katrina, our chairman at the time, Tom Davis, who I have a tremendous amount of respect for, led an investigation of the Bush Administration's response. Imagine that. The republican chairman investigating a republican president. It's difficult to believe it in today's climate, but that's what was normal. Chairman Davis obtained half a million pages of documents from the Bush Administration and held nine hearings in less than six months. He issued a subpoena for emails from the top Bush Administration officials. He got more than 22,000 pages of documents from the White House. And he issued a 569 page report criticizing the Bush White House, federal agencies, state government, and private contractors for their failures. Davis is a republican.

Last fall the hurricanes that struck Puerto Rico and the U.S. Virgin Island were one of the most devastating natural disasters in our history. They resulted in far more deaths than Hurricane Katrina. Yet, Chairman Gowdy held no full committee hearing, he refused to even ask -- to even ask the White House for documents. He issued no subpoenas. He would not even allow us to vote on requiring agencies to turn over documents requested by the chairman himself. He requested the documents and then would not back it up when basically the White House said, hell no, I'm not giving you a damn thing. That's the climate we're in right now.

The problem is that when you look back at the report Chairman Davis issued after Hurricane Katrina, he warned about the exact problems we are seeing again today. He warned that FEMA should have had contracts in place before the hurricane to provide emergency services, food, and water. That seems basic, but after the hurricanes in Puerto Rico, FEMA had to rush to award a contract worth -- listen up -- worth more

than \$150 million to a small business that other agencies had essentially deemed ineligible. They had to cancel the contract within days and people were starving in the meantime. We're better than that.

Why has FEMA reverted to its past mistakes? Why did the President head out for a long weekend at the golf course in New Jersey in the immediate aftermath of the hurricanes? Was there a communications breakdown between the White House and the first responders on the ground? We do not have the answers to these questions and they are not theoretical. They can mean the difference, ladies and gentlemen, between life and death. The American people want their government to work effectively and efficiently for them. Oversight is what makes that happen. The name of the committee is oversight and government reform. Oversight means you've got to have information. If you don't have information you're in trouble. You've got to protect whistleblowers. A lot of our research comes from whistleblowers. Got to protect them.

During the eight years of President Obama's Administration I worked repeatedly with republican members of our committee to investigate and conduct bipartisan oversight of the Executive Branch.

As I close, in fact, not many people know this -- and this is going to shock people -- but I signed as the ranking member more than 800 bipartisan letters with Chairman Chaffetz and Chairman Issa. I'm not sure, but that very well may be a record.

The founding fathers charged Congress with serving as a truly independent check on the Executive Branch. It is time for Congress to do its job. We need to hold hearings, obtain documents, and if necessary, issue subpoenas. That is how we will hold this President and this Administration accountable to the same standards to which we have held every other president and every other administration.

Thank you. (Applause)

MS. HENNESSEY: Thank you, Congressman Cummings. I should also note that we did invite Chairman Issa as well, although he declined to participate in this

conversation.

So I'm going to begin with an observation paraphrasing Walter Shaub, the former OEG Director -- a statement that he made on this very stage -- and that's that you don't hear about congressional government oversight when things are going well, and we've been hearing a lot about congressional government oversight lately.

(Laughter)

So while I welcome any optimistic panelist to sort of challenge that assumption, I do think the task here today is a little bit to dissect a bad news story.

So, to kick that off, I'll start with Danielle and then ask David to share thoughts. On this question, you are both astute and long time observers of Congress, what oversight actions are you seeing right now that are especially alarming or don't look like a healthy functioning Congress to you?

MS. BRIAN: Thank you, Susan. It's a pleasure to be here. And it was terrific to hear the Congressman speaking with such full throated defense of the role of Congress and its oversight responsibilities.

I think it's important to put where we are now in a little bit of historical context. And you saw a sense of it a little bit in the earlier panel, which was talking about the role of congressional oversight when it comes to national security. Something that I've been concerned about -- we've been concerned about for a while, is that Congress to some extent has been ceding a lot of authority to the Executive Branch. You especially see this in oversight of the intelligence communities. And you heard Congressman Schiff referring to trust from the agencies to be able to get information as Congress. And from our perspective, part of the problem has been that, to some extent, Congress has been allowing the Executive Branch to cede a lot of authority away from the Congress.

So we're now at a point where, for example, the Justice Department's Office of Legal Counsel has legitimized the current circumstances where the agencies are refusing to honor minority requests. Congressman, I think you have something like

64 outstanding requests that are being entirely ignored, if that's right.

MR. CUMMINGS: That is correct. (Laughter)

MS. BRIAN: And so that's just a completely broken system. If the Congress has sort of allowed itself to be getting ignore, and now it is literally being ignored.

And in particular, two things that strike me as particularly alarming. One Congressman Schiff referenced was in the House intel committee's work, when you actually had members of Congress voting not to be able to see information, that's just astounding. I mean at that point we actually called for those members of Congress to step down from the committee, because you're abdicating your responsibility if you're choosing not to get information. And that's again what we saw in the last couple of weeks in the Senate judiciary committee when you had members saying we actually don't want information. Happily, that seems to be stopped this week. But those are two moments of sort of shocking inappropriate behavior by Congress.

MR. JOLLY: So, I would add to that, I would agree with it, but I would also add there are multiple layers of oversight that can occur on Capitol Hill. Most of your functioning committees, if they're doing their job, are engaging at least in some level of oversight.

So for roughly 20 years I worked within the appropriations environment. Part of the job was essentially almost to audit some of the more questionable accounts, if you will, to identify spending requests that came in, as well as contracts that were awarded, and investigate those. But it is only one function of your standing committees, which is why the importance of the oversight committee, particularly in this environment, comes into focus.

As a student of the institution, I always like to point out there are two areas in which we as voters and as citizens can approach judgment of political actions. The first is in basic moments of integrity, leadership integrity, political integrity, decision

making. It is fair for us to make assessments of the integrity with which leaders serve. The second is to begin to examine the structural challenges that have brought us to where we are. And those are two very different things. The first lane has a little more passion to it, the second is a little more academic, if you will.

But, look, two examples that kind of highlight where we are in this oversight environment. Though it was a special committee and not the House government oversight committee, go back to the Benghazi investigation where the majority leader at the time, Kevin McCarthy, in his quest to become speaker of the house, admitted -- admitted that the investigation was a tool to try to hurt Hillary Clinton's viability as a candidate. It was not to get to the facts, it was to be used as political tool.

We are in an environment -- to the Congressman's credit and to the points you were making-- where the oversight committee has become a tool of the majority. And I will say this as a republican, at the discretion of a republican majority over the past decade, to his point, it was not always like this. But the current class of republican leadership has decided that the committee is a political tool that they will use in times of divided government against a democratic president and that they will not use during the time of the Trump Administration. That is simply the reality.

We can have a longer conversation about the structural challenges, but the last thing I would add in that lane, and it is an academic answer to a more passionate question, I think we could begin to approach a conversation of whether or not we should give the minority greater tools on the oversight committee, regardless of who controls the Congress, approach it more like the ethics committee where you have an evenly divided committee, equal number of members on both sides of the aisle, perhaps grant subpoena authority to both the chair but also the ranking member, or perhaps create a consensus way to issue subpoenas; some tool that empowers the minority on oversight greater than they are right now and then trusts the leadership and trusts the ability of those competing interests, if you will, to function.

MS. HENNESSEY: So, Charlie, I'm interested both in your observations on anything we've heard thus far, but also to the extent that Danielle and David both focused on some negative things that we are seeing occur, whether or not you think there are areas of congressional inaction -- inaction in sort of areas of traditional congressional oversight function that you think people also should be paying attention to.

MR. SYKES: Yeah, thank you. I think this whole subject is really an indication of institutional decay. The Congress was not supposed to be a Constitutional potted plant. The Article 1 is Article 1 for a reason. And I think the abdication of responsibility is one of the tragedies of our time that members of Congress just don't have the pride to say we are a coequal branch of government. But I think what we're finding out -- and I will get to your question -- is the whole system of checks and balances more of a metaphor and that our system of government, with all of the norms, a lot of it is based on an honor system. And what happens when you have dishonorable people vested with this un-checkable power.

So in terms of things that are not being -- and really glad that Congressman Cummings addressed this because I've been told that it's naive to expect a political party to exercise oversight to an administration of the same party under normal circumstances. Obviously you've answered that. These are of course not normal times. But I think in terms of things that ought to be investigated, and I'll give you five just right off the top of the bat -- and I think that Congressman Cummings highlighted probably the most egregious example of things that were not investigated. The failure of the Congress to hold hearings of oversight into the government's handling of the hurricane in Puerto Rico is frankly indefensible. There is no possible justification for that. But that's also true on a number of different areas. Why do we not have congressional hearings, public hearings, about what is happening on the border with the separation of children. You know, how did this become a strictly partisan issue? Why does everything that we're finding out, you know, we find out on television, but members of Congress have not

exercised oversight into what appears to be either in reality or potentially a humanitarian crisis. And, of course, certainly a bad moment for the American brand -- and, by the way, I hate that term "brand".

I think it was Senator Whitehouse who used the term "open corruption". I think that this is obviously one of the areas to have Congress begin to ask about conflicts of interest, about in fact the -- whether or not there are elements of kleptocracy in our own system. And just based on the news in the last 24 hours, this would be a great time to have congressional hearings about income tax forms (laughter; applause) and ask some fundamental questions about not just the President's income tax forms, but really, frankly, as a larger investigation of the manipulation of the system.

And, obviously -- and I'm going to get to Russia and what Congressman Schiff has talked about -- it is one thing for Congress to fail to exercise its watchdog functions, but in the area of the Russia investigation and the House intelligence committee, they not only have failed to be watchdogs, they have made the conscious decision -- with the support unfortunately of congressional leadership -- to be lapdogs and to go from not asking these important questions to actively enabling some of these behaviors. And I think that is going to be one of the darkest moments in congressional history.

And, finally, I would certainly hope that the next Congress on this issue of the rule of law will ask very, very tough questions about the communications between the White House and the Department of Justice, the communications between the White House and the FBI, to really probe into whether there is undue influence, political influence over these processes, because this is really the nexus of the rule of law when you have a president who I think is either ignorant or actively contemptuous of the rule of law. And right now there are communications going on within the Justice Department, within law enforcement, and within the White House, that I hope that we will learn more about with congressional oversight.

MS. HENNESSEY: So, Congressman Cummings, everyone thus far has sort of spoken about institutional decay and these structural issues that really are rooted in a form of partisanship I don't think we've quite seen before in the legislative branch. I'm wondering if you can speak to some of the specific challenges of conducting oversight in the minority? So what are the tools that you need? What are the specific issues that you're coming up against as the ranking member?

MR. CUMMINGS: Yes. That's a great question. The first one I've already talked about, is being able to get information. Let me tell you, if you cannot get information on our committee you might as well go home and play golf, even if you don't play golf. (Laughter) No, I'm serious. You cannot do it. And Charlie made a great point, this is just not about the business of my republican friends laying back and letting things happen, they actively become defense counsel for wrongdoing. I mean that's a double -- I mean think about what I just said. We're supposed to be the check. And so what we're doing -- what we find ourselves doing is trying to get them to be accountable -- not only get the President to be accountable, but the Congress to be accountable, which is very -- and that makes the job extra hard.

The thing too that gets to me is when we're trying to investigate things that affect the American business on a day to day business. See, we just don't deal with exposing what our President and Executive Branch is doing, we also have a duty to try to address things that are affecting Americans on a day to day basis. And I will give you an example, prescription drugs. This has been a big deal personally of mine that I've made a big priority. You have to beg, literally beg and plead to bring in somebody like Shkreli, who jacked up the price of lifesaving medication 1000 times. But in most instances they will not even allow us to even bring people in like that. Again, we're trying to do what? Address the things that go to the center of people's lives on a day-to-day basis.

That's -- and so then what happens -- not a lot of people are going to be shocked when I say this, but one of my best -- I guess one of the closest people to me in

the Congress is Meadows. Go on, fall over. (Laughter) I mean we -- there are some things that we are able to agree on. And I say, Meadows, if we can work out some things for federal employees, with the things that we can agree on. Ninety-eight percent of the stuff we disagree, but we get along. So I'm trying to get what I can to help people every day. As a matter of fact, the meeting that I had with the President over a year ago, that's what we went -- we went to him -- I went to him about prescription drugs, trying to also create a situation where we could then get effectively and efficiently something done. We couldn't.

But let me just say this -- and it will be a legislative malpractice if I don't say it -- ladies and gentlemen, I want you to listen to me carefully, I have said it -- I said when Hillary and President Trump were running against each other, and I told our democratic caucus, I said this is bigger than Trump, this is bigger than Hillary, this is about the soul of our democracy. And it really is. I think we are in more trouble than we think we are. (Applause) And I really mean that.

The other thing that we find -- when we first came in, you asked about impediments. When President Trump first came in he basically told the employees in the various agencies, you can't even -- you can't talk to your congressman about anything you're concerned about. What does that do for a whistleblower? And basically -- so we find again information, particularly in this climate, when you have a President who says, you know what, I'm going to do it my way and the hell with you. And there is no -- hello, there is no accountability. There is no -- none, none. And that's -- and I'm telling you right, it's absolutely -- it's ridiculous. And I feel so -- I feel that what has happened is the President has now -- he basically controls the legislature. So I mean that's one-third of our government that he controls. Of course he controls the Executive Branch. And as we are debating about Kavanaugh, keep in mind that the courts are being flooded, the lower courts with very conservative judges that will be around for the next 30 or 35 years. And I'm sure there are a few of them probably that don't even qualify to be in traffic court.

No, I'm serious.

So I mean that's what we're dealing with. And it's a lot. But, anyway.

(Laughter)

MS. BRIAN: As I'm hearing the Congressman talk I'm realizing that things have really accelerated just in the past year. It was only a year ago that the Senate judiciary committee was having -- the same Senate judiciary committee everyone was watching in the past week -- was having really remarkably civil hearings. I was testifying along with Watergate prosecutor Richard Ben-Veniste and Charles Tiefer from the Iran Contra, and what they were trying to figure out was what is the role of Congress in concurrent investigations while there is a criminal investigation. And it was Senators Whitehouse and Grassley and Graham and Klobuchar all talking about -- it was interesting that they were trying to figure out what is the role of Congress -- but that was a genuine question, how does the Congress operate -- you know, all of us were testifying that absolutely a role for Congress including looking into criminal wrongdoing, but certainly looking into all the potential wrongdoing that isn't criminal and won't be looked at by the Mueller investigation. But that sort of looking into the past, but also looking into the future, are our current laws adequate to maintaining the kind of rule of law that we require and expect. And that's an essential part of why we have congressional oversight as well, is to figure out whether we need to change the laws if they aren't up to the task.

MS. HENNESSEY: So before we turn to questions, sort of for Charlie and David, I'll leave you with a sort of a final question. And that is that we've been talking about Congress functioning as a co-equal Constitutional branch in its legislative capacity as opposed to just its partisan capacity. We're also seeing something pretty unprecedented occur within the Executive Branch, and that's the Executive Branch essentially attacking itself. You have the President of the United States calling out civil servants, sometimes by name, criticizing the decisions of agencies that he himself controls. What do you view as the role, if any, of the legislature in the face of this really

unusual circumstance?

MR. JOLLY: I think they have a very specific role that they have resigned over and failed to assume. And it is because these behaviors we're seeing of the Executive Branch are either outside of the Constitutional authority of the Executive, or outside the practices of the Executive. Either way, it is within the jurisdiction of a co-equal branch, as Charlie said, article 1 branch, to investigate and look into.

And I appreciate Congressman Cummings providing some urgency to this because I agree very much with that urgency. And my concern, after 20 years of working or with the Hill, I came of age working for a member of Congress who ultimately served 43 years. He was the longest serving republican on the Hill at the time. And it was a different generational leadership, a different respect for the institution, a different understanding of the awesome responsibility that the Congress is vested with. And I would say now more so on the republican side than on the democratic side, that's just an assessment I would make, we have a generation of political leadership that has come of age in a very different environment. And we can discuss the contributions of gerrymandering in closed primaries and campaign finance and the media to what has created this style of political leadership today, but consider the decisions that are being made by republican leadership. We are still within I believe a month of an anonymous op-ed to the *New York Times* suggesting that the President of the United States is not fit to carry out the duties of the office. I've had personal conversations with national security staff that has been so deeply concerned that the President does not understand the basic functions of national security that they've resigned from the office. What does this generation of republican political leadership want to investigate? Hillary Clinton, who hasn't been in office for years. And I'm not suggesting that we drag the author of this op-ed in front of the Nation. Frankly, I think that would be bad for the Nation to have this debate under the spotlight of an open hearing. But to suggest that these allegations have been made by a White House insider about the Chief Executive's fitness, and there is not

at least a private interview between oversight actors on the Hill and this individual and other members of the Administration who have left over the same concerns, gets back to the one of the first points I made, which is it is fair as voters and citizens to make raw political judgments about the leadership integrity of the people who currently occupy offices on Capitol Hill. (Applause)

MS. SYKES: Well, Susan, your question goes back to how not normal our times are. You know, the fact that you have an Executive Branch that is divided among themselves. I think part of this is also getting members of Congress though to rethink what their role is. That is oversight function has become more important rather than less important, even though it has been downgraded. But they need to start redefining themselves as tribunes of the people rather than -- as Congressman Cummings points out -- agents of a political party, or even worse, agents of the Administration. Because right now I do think that you have a lot of members of Congress that see their role as the defense counsel for the Trump Administration, which means that they've decided that their partisan agenda is more important than their constitutional responsibilities to provide the check and balance. I mean that's a fundamental question about what do congressman think they are there for, what is their role.

One last point though, and I just want to sort of toss this out. I know we don't have a lot of time. I had the nagging sense last week that what we saw with the Kavanaugh hearings and Senate judiciary committee may be a preview of what oversight hearings are going to be like in the next year. And I do think that people in both the majority and the minority might want to think through how that is going to play out. Because what we have seen is the rolling delegitimization of any independent check on this Administration, whether it is the press, whether it is the intelligence community. And if in fact this is mishandled, it's over the top, it is hysterical, it is not fact based, I don't think that we'll solve the problem, that we'll just simply play into the increase tribalization.

So I just throw that out. I think you saw what the playbook of the

republicans will be. You know that a lot of other congressman are thinking, hey, I can be the next Lindsey Graham. Think about that for a moment.

And I think that's a caution.

MR. CUMMINGS: Let me just tag onto that. You haven't asked the question that I thought you were going to ask, so I'm going to ask it myself. (Laughter) So how do you deal with all of this? I believe deep in my heart the reason why I was able to sign on the 800 letters with the republicans is because I'm trying to do exactly what Charlie said we're supposed to be doing. And there is something that I -- if you ever watch me in a hearing you will understand what I zero in on is integrity, integrity of the committee, integrity of the institution, respect for the Constitution. And if you're operating like that and you are truly the check that we're supposed to be, there are certain things you don't do, there are certain things you do. Like you don't go out blocking subpoenas, you don't go out trying to tear down the consumer protection bureau and destroy it. Things of that nature.

My point is that I think this is about leadership. And what I'm hoping for is we will have fact based hearings, that we will present to the American people and to the Congress exactly what is going on. And we will not get caught up in a world where lies are determined to be truth and truth are determined to be lies.

MR. JOLLY: Very quickly. That's a very good point about the fairness of this process. An anecdote from last week, I was in the green room about to go on TV and there was an attorney that I introduced myself to in the green room. And he said, we actually met. I was in President Obama's legislative affairs division for the department of justice and you called me in to justify a decision we made on a banking regulation. And I recalled in that moment our meeting. And the most important part of that meeting, to the Congressman's point here, these are not always adversarial meetings and they don't have to be. But today's Hill has made them adversarial. What happened in that meeting is I brought legitimate questions that had been raised to me by constituents how said this

is unduly impacting my industry and I think it's wrong what the administration has done. And I went into that meeting with the message, but the administration had a very good for why they had done that. And we left that meeting in agreement that there was no additional oversight necessary.

So these do not always have to be adversarial, but Congress has to do their job to get to that point.

MS. HENNESSEY: So we'll have time for a few questions. Please wait for the microphone to come to you. And since we're sort of short on time, keep it relatively brief and do make it a question rather than a statement.

Right here.

QUESTIONER: Thank you. Formerly of UNHCR, the Catholic Bishops and Lutheran Immigration and Refugee Service. But general question, do members of Congress see themselves as agents of powerful donors who power was even expanded more by the Supreme Court decision, Citizens United?

MR. CUMMINGS: In many instances, yes. And that's why I've joined with Congressman Sarbanes to try to reverse that. It's clear -- I mean -- just real quick, on this pharmaceutical issue, I've got republican congressmen that will come to me and say, Cummings, man, I love that bill, I love the fact that you're setting up with regard to pharmaceuticals. My aunt just went, got a prescription last month for \$50 and then now it's \$100. This is great, great, great, but I can't be with you. I mean I get it over and over and over again. Why? Because dollars and other things.

And, so, yeah. (Laughter) Not everybody, but yeah.

QUESTIONER: Hi, good morning. Mine is a combination of a comment and a question. I'm visiting from Africa, from Zimbabwe. I am a human rights lawyer, so part of the resistance. And I follow American politics quite keenly, especially since this new Administration. And the political landscape is becoming very similar to what we often see in our African countries. So it's an interesting observation.

One of the panelists mentioned that perhaps part of the solution in this current political landscape would be to provide the minority with tools that can empower them. We'd also be very interested in knowing the development of that proposal given our African countries where generally whoever is in parliament and whatever interests you are protecting or advocating for is really dependent on your political affiliation, which is usually whoever is in power at the time. So we'd really like to learn about that and see what we can glean from that proposal.

MR. JOLLY: I will just quickly address that. And I will admit that the last thing I want to do is play in Mr. Cummings backyard, particularly if these are decisions in his jurisdiction in the majority come January.

My point is though, in terms of how the House is structures, the House ethics committee, which investigates its own members, is a committee I believe with five members on each side of the aisle. And at time that makes it work better, at times that honestly creates a complete impasse. Given the state of oversight today, when you begin to look at the committee on which Mr. Cummings leads, though I don't know politically if leaders on the Hill would agree to do it, I think there are ways to look at the structure of that committee to suggest could we model it in some ways after the ethics committee where each side of the aisle has almost equal representation, could we give subpoena authority to both the chair and the ranking, could we lower the threshold to issue subpoenas. I think what would happen is we would empower the minority, whichever party that is with tools. But you would also create an environment where the chair and the ranking would now know they each have almost equal tools, if you will. And it would create an environment that perhaps holds off some investigations or accelerates them in moments of complete partisan failure.

MS. BRIAN: A little bit more on that particular question. That's the kind of thing that has been in fact happening for decades, since about the 1980s. There was an opinion inside the Justice Department that allowed agencies to require congressional

offices that were not chair of committees to essentially be treated as though they were public citizens and have to subject themselves to the Freedom of Information Act, which is preposterous. It's wrong, it's something that the Congress has needed to change and correct for a long time, but they haven't.

So we now have a more formalized ruling by the Office of Legal Counsel that is essentially legitimizing agencies formally from withholding any information from minorities. Those are things that have -- I mean minority requests. Those have to be overturned. Those are just absolutely unacceptable.

MS. HENNESSEY: Sorry, I'm getting the wrap up signal, unfortunately. And so please join me in thanking our excellent panel for sharing their thoughts.

(Applause)

MR. EISEN: While we allow the panel to clear, I'm going to remind folks that there are some seats. You should feel free to come up and fill in. I know that there are people who are sitting outside and watching on television, so if you are doing that on the outside, hello. The television is talking to you. It's like the Truman Show. Come on in and have a seat in the room.

And I'm going to step down to let the congressmen exit, and when I come back in 30 seconds, we'll have my interview with Preet, which I'm going to set up for you. He's got some newsy things to say about all this.

So a conversation of this kind, the extraordinary summit of thinkers that we've brought together from all sides of the aisle might not have been possible. There are silver linings to the challenges that we're facing to the rule of law, and I'm so struck by the panel vote. We invited sitting members of the majority party and they chose not to join us. I am struck by those both career and political individuals who I know to hold every different type of perspective -- liberal, conservative, and centrist on issues of the rule of law. Some of these individuals who I've clashed with over the years on questions like warrantless wiretapping and civil liberties issues come together now to support the

rule of law.

In having conversations of this kind, my friend, Preet Bharara is an indispensable voice because of his deep and really unique perspective on many of these questions. Like me, a practitioner in the field of longstanding who knows firsthand all of the protagonist and the drama of the rule of law that is playing out in these days in our country. Sometimes it is tempting to forget the stakes and appreciate the drama in a literary fashion if it didn't have such impact on real lives. Ranking Member Cummings was so articulate in his discussion of the ways that the failure to do proper oversight, that aspect of the rule of law, the separation of powers, but also the balance of powers under our constitution. The congressional oversight that makes rule of law function, that enforces rule of law, if that doesn't happen, it can cost lives. And he was very eloquent about that.

We have a snippet of my conversation with Preet. The full conversation is 25 minutes long. You'll be able to find it on the Brookings website and on the webpage for those of you who are watching on the Internet. On the webpage for this event you can watch the full conversation, but we have a snippet here. Preet and I got into a conversation, you'll see, about the nature of the rule of law hurricane and what category of hurricane are we facing, and what could make it better or worse. And in this clip we're talking about the President's assaults on the Department of Justice, the attorney general, the deputy attorney general, and the special counsel.

(Video played)

MR. EISEN: -- on DOJ Sessions, Mueller, the FBI, Rosenstein, and what effect is that having on the rule of law and what's the long-term effect of that likely to be?

MR. BHARARA: Yeah. So terrible. Speaking of the hurricane. Like that's sort of -- that's sort of like the threatening part of the hurricane. Like, are these things going to come to pass? Is he going to fire Sessions? Is he going to fire

Rosenstein? Is he going to indirectly find some way to fire Mueller? If all those things come to pass, then I think the hurricane has arrived and it's a five.

MR. EISEN: You think if Sessions is fired, Rosenstein is fired --

MR. BHARARA: I think it's a way to shut down the Mueller investigation, which can't fully be shut down for reasons we can't discuss. Yeah, we're at a five. I just don't know if that's happening. There's lots of folks trying to convince the President not to bring the hurricane back to shore.

So there are two things happening there; right? One is, is it affecting the rule of law? Now, I think so long as the hurricane doesn't come back -- now we're beating this analogy to death -- people doing their jobs; right? People that you and I both know who work for Special Counsel Mueller, and we know Mueller, they're keeping their heads down. I don't believe they're leaking. They're interviewing people. They're collecting evidence. They always put them together in incredibly detailed, smart indictments and charges.

MR. EISEN: Bob is not a leaker. You can't even --

MR. BHARARA: He's not.

MR. EISEN: -- you can't even get him to tell you what's going on when you're sitting in a meeting with him, much less background.

MR. BHARARA: I totally agree with that. So they're doing their job. I think Rosenstein is doing his job. So to the extent people are permitted to do their job, notwithstanding the sort of swirling threat above them, I think the rule of law is okay. I think, however, going back to an earlier point, to the extent the President tries to undermine the people who are looking at him and his associates, that undermines the rule of law because it undermines people's faith in what the ultimate result would be.

So I have tried to say from the beginning, and it gets lost and never gets reported and people don't pay attention, that I will abide by whatever the ultimate result of the Mueller investigation is; right? So if he decides to write a report that makes it look like

the President has committed 80 high crimes and misdemeanors, I will respect that. I will believe that.

If on the other hand -- and not everyone will; right? And so his reputation, depending on what people think, you know, politically and how they interpret the evidence from newspaper leaks is something different. But on the other hand, if he decides there's no obstruction, there's no credible allegation of X, Y, or Z that, you know, people are talking about and speculating about, I will accept that, too, because that's what you have to do. My worry is that depending on where you sit, you might not feel that way, and part of the reason is the President has done a pretty good job of undermining, you know, the integrity of the people who are working on the investigation and the constant repetition of witch hunt attack Bob Mueller who is a, you know, war veteran, a war hero, you know, it has an effect among the base. And you know, it's not unrelated to maybe the most insidious thing the President does. It doesn't violate any law. And that is to undermine -- when we talk about the press, the press, I think, is free and the libel laws are not going to be changed, but to undermine what the truth is, you know, people talk about that as something separate from rule of law; it's not. If you undermine what the truth is and so people think that such a thing is fake news or such a thing as alternative facts and you never know what to believe, and if the President says it didn't happen even though you have it on tape you believe it didn't happen, that also affects this other stuff we're talking about, right, the rule of law. Because at the end of the day, faith and decisions made by prosecutors matters because it also affects the degree to which future prosecutors decide to bring a case or not bring a case. And so the legitimacy -- it's not just what Bob Mueller determines because we live in a democracy and these things matter, right, what is going to matter also is what the public reaction to that is. And it seems like Trump has already primed a lot of folks to the extent something negative comes out to not believe it.

MR. EISEN: How do we repair -- you've pointed to erosion, hurricane

damage on every part of the political spectrum as a result of some of the fights we've had relating to the rule of law. In this moment when there is a profound challenge on multiple fronts to the rule of law, how do we repair the damage? Some of that you talk about in your new report, legislative and other solutions, but how do we fix what's broken with public confidence in the rule of law?

MR. BHARARA: So I think one thing you need is a check and a balance. You should not have a supine congress. You know, I worked in the Senate Judiciary Committee for four and a half years. I worked on the Supreme Court nominations of John Roberts and Sam Alito.

But the other thing I did was work in a bipartisan way on an investigation into the politicization of things at the Justice Department and the firing, ironically, the firing of U.S. attorneys back in 2006 which we investigated in 2007. And the gavel changed hands between 2006 and 2007. So it became a slight majority democratic Senate, and there were all these things that seemed to be going on at the Justice Department. And I was the lead staff investigator for it. But we did it jointly. Senator Schumer's subcommittee, along with Arlen Specter. And we investigated. And we looked at a lot of things. And we found out that bad practices were happening at the Department of Justice. A lot of people resigned. But at least you had some oversight. And it was credible oversight because we didn't issue a subpoena. We didn't, you know, engage in a certain order of witnesses. We didn't ask for documents unless it was done on a bipartisan basis. Senator Specter's staff and Senator Schumer's staff that I led at the time.

And so if the Congress changes hands -- by the way, it doesn't have to happen that way. You know, members of the same party are permitted. There's no law against members of the same party investigating and overseeing the conduct of people who are in a similar party who are in the administration. That has not happened because everyone in Congress, I think, has some fear of doing anything that's going to bother the

President of the United States. And you have, you know, a chairman like Devin Nunes. Is he going to be at this thing? I don't mean to offend him if he's going to be there.

MR. EISEN: We invited --

(Video ends)

MR. EISEN: To finish my sentence, we invited -- we invited Chairman Nunes. I would have -- I would have dearly enjoyed the opportunity to have discourse with him.

I do want to invite our panel to the stage. Now, if you'll come up for our third panel, please, on Judicial and Law Enforcement Independence.

Okay. I'm going to follow the Wittes example in chairing as I do in so many other things of not introducing our panelists, and simply going down the -- going down the line. Our topic is Judicial and Law Enforcement Independence, and in a sense, everything that we've heard today from our first panel on national security oversight and the rule of law, government operations oversight and the rule of law, our second panel, our two special speakers, Judge Starr and Preet, all flows into this panel because we are now going to directly address the questions of the immediate, the most central players in delivering the rule of law, our law enforcement officials, our bar, and our judges, our judiciary.

Our first speaker is the Honorable Jerrold Nadler, the ranking member of the House Judiciary Committee. Congressman Nadler, thank you for being with us.

And I'd like to begin by asking you, from your perspective sitting on the House Judiciary Committee with oversight responsibility over judiciary rule of law, law enforcement, looking out now at the past 20 months, what is the state of the rule of law in America, and where are we headed?

MR. NADLER: Well, thank you. And let me apologize in advance in case I repeat anything that was said in previous panels since I didn't hear the previous panels.

We have a president who has been systematically, and chaotically, which is an interesting combination, attacking -- attacking the rule of law, attacking the judiciary, attacking the press, attacking the institutions we depend on for democratic governance. Attacking the press, the fake news, et cetera, the judiciary in so many ways, and attacking the FBI and the special prosecutor.

Now, there are very serious allegations as we know that have been made about the last campaign, about Russian involvement in it by possible collusion by the Trump campaign with that, et cetera. And we have a special counsel to investigate that. And the President and the people around him have been doing everything possible to undermine, to sabotage the work of the special counsel, who has not responded. I mean, everything we know about the special counsel we know, and their work, we know from court filings. We know from guilty pleas from indictments from court filings. No leaks. Remarkably, leak proof. So it's been a one-sided attack on the special counsel, on the deputy attorney general. And Mayor Giuliani told us exactly the purpose. He said since the guidelines of the Justice Department preclude indicting a sitting president, if the reason to do that should be there, all the special prosecutor can do with respect to the President is give a report to the people and to Congress. And we want to taint the jury pool. We want to discredit the special prosecutor up front so that whatever he says or whatever report he gives will not be believed by as many people as possible because the ultimate judge is Congress and the possible impeachment proceeding in the House and the Senate and we want to taint that right away.

So they've been attacking the institutions and reaching into the FBI and attacking individuals, individuals who are helpless, just ordinary civil servants who can't reply. When the President of the United States says so and so is a terrible guy, so and so is dishonest, it's very difficult.

Now, this is a great threat to the rule of law when a subject of an investigation or one of the subjects of an investigation attacks the -- not just the

independence but the integrity of the FBI and of the special prosecutor and of the press that reports on it. Now, Congress is tasked by the Constitution with being a check and a balance. Madison designed a system of checks and balances. Congress is supposed to be a check and a balance on the administration, on the executive, vice versa. And Congress, instead of defending these institutions that are under attack and saying, hey, we've got to defend these institutions, we've got to uphold the integrity of the institutions against the President who is attacking them, and instead of holding oversight hearings and instead of being a check and a balance, has absolutely refused to be in a check and a balance. Has absolutely refused to hold the administration accountable.

I've sent, as ranking democrat -- I took over as ranking democrat in the middle of the term last December, but my predecessor, John Conyers and I, have sent almost 100 letters to the chairman of the committee asking that we hold a hearing on this or an investigation of that. None of them got replies. And we have totally advocated, not only our committee, but Congress generally has totally advocated the check and balance function in terms of holding hearings on what's going on, not just on the rule of law, but for example -- not just -- for example, we had all these children separated from their parents at the border. And that's under Immigration, which is the jurisdiction of our committee. How can you not hold hearings? It's months later and a lot of parents still don't know where the kids are.

We got a devastating Inspector General report yesterday, but where is Congress? We ought to have been holding hearings on this. We ought to have been holding hearings on the administration's switch in position on voting rights in the courts or switching position on defending the Affordable Care Act. That merely affects 100 million people in terms of coverage of preexisting conditions. But we have been totally absent.

And obviously, what Congress has to -- and you take a look at the -- what is the Kavanaugh hearings. I mean, regardless of what Kavanaugh as a jurist -- from my point of view he's far too conservative, et cetera, but that's a point of view. He

sits in a hearing and attacks the Democratic Party, the Clintons -- I don't know what they had to do with this at all. I'm surprised, if I were one of the senators I would have said, Judge, what evidence do you have that the Clintons are involved in this at all or did you make it up out of thin air? But the point is he attacked half the country, the entire Democratic Party, the Left, everybody. How can he sit on a court? I mean, a candidate for the Senate can do that. A candidate for the House can do that. A candidate for President. But a judge, a sitting judge who wants to be a dispassionate judge, to dispense -- or who supposedly is supposed to be a dispassionate judge to dispense equal justice, you can't do that. And that should be disqualifying by itself. And yet, we see that one party in the Senate is determined to put him on no matter what. No matter what may have happened years ago. No matter his conduct now.

So there's been a total failure of oversight. And when the administration breaks the norms, I mean, there's no law that says you don't attack the judiciary. But the norms say you don't. If you want to live in a democratic society, there are institutions you must respect. We're going to have to change laws to make some of these norms, for example, the President, the presidential candidates show their tax receipts, show their tax forms. This has been done for the last 40 or 50 years. Now he simply refuses to do it. The President refuses to do it. He refused to do it for some (inaudible). He doesn't even bother with that anymore. We're going to probably have to enact legislation to say you can't get on the ballot if you haven't released your tax returns.

But this is for the future. Right now, we have to defend the integrity of the special prosecutor. We have to defend Rosenstein being there, because Rosenstein being there, if Rosenstein is not there, if he's replaced by some flunky, that flunky: (a) could fire Mueller; (b) he could simply, without the public ever knowing it, limit what Mueller is doing. Don't look at this avenue of investigation. Don't look at that avenue of investigation. And when you're given the report, give it to me and I'll put it in a drawer and the Congress and the people never see it. He could completely, as you see now

with the allegations that the FBI isn't properly investigating what they should be investigating with respect to the Kavanaugh thing, that's because the FBI is controlled in this respect by the executive. But the deputy attorney general, or if Sessions is fired and a new attorney general is not recused, could completely reign in the investigation and then we would never find out what happened. And a great miscarriage of justice would occur.

And so we have got to -- the first priority is to protect Mueller and to protect Rosenstein so that we have some guarantee that that investigation will go on properly and that the American people will know what happened. Because after all, what happened was the Russians came in to try to rig an American election. The Trump campaign either did or did not work with them in doing so, and that we have to know. And the President is accused, and maybe has, in fact, been involved in an ongoing obstruction of justice, and that we have to know, too. Because the integrity of the government is at stake and the Congress, we have a bill to protect the special prosecutor. It got out of the Senate Judiciary Committee, but the Republican leadership in both houses say it's not necessary because he won't do anything. Well, I'm glad they have the power of a profit and they know that the President won't do anything. We know he tried to fire Mueller twice.

We've seen his attacks on Sessions for refusing to -- for, in fact, recusing himself as the law demanded and his attacks on the people and the special prosecutor, so we shouldn't feel confident. We need a Congress that will, in fact, hold the oversight hearings and hold the administration's feet to the fire in all these respects.

MR. EISEN: Thank you, Congressman, for that very rich presentation.

I want to tease three threads out of there. One is what is happening in Congress on the failures to do oversight on rule of law issues that the congressman described. A second is the important reflections on the special counsel. And then the third is the causes and effects within our law enforcement establishment, and particularly

within DOJ.

I'm going to start with Mickey Edwards, who served as a republican member of Congress for eight terms, for 16 years, and was the chairman of the House Republican Policy Committee, former chair of the American Conservative Union, and now a distinguished academic and commentator. And then I'll go respectively to Paul and to Carrie for special counsel and DOJ.

Mickey, thank you for being with us.

What has gone wrong with the bipartisan, what used to be the bipartisan oversight efforts in Congress, if they ever existed?

MR. EDWARDS: Well, first of all, I'm glad to be here. My job has been made easier because Jerry has already said a lot of the same things I would have said. I agree with everything that he has said. Even though I'm a republican, I know that some of the things that you may question here that my never-Trump credentials are pretty strong and my never-Kavanaugh credentials are pretty strong.

But I want to take this a little farther. And I think the problems that we have in terms of the rule of law are much more deep rooted and they're much less one party oriented than we think. And I think if we're going to address the problems we have, we're going to make a mistake if we just focus on the current President and the current makeup of Congress.

I am on the board of the Project on Government Oversight (POGO). We have had a great time under republican and democratic congresses and presidents being able to do the oversight and looking into what the government is doing regardless of what administration is in power.

So I am concerned about judicial independence. I'm also concerned about congressional independence. It's not just oversight hearings. It's surrendering Congress's authority over determining when we go to war. With the War Powers Act and the things we've done since, it's surrendering Congress's constitutional right to regulate

international commerce, sitting back quietly while the President determines whether we're going to impose tariffs or not. So the issue is a lot broader than just the oversight hearings, although that's a major problem.

I think we now have accepted as a people, certainly the Congress has, and activists have, you know, that judicial appointments are not based on temperament, learning, experience; they're based on which party you belong to. We all as a people tend to look now at the Supreme Court and Federal courts as whether the person who is being nominated will be a reliable republican or a reliable democrat, and we form our judgments according to that.

This is why I wanted to say that I'm not speaking specifically about the Kavanaugh appointment or about the accusations at the moment regarding Judge Kavanaugh, but the fact that what we saw is -- we've divided into two camps. We don't have the results of the investigation yet, but we're in two camps. We know that he assaulted the victim, I think she was. Or we know that, you know, we've sided with the accuser or the accused before the facts come in. That's what we do. We've moved from, you know, the idea that we are presumed innocent until convicted to the idea that we're presumed guilty unless we can prove our innocence.

So I just want to suggest that if we're talking about the fact that we need an American people who have confidence in the judicial system, have confidence in the courts, have confidence in the separation of powers, have confidence in the constitution, which is after all, you know, the supreme law, you know, that we've got a lot of problems. And if we just zero in on whether or not the current Congress, which I think has been acting abysmally -- I told Jerry when we were standing out there that I'm glad I'm not there and I feel sorry for him that he is. But I think we have to look deeper. The question about integrity, belief in the propriety of our rule of law, and how all the branches of our government operate is much deeper than simply saying the President is a cad or that we know these particular things about Judge Kavanaugh or that there have been some really

strange people serving on the republican side of the Judiciary Committee.

But that's all. I mean, let's look deeper, Norm. It's not just lack of Oversight Committee functioning.

MR. EISEN: Paul, I'll come to you now on that subject of confidence and of looking deeper. You and I were on opposite sides of the Starr investigation. Judge Starr likes to tease me about that. And we became good friends nevertheless. Do you have confidence in Bob Mueller when you look deeply in the way he's conducted his investigation? What's your reaction having served as -- you were special counsel; right? Or senior counsel. You were senior counsel on Judge Starr's investigation. What's your reaction to the attacks on Bob? And do you have confidence that he will be able to finish his investigation?

MR. ROSENZWEIG: Well, oddly enough, the answer to that question points in two different directions, which is to say that I have a great deal of confidence in him now. First, because of his personal rectitude and his well-deserved reputation for professionalism and probity. But also, precisely because he is a part of an institution, the Department of Justice, in which I also continue to repose some confidence.

Ben asked Ken Starr a question earlier about the role of the deputy attorney general, and in many ways, our confidence in what the special counsel is doing is precisely grounded in the fact that he's doing it underneath the Department of Justice. And we have confidence not just in him but also in the deputy attorney general and in his professionalism, and we have a confidence in the structure of the Department of Justice that goes back, you know, 200 years, or 150 years. I guess it was 1870s that the department was actually created. And it has a tradition of professionalism. It has policies. They may not be policies we like, but you know, somebody asked earlier about the indictability of a president while sitting -- while he's the sitting president. The department has had a policy about that for more than 40 years, 50 years. And we have a confidence that that policy is independent of politics and is not grounded in my team or

the other team, but rather, in their judgment. And we may think it's the wrong judgment, but that grounds us a lot in thinking that whatever comes out of the Muller investigation. I, like Mr. Bharara, think that it's going to be a matter of integrity if he's allowed to continue.

That does lead directly to the second answer, which is in some way our confidence in that professionalism comes at the cost of its dependence on the department for top cover, for its existence. And the reality is that as Congressman Nadler said, you know, that right now is working quite well but it could change, turn on a dime if President Trump were to exercise his executive authority and replace Rosenstein or replace the attorney general with somebody who is more complacent and complicit and compliant, the three Cs, for the President's own viewpoint.

I don't see how you can square those circles; right? I mean, we tried an independent counsel law for 20 years and we stopped because we generally thought that that was an unsuccessful effort. And the reason we thought it was unsuccessful was precisely because it took that prosecutorial authority outside of the umbrella of the department broadly writ and made it kind of a one size, single purpose prosecutor with one mission and one focus. And, you know, the reality of that I think is when you're a hammer, everything looks like a nail to you. And so we decide to bring the prosecutorial function back into its traditional home within the Department of Justice, and that brought with it more regularization, more legitimacy, more professionalism, but also less independence. And I don't see how we can square the circle. The pendulum keeps swinging back and forth. We've gone from independent counsels to special counsels, to independent counsels to special counsels again, and now, you know, there's probably going to be a swing backwards in reaction to the dependency of the Mueller investigation. And 20 years from now we'll go the other way.

So my answer to you is it's an unsquareable circle.

MR. EISEN: Carrie Cordero, the Robert M. Gates Senior Fellow and

General Counsel at the Center -- I know I said I wasn't going to introduce them but I lied -
- at the Center for a New American Security, a Brookings colleague because she's
associated as a contributing editor of Lawfare and also my CNN colleague. We often -- I
wish I could just play the conversations in the CNN green room. There's a lot of bold
predictions that are made there.

Carrie, has Rod Rosenstein done a good job so far of the logical
impossibility that Paul lays out in acquitting the rule of law in America and in defending
the Mueller investigation of squaring the circle? Has he managed to do that so far? And
is he going to be able to continue that?

MS. CORDERO: Thanks, Norman. And thanks for the invitation to join
this discussion.

I think that Rod Rosenstein has done an incredible job of maintaining the
integrity of the special counsel's investigation. I'm reminded in particular of the press
conference that he gave when one of the major indictments were read. And it was so
unusual for a Justice Department major indictment press conference, because usually
you would have in a normal investigation that was conducted by one of the divisions, you
would have the assistant attorney general for that division. You would have some
representatives from the FBI or the other agencies that might have supported the case.
You might have the FBI director or deputy director, and there would sort of be a
supporting cast that would support the prosecutor or the head of the Justice Department
who was announcing that. And instead, Rod Rosenstein stood there alone and
announced those indictments. And by doing so, he provided, in my judgment, the
political cover for the special counsel and its investigative team to continue to do its work
as insulated as they possibly could be from the political influence that was trying to be
asserted on them nearly every single day. And so I think he's done a terrific job. I think
he's been really a lynchpin of consistency in terms of holding that together. I do worry if
he were removed from his position whether or not somebody else would feel more

pressure because there has been so much pressure from the President and from the White House, not -- I don't worry so much that a new individual would come in and immediately fire Bob Mueller as the special counsel. I worry more about what could be done on the margins that actually could have a substantive effect. So these are -- a few people on other panels have described these a little bit, but some of the things that could be done would be not, I think as Congressman Nadler mentioned, not letting the report actually be revealed publicly or provided to Congress. It could be something like not being willing to refer certain criminal matters that come to light during the course of the investigation be referred to the U.S. attorney's offices like we've seen with the referrals to the Southern District of New York. It could be decisions not to pursue certain areas of where the investigation is intending to go. For example, one area that we haven't seen a lot of public evidence of that perhaps is part of the investigation has to do with financial matters, more depth on potential campaign finance or foreign influence financially into the campaign with one exception, that one plea that was made with a foreign contribution that made its way to the Inauguration Committee.

So I think he has done as admirable job as one could have done. And I also want to say a word about Attorney General Sessions because regardless of where one stands on the policy positions that the attorney general has taken, and I, for one, have been a significant critic of the zero tolerance policy and what has ended up as a result of the implementation of that on the family separations out of DHS, Attorney General Sessions made what was probably the most important career decision, which was to recuse from the special counsel investigation. And for that I believe that he demonstrated his respect for the institution of the Justice Department and the institution of the Office of the Attorney General.

MR. EISEN: Since in your DOJ capacity you were a frequent consumer of FBI materials and in constant communication on counterintelligence and other issues with the FBI, I'm going to start with you, but then I'm going to go down the panel.

How much damage has been done by the tussle? I agree with the heroic efforts of Rosenstein and the surprisingly strong performance on this narrow slice of issues that Attorney General Sessions has been absolutely unbending on the Muller investigation issues. But how much damage has been done? I want to go down the panel and ask, just short answers, your assessment of the damage. Then I want to do one round on the panel on how we begin to repair those breaches. And then prepare your questions because we will come to all of you after that.

So just quickly, actually, I'll start with Congressman Nadler. How much damage has been done to the rule of -- you've got it. How much damage has been done to the rule of law?

MR. NADLER: I think substantial. It's very interesting. Some people have noted that when Comey had his meeting with the President just before he was fired, he then called in the senior leadership and told them what happened. Every single person in that meeting is no longer with the FBI. They've all gone. The President and some of my colleagues on the Judiciary Committee on the republican side have been attacking individuals in the Justice Department, in the FBI by name, and I would assume - - and some of them have been very seriously damaged, and some of them have been fired, and some of them are just standing there. But I would assume that there will be a lot more lack of courage or just people keeping their heads down in the future because we have shown, or it has been shown that individuals in the Justice Department, in the FBI, career people, are vulnerable to political attack. That will take quite a while to get over.

MR. EISEN: Carrie?

MS. CORDERO: So two thoughts. First of all, with respect to the Department of Justice, I think the institutions have been holding up relatively well in large part due to excellent leadership on that point in terms of protecting the institutions from Attorney General Sessions and Rod Rosenstein and FBI Director Wray. I have been

more concerned about the ability of the intent by the President to try to corrupt law enforcement when it comes to DHS. You know, DHS has more law enforcement officers than the FBI does if you combine the agent force from Immigration and Customs enforcement and Customs and Border Control. And what we've seen, as demonstrated from the Inspector General report that the congressman mentioned that just was released, the Department of Homeland Security Inspector General did an initial review of how the Department of Homeland Security implemented the issues on the border and the separation of children. And they found that there were no databases in place. No comprehensive database in place that would assist in the reunification of children. They didn't track -- they didn't have a mechanism for tracking young children who were not yet verbal with being able to reunite them with their parents.

And so where I think we've seen, and where if we want to have hearings on this, Secretary Nielsen would be at the top of my list to call to explain how it is that a system became so broken. And so I don't think that we've seen the same level of institutional oversight internally in all departments as we have with the Justice Department and the FBI.

One other quick thing. On the other area where I think it will take some substantial time to repair has been on the national security side is the politicization of the declassification of national security information. The interactions that have taken place between the White House and the assistance that they've had from some allies in Congress in particular and the majority on the House Intelligence Committee has really been a step beyond anything that I've observed in the last over 15 years of working with the national security community. And the politicization of intelligence information I think is something that is going to be harder to rectify and will take more time to repair.

MR. EISEN: Mickey, you wisely counseled us to take the broader view in assessing the damage. So just a quick word, if you would, about the level of the damage. And then if we can start to focus a little bit on how to fix it, Mickey. You're one

of the wisest people I know in breaking -- fixing what's broken. So how to fix it.

MR. EDWARDS: Well, first of all, let me just say, I agree when you broadened this because you didn't mention education, you didn't mention interior. I mean, there are a lot of other areas where this needs to be done.

We start by fixing it where in my mind the greater problem is. And I think the greater problem, and it has lasted longer than these two years that we've suffered through, is Congress. It's Congress failing to not only do its oversight but to assert its authority. If I were there, which you know, I'm not, but if I were there and the administration failed to turn over reports that we needed to see, I would say, well, we will stand in adjournment on the nomination until we receive them. The Congress has great authority, great power that it never exercises. It acts as though it is a subservient branch to the executive branch. It has done that under presidents of both parties and congresses of both parties.

And so the answer is very simple. Congress reasserts the authority. Jerry Nadler has more authority and is backed up by the party leaders and by the speaker and the majority leader in the two houses to do these things. And you'll see a change. You know, that's where the fundamental problem is.

So people talk about get back to regular order. That's kind of a bit of a meaningless phrase because regular order did not exist when I was in Congress. You know, it was, you know, it was not really bipartisanship. It was dominance and submission. It was like, you know, Fifty Shades of Gray. But if Congress fixes itself and reasserts its role, a lot of this will be fixed pretty quickly.

MR. EISEN: Paul, you have the long perspective, also, like me, you've been doing this for a while and you're a scholar, as well as a practitioner, even if you scoff at that. And you participate in one of the great, what has emerged, as one of the great voices, one of the great bipartisan institutions, the Lawfare blog, which is housed here at Brookings and which brings together people from every different part of the

political spectrum.

What are your thoughts on how we fix what's broken? And in particular, the inflictions of unthinking partisanship on all sides?

MR. ROSENZWEIG: Indeed, I am honored to be part of the Lawfare group, and thank you for mentioning that.

My fix turns on the fact that I actually see a slightly different problem, which is that given the complexity of executive action and American government today, so much of what we do depends on a belief in the well-meaning discretion of executive actors. No matter how strong Congress gets, no matter how much oversight it does, it's always going to be in a position of having to rely somewhat on the well-meaning discretion of the executive. An example is in trade, right, we have trade laws, but we have national security exceptions to them. And given the size of government, it is almost impossible to imagine a world in which the executive doesn't have a great deal of discretion, cabined by oversight, by audit, both from the inspectors general and from congressional oversight. The true horror of what has happened over the last two years is that we can no longer have that confidence in the well-meaningness of the discretion. Even in situations where we might have thought that the President was exercising that discretion in a way with which we disagreed or a way we thought was perhaps a little self-serving or partisan in nature, we basically started from the assumption that every executive had as a ground the success of the American republic and the best interest of the American people. We've lost that, I think, and that is my assessment of what is the true fracturing of the last two years.

So then the question is how to recover that. And I think that the only real answer to that is time. Is, you know, a couple of presidencies, one from each party, that restore our faith that we can elect people who even though we disagree with them are kind of headed in the direction of the best interest of the country even if we think that the way they're choosing to get there is not the way that we personally would choose. And

that means for me that some of the immediate things that have been suggested, like hearings and congressional oversight, are short-term palliatives that staunch the bleeding, tourniquets, if you will. But the only real answer is for the American public to insist on candidate for presidency and in their congress, who are not nonpartisan, because that's impossible, but are well-meaning partisans. And I don't know if we can achieve that. I know that I plan to vote that way for the immediate future. I like to think I have in the past as well, but I know that I will in the future. And that's kind of my submission.

Larry Kramer, who is a professor of law at Stanford, wrote a wonderful book about people's constitutionalism. And essentially, his bottom line is we get the constitution that we deserve. And all the rules of law and all the constraints of structure that we have, no matter what we do, can't substitute for whether or not the American public wants a particular form and responsiveness of government. And I think he's write as a descriptive matter. I'm not sure I like it normatively, but as a descriptive matter he's accurate. So vote for good guys. That's how we get it.

SPEAKER: And gals.

MR. EISEN: Yes, we heard from the audience. And gals.

The tension in the Kramer argument, of course, is that there's a substantial portion of the constitution that protects the country from the desires of the majority for what they want.

MR. ROSENZWEIG: That's why I said it was normatively not quite right but I think descriptively it's accurate.

MR. EISEN: With that caveat, we agree, as usual. Since the Starr investigation ended we've agreed on everything.

Congressman Nadler wants to intervene, so I'm going to give him the last word and then we're going to come to you for your questions.

MR. NADLER: Thank you.

I just wanted to add that I agree very much so, that Congress has advocated not just on oversight, but for instance, if you look at the political history of the United States, one of the great battles, one of the defining issues between political parties for much of our history was the question of tariffs. Whether it was the Tariff of Abominations in 1828, of Smoot-Hawley in 1932 or whatever, but this was decided by Congress. So we enacted -- I shouldn't say "we," I wasn't there -- but Congress enacted many years ago, the current tariff regime and put in a national security exception, which is now Eaton, the rule. The President can impose a tariff on anybody if he calls it national security. The Canadians are properly insulted that we view them as a threat to our national security. Congress has got to rewrite these laws so that we have less discretion because we can apparently not trust the discretion of the executive. He's just going to completely abuse that kind of discretion.

The same thing goes with war powers. I was very critical of the Obama administration for intervening in Libya with no exigent threat to the United States and without permission of Congress. The same thing is true at any number of occasions. Trump should not have been able to attack Syria without going through Congress. And any number of other occasions. We have to rewrite these laws so that the executive can do these things.

And there is a problem because you look at, for example, the EPA. Now, Congress cannot write a law that says Mercury is okay to 15 parts per billion and iso ethyl is okay to 17 parts per billion. You have to leave that to somebody to gather the scientific evidence and decide that. So we've delegated that to the EPA. But the EPA is now captured by appointments, and the EPA is just one of any number of agencies of the regulatory agencies, that are captured by appointments from the regulated industry and that are serving the regulated industries rather than the purpose which Congress set these up. And the only answer to that is Congress has to have oversight and bring this to public light. And maybe have remedial legislation, although the legislation cannot totally

eliminate the discretion of the agencies because Congress cannot write all these rules for things that must be regulated in this kind of society.

MR. EISEN: I predict that there will be fascinating new alignments, left, right, and center, of ideas as ones like that limiting executive agency discretion, which has long been some conservatives that long felt the executive branch has overreached. So we're going to see some interesting new alignments, like the ones we've seen today around rule of law issues.

I'd like to come out to the audience now. I'll take a cluster of questions. There's a gentleman back there holding a white paper. There's a lady here with a red sweater, and there's a gentleman there with a blue suit and a red tie, one of my own personal sartorial models.

So we'll take those three questions as a cluster. And I'm going to be equally tough as my previous moderators. Questions, please, not comments or speeches.

MR. MALONE: Well, thank you very much. I'm Jerry Malone from London, and the first thing I'd like to say is I'm rather pleased that you let me in here.

MR. EISEN: Well, we probably didn't know you were from London.

MR. MALONE: Well, I'm glad those will be my first, but last clearly attendance at this thing.

MR. EISEN: God forbid.

MR. MALONE: Can I make a comment about the most important thing about the rule of law I think as an independent judiciary, an observation. However one looks at it, it has become clear to an outside observer that there is no independence in terms of the way that you nominate your judiciary anymore and the system is flawed. When you set up your constitution, you rightly did it on three pillars, the separation of powers, and you did it saying that we, in Britain, had no separation of powers.

MR. EISEN: I'm just going to stop you there because you've posed an

excellent question, which is whether the judiciary has maintained its independence given the current state of the nomination process, something which some of my colleagues on this panel occasionally think about.

So we're going to cabin that question and we're going to come over and get the next question over here.

MS. RUSSELL: Good morning, still. I'm Diane Russell. I thought I came further than anybody else. I flew in from Maine this morning. So I'm going to read this because I want to get to the point quickly.

MR. EISEN: It's all foreigners here today.

MS. RUSSELL: I know. We call it from away, Norm.

As you know, I think about how we translate this to voters. We keep talking about how partisanship plays into this, but that leaves everyday voters hearing the he said, she said, which we've seen particularly with the Kavanaugh hearings. But this isn't actually about partisanship. It's about an intentional switch to authoritarianism with almost no check on that power. And that is setting us up for a very real constitutional crisis, which I think is what the ultimate point of this symposium has been about. How do we get back on a course toward reason and democracy where as you put it, sir, the best interest in the country is actually a goal of our elected leaders? And is there a better word than partisanship that we can start using? Because I think partisanship isn't really covering what's really happening.

MR. EISEN: Okay. So we have independent judiciary, how do we get back on track?

And now our third question for the panel.

MR. GOLOVIN: Hi, Karl Golovin, retired special agent, U.S. Customs. I was a 9/11 responder, domain reference anidealiveson.net. My question fundamentally is, whether, could we have rule of law without true transparency in the most important events in our society's experience? Now, I go back to even to JFK's assassination. I

was very hopeful Trump would simply do nothing and then by law all of the still withheld records would have come out in October. But he said yes, then he said no, so the national security state still controls important records the public needs to know.

As a 9/11 responder, I helped go through the rubble of World Trade Center 7. Ms. Cordero, I understand you recently wrote an article about the 9/11 Commission Report. That report did not even reference that 47 story building that collapsed in seven seconds at 5:20 in the afternoon on 9/11, which wasn't hit by a plane and tends to undermine the entire official conspiracy theory of 9/11. So I would ask, can we have transparency on those two most important issues?

MR. EISEN: Judicial independence, how we go back to the American people on these questions and the importance of transparency.

I think I'm going to just go down the panel given the time and you can reflect on any of the three questions that you wish.

Judicial independence, how we talk again to the voters, and the importance of transparency.

MR. NADLER: Well, on judicial independence, I think you have to recognize a one-sided development. Presidents traditionally have appointed judges on the recommendations of the local senators or whatever. You know, period. There wasn't a concerted effort to stack the judiciary in a particular ideological direction. That changed about 30 years ago. The Federalist Society and the Heritage Foundation have determined that we have to have a very conservative, I would say right-wing judiciary, and they've taken republican presidents, and now Trump openly says he'll only take candidates from the Federalist Society list. And you have a very deliberate attempt to stack the judiciary from one point of view. That is not symmetrical. You have not had the same thing from the Democratic Party. President Obama wanted diversity and he certainly wanted somewhat more liberal, but he wasn't trying to stack the judiciary from the left as you see here. And as a result of this, you see in the last several years

routinely now something you never saw before, and that is when a decision comes down from the Court of Appeals or even from a district judge, they'll tell you that this judge, or the two judges in the majority were appointed by republican presidents or democratic presidents, or this president or that president. You never used to see that. But now you've grown to expect that you get one result from a democratic-appointed judge and a different result from a republican-appointed judge. That's poisonous. How you get away from that? The Senate has to do a job of seeing that judges are top flight and not all one sided on an ideological basis.

MR. EISEN: Carrie, you worked on a presidential campaign, the Kasich presidential campaign. You advised him. Any thoughts on the voter issue or any of the other questions you want to comment on?

MS. CORDERO: Actually, you know what? I want to take on the transparency question since I know we're short on time.

Okay. So I want to speak to transparency because it's an area, particularly in the national security arena where in the last few years we've seen a lot of movement, but in the last year it's going down a path that we need to be concerned about writing. And that is that in order for transparency, particularly about national security information, to be effective, in other words, the intelligence community, the national security community releasing information, declassifying information to inform the public about either laws, how laws are interpreted, policies, or the actual substantive national security information, it needs to be, in my judgment, timely. In other words, tied to something that's of some relevant current interest. Two, importantly, it needs to be accurate. So garbage getting released publicly or false information getting released publicly under the banner of transparency is not actual transparency. And third, it needs to be meaningful in some way. And so going to the substance of what the information is, again, it has to add something. In order for national security information to be, in my judgment, rightfully released, it needs to be adding to the public debate in some

meaningful way.

The intelligence community over the last few years under White House and director of National Intelligence leadership, made a lot of strides in releasing more information publicly. Some of it they did voluntarily. Some of it they did in response to unauthorized disclosures of information, and some of it they did it because Congress legislated that they had to. However, what we're seeing recently, both from the White House and from parts of Congress, is information being released that is saying it's national security information. It's doing it because they're saying it's under the banner of transparency, but it's not accurate or it's not vetted or it misrepresents what is actually going on behind the scenes.

And so I think generally, my judgment is that we can't go backwards on transparency. I think just the way that information flows and the demand for information is just such in our current era that we have to move forward on transparency, but we really do need to pay attention and consumers need to be aware of the environment in which it's being released.

MR. EISEN: Paul, I've come to you last all day because you're way down there at the other end of the dais, so I'm going to go next to you on transparency or judges, or reaching the voters. And then finally, we'll let Mickey bring us home.

MR. ROSENZWEIG: You get to bring us home. I was glad because I didn't want to be the one person between everybody here and getting out of this room; right? So I'll be brief, and I'll pick up on two of the three.

Briefly, on the issue of judges, I actually think that notwithstanding the difficulties that we're going through right now in the nomination process, the judiciary has been a shining light in the last couple years. They have exercised far more scrutiny than they typically have over national security and immigration issues in particular. I'm not sure whether that's a welcomed change or not systematically, but in this context it certainly is. You look at the immigration laws, for example, and that's an area where for

years we've said that the executive discretion is at its maximum. And yet we have seen a number of instances of judicial retrenchment and restrictions on what I think are rightly characterized as abuses of that discretionary power.

So I'm not as concerned just yet about the judiciary's transformation as perhaps Congressman Nadler. I see it as still a bit of a happy point. What bothers me most, what concerns me the most is recovering the civility of the conversation. And stopping the trope that, you know, people I disagree with are evil, wrong, and bad. And, you know, I reflect back on my own 30 years, 35 years in this town, and I look back on my own conduct and I see instances in which I have not upheld that virtue as well as I might have and in which I became quite enamored of a particular viewpoint and convinced of the rightness of my views. And not just that but also personalized the dispute in ways that -- so I think the only way is for each of us individually to recommit themselves to a debate about policy, not about personality. And that's extremely hard in a world in which the leading political actor on the world stage is all about personality and converts every dispute about policy into a debate about his personality. But nonetheless, that's really the only answer.

So, yeah, I know, you're looking grim. Institutional changes that empower your opponents where you say I will not -- I love what Congressman Jolly said earlier about giving the minority systematic rights. That's a great idea. I hadn't thought about that before, but that's my answer. It's not as happy an answer as you wanted.

MR. EISEN: Congressman Edwards?

MR. EDWARDS: So nobody eats until I shut up; right?

Well, I want to go through each of them very quickly.

I completely agree with what you said about the judiciary. I think we look at the way the Supreme Court divides so often five to four, Democrats against Republicans. We look at what happens in the confirmation process, but overall, we have seen over the last couple of years a number of federal judges doing a good job of

stepping up, performing their duties, putting a stop to things. Even going back to when John Roberts tried to find a way, and did find a way, to reconcile the differences on the Obamacare dispute. So I do think the federal judges are doing better than we might think.

But to your question, I disagree a little bit. Partisanship is the issue. Political parties exist for one reason -- to gain power, which you do by stopping the other people. George Washington was right in his Farewell Address. And so partisanship is not on the side. Partisanship is why we're here. People today decide before the facts are out based on which party they're in, what they believe. So that's a fundamental problem. Unless we find some way to reform that, we are going to not get out of this problem.

Rule of law, transparency, the picture that comes in my mind is about the fact, have you ever served, Jerry, on the Intelligence Committee? I'm always struck by the fact that on the Intelligence Committee, the executive branch will come to the members of the Intelligence Committees and say; we will give you this information and only this. You cannot bring in a staff member and you cannot tell it to anybody else, to which the proper response is, we're the Congress of the United States. We make the laws. We will tell you what is classified, what is not, who we can share it with, and what we will do about it. So, I mean, it does come back. You know, much of the problem we have now stems from a Congress under both parties that does not do its job, does not assert its authority. If we got back to the constitutional model of separated powers, separated and equal powers, you know, I think we would solve an awful lot of this.

I wanted to say a word because, you know, mentioning the Federalist Society, if there was ever an organization that was misnamed it's the Federalist Society.

MR. EISEN: I'll just end on an optimistic note of my own analysis. The United States, indeed, the liberal, democratic project on both sides of the Atlantic has been through a century of profound challenges, challenges far worse than the ones we

face now. I wrote in the New York Times on Sunday about this model. Every time when we come through those, we're in the midst of them, much deeper and much more dangerous challenges, the rule of law and the rest of our project, our democratic project, they seem insoluble. And every time we've come through them, and when we do exactly that, the notes of healing, of oversight, of congressional functionality, of bipartisanship, of joining together, of affirming the values that are much deeper than what separates us flourish. And there's a healing moment and we end up better. The great reforms that guide government, that allow us to talk about the failings and the legislative solutions that are now fixes, those reforms came out of the Watergate crisis. So I believe that we are going to come out of this crisis stronger than ever. That the rule of law as a necessary corrective part, these crises serve that function. We've solved tougher ones. With the help of leaders, like my friends on this panel today and all of our speakers from all sides of the aisle who we've been privileged to hear from today, the rule of law is going to make it through this moment and we'll emerge on the other end. No one knows how long the passage will be. But we're going to emerge on the other end stronger than ever.

I want to thank my friends for being here with me, and I want to thank all of you for joining us at Brookings. Thank you.

(Applause)

* * * * *

CERTIFICATE OF NOTARY PUBLIC

I, Carleton J. Anderson, III do hereby certify that the forgoing electronic file when originally transmitted was reduced to text at my direction; that said transcript is a true record of the proceedings therein referenced; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were taken; and, furthermore, that I am neither a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

Carleton J. Anderson, III

(Signature and Seal on File)

Notary Public in and for the Commonwealth of Virginia

Commission No. 351998

Expires: November 30, 2020