

Ralph Nader Radio Hour Ep 438 Transcript

Tom Morello: I'm Tom Morello and you're listening to the *Ralph Nader Radio Hour*.

Steve Skrovan: Welcome to a live Zoom edition of the *Ralph Nader Radio Hour*. My name is Steve Skrovan along with my co-host David Feldman. Hey David, how is the house?

David Feldman: It's exciting. We're meeting our listeners.

Steve Skrovan: I also want to welcome our Associate Producer, Hannah Feldman who is going to be moderating our live audience questions. Hello Hannah.

Hannah Feldman: Hello Steve.

Steve Skrovan: And of course the man of the hour, Ralph Nader. Hello Ralph.

Ralph Nader: Hello to the viewers, listeners. It's all about the headlines of today, bringing Trump to justice.

Steve Skrovan: That's right. Today we were scheduled to hear lawyer Josh Koskoff. That's what we were promoting all week. He's the attorney who won a 73 million dollar judgment against Remington and other Arms manufacturers on behalf of the families of nine victims of the mass shooting that took place at Sandy Hook Elementary School in Connecticut. Unfortunately for us, he was called away at the last minute to attend a congressional hearing in Washington, D.C. on the topic. Unfortunate in the short term for us, but potentially fortunate in the long term for the cost of sensible gun control. So we will reschedule Mr. Koskoff in the coming weeks and get an insider's view of how that hearing went and how Mr. Koskoff successfully argued his case in court. So stay tuned for that. But we are nothing if not nimble here at the *Ralph Nader Radio Hour*, so we've quickly switched gears. As Ralph mentioned, today we're gonna talk about the recent news that the Department of Justice is investigating Donald Trump's role in the January 6 insurrection. According to the *Washington Post* they are interviewing close associates of then VP Mike Pence and I assume many others as the days and weeks go by. Many had been clamouring for the DOJ to take action in light of what we've been learning through the January 6th hearings; now it looks like it's happening. To help us sort all that out we have invited our resident constitutional scholar Bruce Fein to join us today. Ralph and Bruce will talk upfront about the implication of the DOJ investigation. Then those of you in the Zoom room will have a chance to ask Ralph and Mr. Fein questions. As always, somewhere along the line we'll check in with our corporate crime reporter Russell Mokhiber. But first, David, introduce our guest to the people.

David Feldman: Bruce Fein is a constitutional scholar who was Associate Deputy Attorney General under President Ronald Reagan. He has been a visiting fellow for constitutional studies at the Heritage Foundation and an adjunct scholar at American Enterprise Institute. He is the author of *Constitutional Peril: The Life and Death Struggle for our Constitution and Democracy*, and his other book is *American Empire Before the Fall*. Welcome back to the *Ralph Nader Radio Hour* Bruce Fein.

Bruce Fein: Thanks for inviting me.

Ralph Nader: Welcome back, Bruce. We're gonna cover a lot of ground and it entails all the questions that a lot of people are asking that they're not getting answers to from the January 6th Committee and from the Justice Department. All over the front pages today the *Washington Post* and the *New York Times*, have reported that for some weeks now there's been a grand jury empanelled by the Justice Department to investigate the insurrection and the predicates leading to the mob against the Congress on January 6th to obstruct the certification of the election in favor of Joe Biden. Let's start with this section, Bruce. The committee has a lot staff. They've gotten a number of hearings with pretty good ratings. They seem to have been doing a good job but they're not using the priority powers that they have with Trump, Pence and other arenas that can open up and strengthen their case.

Bruce Fein: Thank you Ralph. Well the first thing is we need to remember that one of the refrains of the Committee has been the dereliction of duty of President Trump during these 187 minutes of insurrection where he sat and fiddled while the Constitution was torched. But there's been a dereliction on the committee side, too, and let me explain. They have unchecked inherent power to subpoena and to demand the testimony of Mr. Trump and Mike Pence among others and to sanction any disobedience to those subpoenas by imprisonment or otherwise without going to court. Yet it's Mr. Pence especially who has the smoking gun. We know there are at least half a dozen or more incidents where it's been said that the two men were speaking together without anyone else in the room about not counting the state certified electoral votes on January 6th. Why would you not call the man with the smoking gun? That would be like the Watergate Committee not subpoenaing the Nixon tapes after Alex Butterfield revealed them. The Nixon tapes brought him down. Remember the tape that showed that he was urging HR Haldeman to obstruct justice and that led to Mr. Nixon's resignation. So, one problem is why have you not subpoenaed Mr. Pence? There isn't any privilege there. No vice president in history has ever successfully claimed a privilege not to testify. He's not even a sitting vice president. The same thing can be said about President Trump. I worked on the Watergate impeachment of Nixon. There were four congressional subpoenas against Nixon for his tapes. He flouted them and that was an article of impeachment. So when the House is investigating high crimes and misdemeanors, there isn't any presidential privilege, former presidential privilege or otherwise. This is a dereliction. The American people are entitled to know exactly what Trump said when he was informed there is violence unfolding on Capitol Hill; they're yelling and screaming, "Hang Mike Pence!" among other things. We don't want claims of executive privilege or I don't know or we can't reveal that. That's another deficiency. Not only are they not calling the prime witnesses about January 6th, Trump and Pence, but they let Cipollone, the White House lawyer claim privilege to not disclose exactly what Trump said when he alerted Trump that his followers were committing violence on Capitol Hill. We know previously when he was informed that his followers were bringing arms into the Ellipse, Trump said, "Don't check them, because they're not coming after me." So these particular words are very important. There may be some listeners and you may remember Ralph, that John Dean was White House Counsel who testified on five or six complete days before the Watergate Committee on blow-by-blow conversations he had with President Richard Nixon. You remember the words of Nixon that rained like a thunder on an anvil for weeks. Where when he said in response to raising money to pay off the Watergate burglars, "Oh we could do it but it would be wrong." Those words, well it would be wrong, looked like a cover up after he was acknowledging that, that's exactly what they were thinking about, paying the \$25,000 as bribes. So where is this idea that they let Pat

Cipollone get away with not responding and explaining, well what in fact did Mr. Trump say? That's very important.

Ralph Nader: There's no executive privilege that can be invoked against a congressional subpoena. You want to elaborate that?

Bruce Fein: Well no, there isn't. When they tried to claim that in Nixon's case, they impeached him because he flouted the subpoenas and there was no defense. The impeachment power is plenary. You can imagine why there's no privilege. After all, if the smoking gun is in the White House, how can you give the White House the privilege to cover it up? That makes no sense whatsoever. You're gonna say that a criminal suspect can decide, well, I'm not gonna surrender the murder weapon. No, you can subpoena the murder weapon here. Now of course there is the privilege Ralph, of self-incrimination. It's not executive privilege. There's a 5th Amendment privilege against self-incrimination, no matter what the context, whether it's in a civil or other proceeding. But Trump has never claimed the 5th Amendment privilege. You can draw a negative inference about that invocation in a civil context, and an impeachment proceeding is civil. It's not criminal, which is why after you're impeached you could still be subject to criminal prosecution. But Trump has insinuated he would invoke the 5th Amendment privilege against self-incrimination. But there's certainly no executive privilege with regard to attorney client privilege. It was established in the Bruce Lindsey case and Clinton, that the client of a government attorney, especially in the White House, and it was my client when I was in the Justice Department, was the United States Constitution; it is not any individual. You don't do dare, fear, salute the occupant of the White House, no; that is not your client. When I took an oath to be a government attorney, my oath was to the Constitution itself, period. Anything that subverts the Constitution is a danger and you have a duty to disclose what that is.

Ralph Nader: Now just to summarize, you're criticizing the a January 6th Committee for not subpoenaing Trump and Pence, which is really inexplicable to people who know anything about congressional investigations. [chuckle] Eventually you got to get to the top of the heap. The second is that Congress is not, and the Committee is not informing the public that they don't have to go to court and endless appeals and delays to enforce their contempt power if Trump and Pence defied the subpoena. They have inherent, listen to this please, they have inherent congressional contempt power under the Constitution to enforce their own subpoenas without going to court. In fact in the 1930's they did that against an individual and arrested him, and put him in a little jail in the Congress. Third, you're saying all these attempts by witnesses requested for certain testimony cannot invoke any kind of executive privilege; that's not gonna be upheld and the judicial precedents are in favor that position. Now we come to the most astonishing of all, that the January 6th Committee may complete its hearings and report s without urging the invocation of Section 3 of the 14 Amendment, which would disqualify Trump from ever running again for public office. Can you explain that?

Bruce Fein: Yes, the Section 3 of the 14th Amendment, which by the way the US Supreme Court held as a self-executing amendment like the 15th Amendment, or the 13th Amendment. That is you don't need implementing legislation. It's self-executing. It provides that any person who has taken an oath to uphold and defend the Constitution, who after having taken that oath engages in insurrection or rebellion against the United States, is forever disqualified from holding public office--not only the presidency or in Congress, but from holding any public office

again. This is something that can be removed by a two-thirds vote in Congress to remove that disqualification. So you would think, especially in light of Liz Cheney, the Vice Chair's closing statement to the last hearing where she said, the American people need to think, can we ever trust former president Trump with holding public office again, given the gross derelictions on January 6th. But she didn't follow up and say, well, and under Section 3 we're going to find that he is disqualified because he did engage in insurrection against...

Ralph Nader: Just to clarify, implementing Section 3 by the Congress does not require a two-thirds vote. It only requires a majority vote.

Bruce Fein: Simple majority, and the Democrats have simple majorities in the House and the Senate.

Ralph Nader: Well, that's interesting that neither the January 6th Committee nor any other committee as House or Senate Judiciary has raised this. But it does reflect something long standing, Bruce, which is that the Democrats are very soft and weak. It's like they have 12 arrows to their quiver and they're using two. When they moved against Trump on the first impeachment, you laid out, and all this was put in the *Congressional Record* in December 19, 2019--12 impeachable offenses, some of them actual federal crimes committed openly, brazenly, daily by Donald Trump. And Nancy Pelosi only picked the Ukraine matter, which wasn't exactly a kitchen table issue for the American people. So the background of softness on Trump is extraordinary, especially since, what did he say once in the middle of his tenure?

Bruce Fein: I've quoted this one as I've memorized Ralph, July 23rd 2019, a day that should live in constitutional infamy, President Trump, I quote, "Then I have Article 2 where I have the right to do anything I want as president." That's the equivalent of saying the king & can do no wrong; the equivalent of saying we're back to pre-1776 where the king was the law, and the law was the servant of the king. I mean it's truly an astounding statement. That by itself in my judgment is an impeachable offense. It's an attempt to subvert the Constitution. He's explaining exactly what his purpose and goal is. Not only the Democrats don't use that quote, Joe Biden never even used it in the 2020 election campaign. You will not find the January 6th Committee ever quoting those words in the hearings, which is unbelievable to me. We all remember that very famous or infamous exchange between Frost and Nixon when Nixon said, "when the president does it, that means it's not illegal." Everybody was alarmed and shocked. What do you mean if the president does it, it automatically means it's not illegal? A president is under the law, not above it. But here we are years later and Trump says the same thing as Nixon. People shrug their shoulders and move on, truly stunning.

Ralph Nader: Even more extraordinary, is this isn't just history. It continues. Trump and the Republicans are continuing in many states to run roughshod over election laws, and standards, and purging voters, and obstructing voting, and criminalizing volunteer precinct workers' behavior and intimidation. It all continues. But I'm sure some of our audience are asking, what are some of these crimes that Trump openly and brazenly, and daily committed when he was president. Including something that often many people don't think is a crime but is a very serious crime--massive obstruction of justice by Donald Trump in the White House. Why don't you start with that?

Bruce Fein: Okay, well John Bolton, by the way, who I know because I worked with him in the

Justice Department at one time, is very conservative. I disagree with him on a whole lot of issues. But he wrote after his tenure as national security adviser, that “obstruction was a way of life at the White House.” Trump all the time was interfering with Mueller investigation. He was interfering with the investigation on Halkbank, a Turkish bank that evaded sanctions against Iran to do a favor for Turkish current president Erdoğan. His whole role was thinking about how can we fire Robert Mueller to do another Saturday night massacre? How can we get the attorney general to not recuse himself? How can we offer pardons and phone calls to people to say we’re still on the team? We saw relics of this Ralph, in the testimony before the January 6th Committee where we have testimony that yeah, there were calls received from Trump or his alter ego saying, hey you know we really believe in you, and if you stay on the team, good things will happen to you in an effort to distort and influence the testimony. Obviously it seems quite clear that a whole new slew of Trump pardons to Roger Stone, and for Mike Flynn and others were there to help his friends. In fact in the discussion of impeachable offenses, at the time of the framing, framers explicitly stated that a president who wields the pardon power to help and favor his friends could be guilty of an impeachable offense. Trump has filled that standard in spades.

Ralph Nader: Obstruction of justice isn’t just politics as usual. Some people say, “Well, you know, politicians always do that.” But this is a serious crime, a serious violation of federal statutes that can be prosecuted and result in imprisonment.

Bruce Fein: Yes, the entire Watergate cover-up trial concerning Haldeman, Ehrlichman, John Mitchell, et cetera, were obstruction of justice prosecutions and they all succeeded. President Nixon, the Articles of Impeachment voted against him by the House Judiciary Committee before he resigned, alleged obstruction of justice. That was the payoff of the Watergate burglars who tried to influence testimony before the grand jury illegally. In fact it was obstruction of justice that was the final straw that broke the camel’s back when the tapes showed that Nixon was urging HR Haldeman to lie and say he couldn’t remember things to the grand jury when he could. That was viewed as sufficient to oust the president from power. This is not a garden variety crime. With regard to President Clinton himself when he was under investigation, yeah it was obstruction when it was alleged that he was lying to Whitewater a grand jury, to Ken Starr, to the judge in the Paula Jones case. And he ended up losing his license. He was charged with contempt of court for lying about not having sex with that woman, fined \$90,000. So it’s a very, very serious prohibition. I mean after all if obstruction of justice could be committed with impunity, our judicial system would collapse. Anybody could get on the witness stand, lie, cheat, steal.

Ralph Nader: Yeah, just a footnote. In the Mueller Report, which was heavily censored by the attorney general for Trump, there were all kinds of evidence deduced of obstruction of justice. To this day even though the Democrats howled at Trump and demanded the attorney general release the full Mueller Report uncensored, un-redacted, they still have not released the Mueller Report, and they’re in charge. The Democrats are now in charge. So again, they’re very soft; they’re very weak. Trump knows that. Now there is a federal law that says presidents, vice presidents must never use the power of the federal government against their political opponents in an upcoming election, especially. It’s called the Hatch Act. What did Trump do on the Hatch Act?

Bruce Fein: Well the Hatch Act criminalizes a candidate for office from commandeering federal

resources or federal personnel to influence the outcome of the campaign. Basically, Mr. Trump turned the White House into a crime scene at the time of the convention and before when he was making candidate speeches from the White House. His wife was making speeches in his support from the White House. Mike Pompeo was utilizing the US Embassy in Jerusalem to support Trump in his candidacy on US property. It goes on and on. That's clearly illegal. The other thing that Trump was doing, and people who have got some of their so-called CARES checks; you may recall sometimes there were direct deposits. Some say they were checks. Mr. Trump put his name gratuitously on checks to try to make it seem as though people were receiving money, not because of the Congress, but because Trump is responsible for this CARES check, and that's what you should consider voting for him because he has given you some money in part of his program. He had to utilize Treasury Department personnel to get his name on all of those checks. Then he used White House stationery to communicate with direct deposit recipients of CARES money to say hey we're alerting you that we've deposited X amount of money in your account; this is one of the great things that the president does. It's all on White House stationery, and it was obviously time to influence the outcome of the 2020 election. These are examples of the White House, and indeed his chief of staff at the time, Mark Meadows said, "Only inside the Beltway, people care about the Hatch Act; nobody else does" as though okay, a criminal statute doesn't apply if it's inside the Beltway and people don't care. Well listen, it does apply no matter what. Hatch Acts are serious violations. You may recall there are a huge problems with the Hatch Act that were raised against then Vice President Al Gore in 2000 saying that he was utilizing his Vice-Presidential offices in the EEOB [Eisenhower Executive Office Building] to raise money. That's obviously a partisan issue. There are questions of whether President Clinton was using the Lincoln Bedroom to host guests who would contribute to his campaign. So it's a serious issue. But I think Ralph, in part, you're asking why are the Democrats so soft? I think at least one of the motivations is that they do basically the same thing, and they don't want to have the criminal justice system turned against them when they're no longer in power.

Ralph Nader: Of course there's an order of magnitude. Nobody has done it so frequently, openly, brazenly, regularly the way Trump has. For example, Presidents shift money around here and there in complex budgets that aren't particularly stipulated by Congress when Congress approves the federal budget. But nobody has done it at the scale that Trump did it in open defiance of a prohibition by the Congress not to spend billions of dollars building the wall on the Southern Border. Can you talk about that and how he shuffled it from the Pentagon?

Bruce Fein: Yes, it's an important statute Ralph, and listeners or viewers. It's called the Antideficiency Act. The reason why it was enacted was to protect the congressional power of the purse, to make certain that Congress could oversee the executive and control abuses by the power of the purse. It says in layman's language, no, it's a crime for the president to spend money on projects that Congress has not appropriated the money for. So, this is litigation that showed Trump diverted scores of billions of dollars of military construction funds to build a wall with Mexico to address immigration, which is not a military issue. It's an immigration issue. He diverted 80 billion dollars in FEMA (Federal Emergency Management Agency) funds to pay unemployment compensation which he thought would help him with his constituents--80 billion dollars. So if the president can go ahead and spend money as he wishes, irrespective of what Congress has appropriated the money for, the power of the purse becomes crippled.

Ralph Nader: As he said, with Article 2 he can do whatever he wants as president. There's one

more outrageous pattern of criminality. He set the all-time record for defying congressional subpoenas. Could you talk about that?

Bruce Fein: Yeah, over a hundred. Of course the oversight power is very, very critical. Woodrow Wilson once wrote in congressional government that the informing function of Congress is even more important than its statutory function or legislative function. "Sunshine is the best disinfectant" as Louee Brandeis said. So overseeing the executive branch is absolutely critical. Let me just give you one example; I hope it's not a diversion. There was no oversight of the Afghan War that continued for over two decades, and as a result Ralph, the United States spent every day for 20 successive years more than 300 million dollars in the Afghan War to result in a return of the second edition of the Taliban more barbaric and prudish than the first edition, right?

Ralph Nader: Over 300 million dollars a day.

Bruce Fein: A day, a day for 20 successive years, every single day. No oversight, and no one is accountable. What do you think is the signal that gives to the executive branch? Go to war, do whatever you want; no oversight; we can cover it up; you will never pay a penalty; we'll just move on.

Ralph Nader: The U S Inspector General for Afghanistan expenditures documented again and again unbelievable looting, corruption, collusion, payoffs, waste. At the end he was asked, well what was the result of all your investigations? He said, they never led to any law enforcement. It's all on the record. One thing I wanted you to elaborate a bit about is the defiance of subpoenas to find out what? Because defiance of subpoenas is a little vague,. Nixon defied four subpoenas and that was enough to set Congress on the course to impeach and convict him and throw him out of office. Trump has defied well over 120 subpoenas from various congressional committees. What were the subpoenas for, for example?

Bruce Fein: Well, there are a variety of inquiries here. But one example would be to go back to the wall to Mexico. After all they asked, what is the documentation that this is military construction related? Remember the first time around Trump said when Congress wouldn't appropriate the money, he shut Congress down. He wouldn't sign the necessary spending bills to keep the government in operation. Then he turns around and immediately says, okay, now I'm gonna spend it on my own. So we need the communications. Where did he get that advice? Where was his authority? Where is the documentation that shows you could spend this money? Another area where he was defying is they're asking for information about his refusal to send arms that Congress had appropriated money for to Ukraine in order to get then President Zelenskyy who is still president, to go investigate Hunter Biden and Biden and whatever. We want the documentation. What was the need under the Impoundment Act, that justified that kind of delay? Who did you talk to? Who did you talk to in deciding you want to talk to Zelenskyy directly and that you were not gonna give him the arms? Especially with communications with Rudy Giuliani.

Ralph Nader: A lot of other subpoenas dealt was really bread and butter issues like subpoenaing information about how the Trumpsters shut down the economic protection regulation of the Consumer Financial Protection Bureau or the Food and Drug Administration, looking the other way, or the Department of Interior, or the Department of Agriculture favoring

agribusiness, or the big land owners, exploiters of the public land. Yeah, I mean it dealt with a whole shut down of the federal government and turning it over to Wall Street and Houston by the Trumpsters' corruption. So many of his appointees in high government offices had to flee their office, had to resign under a shadow of wrongdoing, like the head of the Environmental Protection Agency.

Bruce Fein: Yes, Scott Pruitt, yeah.

Ralph Nader: Yeah, and the Secretary of Interior. Now we come to the most interesting question to Bruce Fein, why are the Democrats behaving this way? What are the various motivations when they keep tiptoeing and investigating but they're not using the evidence in full power to make sure that Trump goes back to his casino business, or is prosecuted and convicted of these crimes? What's going on here?

Bruce Fein: Well, it takes some speculation here Ralph. But both you and I probably collectively have spent like a hundred years or more around these people. I've come to the reluctant conclusion; the Democrats are soft because they have skeletons in the closet. They know they've done the same or similar things, maybe not on quite the same magnitude, and they worry that if they lose the elections to the Republicans in the fall, they're gonna turn these precedents and they're coming after us. We've got a lot of skeletons that we want to conceal. So we go soft on them; they'll go soft on us.

Ralph Nader: Why isn't this corruption a winning agenda for the election? It comes in number one always. People, no matter the party--Republican, Democrat, Libertarian, Progressive, whatever. Whenever you ask people about ranking things they want done away with, the corruptions issue is right at the top; It's true around the world, too. Why aren't they making this into a winning political issue--law and order, clean government, responsive government, preserve tax payer money, get Wall Street off Washington's back, bring it close to the people, make politicians accountable? Those are winning election arguments. What's going on here?

Bruce Fein: Yeah, and to reinforce your observation Ralph, I remember that after the Nixon investigations, the Republicans were clobbered at the next election; they were like wiped out in November of 1974 after Nixon resigned. So it was clearly a vote of no confidence for anybody who had defended President Nixon that were implicated in this corruption. The only thing I think of is that they think well that may be true. Maybe it's good for the public. But for us, no, because we got skeletons in the closet. You remember, I don't want to push it too far, the way in which the Republicans kind of came unglued when they did the impeachment of Bill Clinton. Then okay, Newt Gingrich, the youthful indiscretions. Then you had two or three speakers that had to all resign because they had done the same thing as Clinton. So, the Democrats likely think we may be popular with the public, but when they see our skeletons, when the Republicans get back in power it will be a loss for us. So it's just the club instinct out there; everybody protects everybody else, which is why--we haven't gotten into this Ralph--the January 6 Committee has not sought to compel a single member of Congress who has information relating to what Trump said to them on January 6th, to just come testify. I guarantee you there is no privilege for a member of Congress to refuse to testify. The speech or debate clause protection only applies when the executive or judiciary is at work, not the legislative body.

Ralph Nader: That included Senator Lindsey Graham. They haven't subpoenaed him. He was

part of that, and wannabe speaker Kevin McCarthy, right?

Bruce Fein: Absolutely, yeah, Kevin McCarthy said things that were quite critical of Trump. Then he kind of became mini-mouthed in trying to retract them later on, trying to fall into Trump's good graces. So yeah, Kevin McCarthy would be a prime witness. Certainly the same can be said with regards to Mitch McConnell, who also was on record saying this is a moral condemnation, a legal condemnation; this is all Trump's handiwork, January 6th. Okay, what made you conclude that then majority leader McConnell? We know that Trump in fact called repeatedly House and Senate members. House members went up to the White House shortly before January 6th and were talking about ways in which you could try to obstruct/prevent Pence from counting the votes on January 6th. Well those members need to be called. Scott Perry, among others, Matt Gaetz among others, Jim Jordan among others. What did you tell the president? There's no privilege here. We need to know what do you advised him? What did the president say in return to establish a corrupt motive? What's going on here? Is there a conspiracy?

Ralph Nader: I think there's a fear aspect, too. The press always said criminally prosecuting a former president has never been done before. The *Washington Post* says for example, the revelations of a federal grand jury investigating Trump on January 6, "Raise the stakes of an already politically fraught probe involving a former president." What are they talking about? If nobody is above the law, it's even more important to go after the top dogs. They keep saying, this will divide the country, and this and that. But the more people who supported Trump learn of what he's done to our republic, to our Constitution, to our rule of law, to engender more anxiety, dread, and fear about the coming elections, to intimidate voters on, and on, and to enrich himself, he is gonna start losing some of his own supporters. Maybe not the hard core, but he can start losing five, ten, fifteen percent of his supporters. But the Democrats don't seem to get that. There's one more thing before we go to Steve and David for their quick comment or question. You are quite focused on this attempt by the Republican state legislatures in about a dozen states that are trying to set up the overturn of Democratic wins in the coming elections in their states by empowering their legislatures to override the electors who won and establish their own electors. Can you elaborate that in clearer language than I just did?

Bruce Fein: Yeah, the Constitution provides that presidential electors will be selected as the states provide; it says "state legislatures," but there's nothing in the language that suggests that when the Constitution references the states or the Congress, it means Congress alone, or the states; it's really talking about the government itself. I don't want to divert, but I think it's important. For example Ralph, the First Amendment says "Congress shall make no law abridging freedom of speech." But everybody understands Congress is a shorthand for Congress the executive branch. Any arm of the federal government can't abridge freedom of speech. That's why you read the Constitution in broad language. So, in the language of the Constitution that prescribes the selection of presidential elections, basically the states decide. Some states have constitutions that place limits on what the state legislatures can do under state constitutions. Sometimes the state legislatures delegate certain electoral functions in presidential campaigns to administrative electoral boards and things like that. It's part of a state's choice to have separation of powers, if you will. State legislatures now, at the exhortation of Trumpists if you will - John Eastman-like - to say no, it has to be the state legislature alone and that if the state legislature is limited by the state constitution, even when the state legislature chooses to amend the

constitution, it can't be done. It has to be the state legislature alone that selects the electors. They can't even delegate it, in some of arguments, even to the people, which is a ridiculous counter-constitutional argument for well over a hundred and fifty years. The last state that had the state legislature select electors as opposed to having a popular vote was South Carolina in 1850's, which is like 107 years ago. So, it's an effort to try to deprive the American people through popular vote, deciding who the president is and then trust to inbred state legislatures with all sorts of ulterior motives to defy popular will in favor of self-enrichment.

Ralph Nader: Right, imagine overthrowing the election, the will of the people by state legislative action right after the election. So people don't think this is all theoretical, the Supreme Court has announced that it is going to take up a case just on that point next year, in the next session. Is that correct?

Bruce Fein: Yeah, out of North Carolina, correct Ralph.

Ralph Nader: We've been talking with Bruce Fein, constitutional law specialist, author, advocate, calls it as he sees them, and has testified over 200 times before Congress over the years. Now it's time for Steve and David to have some input and then we'll go to the audience.

Steve Skrovan: Yes I have a quick comment and a question, because we do want to get to these audience questions. We've got a lot of good ones. My first comment is that Bolivia just put their ex-president away for ten years, after not an attempted coupe, it was actually a successful coupe. So, Bolivia is kind of showing us the way that it can be done.

Now to play a little bit of devil's advocate as far as the January 6th hearings go, it seems to me that the January 6th hearings are for the public, to lay out the story, so that the public understands the sequence of events and is fronted by Republicans, and it's Trumpers who are all testifying, and it is trying very hard to seem as non-political as possible. Then it really is up to the DOJ to take up the legal cudgel which it appears this week we're finding out they're actually doing. So I'm just saying that to maybe cut the January 6th people a little break. What do you think?

Bruce Fein: Well it's a wonderful comment and I don't like to be fault finding, Steve. But hey, I lived every single day in Watergate. That same Watergate Committee, same task that January 6th Committee had, no. They had, and I saw them, and you should have seen them too. HR Haldeman, John Dean, John Mitchell, John Ehrlichman, all the chief people were there and testified. I also was counsel on the Iran-Contra Committee. You know who was there? George Schultz, Cap Weinberger, Rob McFarlane, John Poindexter. These are the chief people. The precedents are there. This is not novel asking the January 6th Committee to do things that the predecessors have not done. It's stepping up to the plate.

Ralph Nader: Bruce, the Watergate Committee never subpoenaed Nixon did they?

Bruce Fein: No, they had the tapes. But remember this about Nixon. After he resigned, they were going after him for criminality, which is why pardon came forth with president Ford. This idea that he was scot-free, no. The whole reason why Ford pardoned Nixon was because the Watergate Grand Jury was investigating the indictment. You remember Nixon himself was named as an un-indicted co-conspirator in the Watergate cover-up trial.

Ralph Nader: You're right, there's no doubt the Justice Department prosecutors were ready to

prosecute Nixon after he left office and went to California. Because he had an ailment, Gerald Ford pardoned him. So they were going after the full force of the law. David, quickly.

David Feldman: Yeah, let me follow up on Steve's question. During Contragate, Bruce, independent counsel Lawrence Walsh secured three convictions against Colonel Oliver North but the ACLU, I think, of all people, helped Oliver North get those convictions vacated because some witnesses had been given some kind of immunity when they testified before the Iran-Contra counter Committee. So when we called the January 6th Committee toothless, is that because the January 6th Committee is worried about repeating what happened with Oliver North and contaminating the Justice Department's case? Are they worried about inadvertently contaminating Fulton County, Georgia, Fani Willis's investigation? Is that why they're...

Bruce Fein: No, if you go back, listen, I was involved in that. The reason why Oliver North's conviction was reversed is because some of Lawrence Walsh's people, despite instructions of the contrary, we're listening to immunized testimony of Oliver North. So when you're given immunity that means the government can't use your testimony against you. Unfortunately, because these were highly televised hearings, some of the lawyers were privy to this immunized testimony, and they used it in framing questions for witnesses. So the court said, no, you've abused the immunity privilege; you went too far. And that is the reason. The January 6th Committee hasn't granted immunity to anybody, so there isn't any conceivable danger of a reprise of the Oli North situation.

David Feldman: Great.

Steve Skrovan: We've been speaking with Bruce Fein. We will link to his work at ralphnaderradiohour.com Up next, Bruce and Ralph will answer some questions from our virtual audience. But first, let's check in with our corporate crime reporter, Russell Mokhiber.

Russell Mokhiber: From the National Press Building in Washington, D.C., this is your *Corporate Crime Reporter* "Morning Minute" for Friday, July 29, 2022, I'm Russell Mokhiber. Biogen said last week it will pay 900 million dollars to resolve a whistleblower lawsuit accusing the biotech company of paying doctors kickbacks to prescribe multiple sclerosis drugs. That happened just days before a trial was scheduled to kick off. That's according to report from Reuters. The agreement in principle, which Biogen disclosed in a quarterly earnings report, came ahead of a trial set to begin on Tuesday of last week in federal court in Boston in a lawsuit brought by a former employee. The settlement is subject to approval by the Justice Department which did not intervene in the case as it could have under the False Claims Act, but instead left it to the ex-employee, Michael Bawduniak to litigate on his own. For the *Corporate Crime Reporter*, I'm Russell Mokhiber.

Steve Skrovan: Thank you Russell. Welcome back to the *Ralph Nader Radio Hour*. I'm Steve Skrovan along with David Feldman and Ralph, and Hannah Feldman. Hannah, start taking us through some of these audience questions.

Hannah Feldman: Thank you Steve. So our first question comes to us from Rachel Branch.

Rachel Branch: I would like to know what it would take to charge Trump with treason and why that isn't brought up?

Bruce Fein: The answer comes out of the Constitution itself. Treason is the only crime that is in fact defined specifically in the Constitution because the British had so misused the concept to persecute political enemies. The crime of treason is defined as levying war against the United States. Despite my criticism and belief that appalling things Mr. Trump did, I don't think it constitutes levying war, and that's why treason is not appropriate here.

Steve Skrovan: Thank you for that question.

Hannah Feldman: Our next question comes to us from Dawn Tuveson.

Dawn Tuveson: The January 6th Committee has not mentioned anything about who has funded all of this, or if you know that maybe they are investigating that. When you look all the wood that built the guillotines, and the funding of the transportation on the bussing of these people, it just seems that there's some money involved here. We're not hearing anything about that. Thank you.

Bruce Fein: Well I think the question is a wonderful question. It may be a little bit overstated. We do have statements from Liz Cheney, and I think in the public domain that Mr. Trump himself was raising money from his supporters, misleadingly saying, oh yeah, we're gonna win all these court cases and he raised literally millions of dollars. I don't know what the amount is, from the MAGA [Make America Great Again] people. There's some very wealthy like Mike Pillow who obviously is supporting the campaign as well. Now it hasn't got probably to the granular level that we would like--to have an itemized statement of how much money people gave to so much. But it does seem clear that the money is coming from the Trump supporters. I mean, at least it's not coming from taxpayer money, if that's any solace.

Hannah Feldman: Thank you Bruce. Our next question comes to us from Mansur Johnson.

Mansur Johnson: Hi Bruce and Ralph. Bruce, you're an attorney with Free Speech For People. I've been following the actions and I'm wondering, I heard you say earlier that Congress could invoke that Section 3 of Amendment 14. Where is your group now regarding that and is it possible, or is it up to the Congress to try to include all the insurrectionists in this denial of ability to run?

Bruce Fein: Remember that as a predicate for the disqualification you have to have taken an oath as a public official to defend and support the Constitution. I think the vast majority of the rioters have never taken that oath as public officials; a handful may have. But listen, just because you may have many criminals, doesn't mean you have to ...ordinarily there is prosecutorial discretion involved here... in the most important to save us from the destruction of a republic and the Constitution is Mr. Trump. Because he is the one who said before, to requote, "then I have Article 2 where I have the right to do anything I want as president." That's the statement of a tyrant. That's a statement of a king. That's the statement of emperor. That's why he's the one who needs to be chastened and be disqualified more than anyone else because he's the greatest danger.

Ralph Nader: The point the questioner made can be expanded. I think he's right in the sense that there were sitting legislators at the state level and at the federal level who did take that oath. Some were also candidates who might have taken that oath. So it could be broadened out to a few dozen other officials, couldn't it?

Bruce Fein: Definitely it could. It's a matter of okay, gathering the evidence and deciding we need to do due process, give people an opportunity to respond/defend themselves. I'm not suggesting we ought to de facto pardon them. We're dealing with priorities here, i.e., which should take more priority over something else. Now we're also dealing in the area of law that might be called virgin territory. There's not a whole lot of history under Section 3 that was invoked shortly after the Civil War in 1871, but in 1872 Congress by a two-thirds vote decided, we've got to take everybody who was then disqualified and lift the prohibition on holding office again. They did that by a two-thirds vote as the Constitution requires. So we do know from the US Supreme Court that Section 3 is self-executing. It matters which body is entrusted with deciding, whether the individual office holder engaged in insurrection against the United States. My view is as long as due process is satisfied, that is you give the accused an opportunity to answer--that institution can be the Congress of the United States; it can be an electoral board, where a candidate is trying to get on the ballot to run for president. As long as due process is satisfied, all you got to show is 1) did you take an oath? 2) did you engage in insurrection? The January 6 facts speak for themselves with regard to Mr. Trump's involvement.

Hannah Feldman: Our next question comes to us from Lynn Harvey.

Lynn Harvey: Should we be concerned about the possibility of criminal charges being brought by Merrick Garland against Donald Trump and his accomplices, and then having jury trials that fail to convict? Would that be worse than not bringing charges at all? Parish the thought.

Bruce Fein: I served in high-level government as well. Your oath is to uphold and defend the Constitution, not to calculate what the politics are. The politics of justice are always right in my view; assess the precedent. So if we have the standards, there's a belief we can prove guilt beyond a reasonable doubt. The fact that you can have jury nullification, which is always possible, is not a reason to refrain from moving forward with an indictment. Remember the OJ Simpson case. It's true that once a jury acquits that's the end. The government can't seek double jeopardy, have a new trial or go on appeal. My own view is that the likelihood of acquittal is very tiny. We can extrapolate from the over 200 guilty pleas and convictions that we have for those who have been prosecuted for implication in the January 6th assault. We got 600 more cases to go. There have not been juries or judges who have been sympathetic towards those who have been involved. Also because to be candid, even if we're being practical, the venue for the prosecution would be in Washington, DC. That means the jury venire is gonna be the Washington, DC area. That is not gonna be a jury venire that's gonna be predisposed towards favouring Mr. Trump.

Hannah Feldman: Our next question is from Eoin Farrell.

Eoin Farrell: Hi Bruce, and the question I have is the fact that subpoenas are not being issued. Does that not suggest that the whole process is just performative and maybe not very serious? Thanks.

Bruce Fein: Well I think that may be a little overstatement. Some people who are critical witnesses testify anyway. Going back to my historical involvement, John Dean testified without subpoenas. That didn't make him an unimportant witness. But the fact that there are an absence of subpoenas does give a signal of weakness because it suggests if people are on the borderline

about whether they should cooperate or not, if they know there is no subpoena forthcoming, then they might not say anything, which they believe is why not a single member of Congress who was at the White House talking about trying to obstruct the counting of electoral votes by the vice president on January 6th, has been called and insisted to answer questions by the Committee. I don't know whether I'd call it unserious. I think it makes them irresolute because I go back to my suspicion, they're worried about setting a precedent that can come back and nip them because they've got skeletons in the closet.

Ralph Nader: In fact the Republicans are threatening that if they take control of the Congress, they're gonna do the same thing, which is what you're saying might be deterring the Democrats on the January 6th Committee of actually subpoenaing Kevin McCarthy and Lindsey Graham.

Bruce Fein: Yes. Notice also that Lindsey Graham has been subpoenaed by a Georgia State Grand Jury. Figure that, wait a minute, if a Georgia State Grand Jury is not reluctant to subpoena Lindsey Graham, and that's certainly lower on the hierarchy of power than the January 6th Committee, why isn't the January 6th Committee trying to subpoena Lindsey Graham? After all, the investigation in the Georgia Grand Jury is about criminal activity of Lindsey Graham, relating to counting the electoral votes and trying to manipulate the results to make Trump the president even though he lost the election.

Ralph Nader: Let it be said that I don't think Trump or Pence would comply with subpoenas; they would defy them. But at least the Democrats could say to the country they gave Trump and Pence an opportunity to make their case, or defend themselves. So I think politically it's not a wise move where they are right now.

Bruce Fein: There are legal consequences, I apologize Ralph for speaking over you, but there are legal consequences as well. In a civil proceeding it is permissible to draw an adverse inference from somebody that they are guilty of some kind of wrongdoing, if they refuse to respond to a subpoena, or even invoke the 5th Amendment. So the fact that they would flout a subpoena, and remember if they do that the Congress can hold them in contempt. If they wanted to, they can have marshal go put them in detention until they comply. They may refrain from imposing a sanction. But even if they did not impose the sanction of detention, they could still say we're gonna draw an inference against you because you refuse to testify, and you obviously are in possession of very critical evidence. And if it was exculpatory, we assume you'd come forward so we can assume it's incriminatory, which is why you're not talking.

Hannah Feldman: Our next question comes to us from Steven Wisensale

Steven Wisensales: Yes, my question goes back to something Ralph said, and I think you've hit up since. You said that Congress really doesn't have to, this January 6th Committee doesn't have to go through the court system. They can basically throw people in jail if they want to, if they're not testifying. Could you clarify that, and then talk about Bannon. I mean why was Bannon in court?

Bruce Fein: Yeah, okay. It's a wonderful question. In the famous case that stemmed from Teapot Dome, called *McGrain v. Daugherty*, for those people who want to trace down US Supreme Court decisions. In that case the Congress decided that a recalcitrant witness would be immediately detained and imprisoned, because defying a subpoena, didn't want to reveal the scandal at Teapot Dome. The Supreme Court said, yeah. This was a unanimous decision. It

wasn't a five to four decision, it was unanimous. What happened in *McGrain v. Dougherty* is, there wasn't any court proceeding whatsoever. The Congress itself voted immediate contempt for defying the subpoena. Now, once you're in detention, then you can seek a writ of habeas corpus claiming you're being illegally detained, which was done in *McGrain v. Dougherty*. And the US Supreme Court said, no, you're not being illegally detained. Congress has this authority. Now Steven Bannon, wonderful question. You're exactly right, why didn't the Congress, why didn't the Committee just vote to hold him in contempt? Remember, the contempt is civil contempt, not criminal, because he can get out of the contempt by simply complying with the subpoena. It's not a permanent punishment if you will. So you can be held in civil contempt as well as being criminally prosecuted. In my view the important thing with Bannon is getting his testimony. They decided that they would make a referral to the Department of Justice, again, because they didn't want to invoke the civil contempt power, and let the department then take whatever heat would come from a criminal prosecution of Steve Bannon. But even today, even with a criminal conviction, they can still impose a civil sanction on him. They could do things like grant him immunity because he has already been convicted, so you can't even claim the 5th Amendment privilege. Then if he defied that, they could stick him in jail beyond whatever prison term he might get from the judge until he agrees to comply. Why they are not doing this is truly a mystery to me.

Ralph Nader: Bruce, these are such good questions. We've run out of time. If someone wants to send you a question, do you have an email that you can give them?

Bruce Fein: Yes. If you want to ask a question of me, my email address is Bruce, spelled like my first name, @feinpoints.com. And I'm eager to respond to your questions. That's my public duty as a lawyer and a citizen of the United States, who every day I wake up in my complex right behind the James Madison Building and say, wow I'm sure glad we had people who risked their lives fortune and sacred honor so we can have the freedom we got. The least we can do to express gratitude is to make sure our posterity inherits the same freedoms that we inherited.

Ralph Nader: So well said. Thank you Bruce Fein, graduate of Harvard Law School class of 1972. He didn't let the education at Harvard Law School impede his quest for justice for all. Thank you very much Bruce.

Bruce Fein: Thank you, thank you Ralph, delighted to be on the program.

Steve Skrovan: I want to thank our guest again, Bruce Fein and all of you joining us on Zoom room. For those of you listening on the radio that's our show. For you podcast listeners, stay tuned for some bonus material we call "The Wrap Up." A transcript of this program will appear on the *Ralph Nader Radio Hour* website soon after the episode is posted.

David Feldman: The producers of the *Ralph Nader Radio Hour* are Jimmy Lee Wirt and Matthew Marran. Our executive producer is Alan Minsky.

Steve Skrovan: Our theme music "Stand Up, Rise UP" was written and performed by Kemp Harris. Our proofreader is Elisabeth Solomon. Our Associate Producer is Hannah Feldman. Our Social Media Manager is Steven Wendt.

David Feldman: Join us next week on the *Ralph Nader Radio Hour* when our guest will be Sari Horwitz and Scott Higham and their book, *American Cartel: Inside the Battle to Bring Down the*

Opioid Industry

Thank you Ralph.

Ralph Nader: Thank you everybody. Look at tortmuseum.org; take a tour with your families and friends. You'll come out knowing about the law of wrongful injury, which is designed to make you and the environment safer.