

Alex Schein:

In the fall of 2020, the Omnia team brought you *In These Times*, a podcast that used COVID-19 as a platform to go deep on issues like healthcare inequality, political polarization, and the climate crisis. We're currently working on a second season dedicated to racial justice to be released later this spring.

In the meantime, we're here with a bonus episode, responding to the January 6th attack on the US Capitol. In this episode, we talk to a constitutional scholar and a professor of sociology and Africana studies about the events and what comes next.

Speaker 1:

The US Capitol has been placed on lockdown as angry protesters surround the building. We should note that the House and Senate have halted debate on objections to the electoral college vote, and they have gone into recess. Senior members, including the Vice President, Mike Pence, have been rushed from the floor.

Alex Schein:

On Wednesday, January 6th, 2021, as the legislators counted and confirmed the votes in the electoral college, rioters breached the Capitol building, forcing an evacuation of the house floor, including Vice President Pence. The events unfolded amidst President Trump having urged his supporters to fight against the ceremonial counting of the votes. The rioters who could be heard calling police officers traitors eventually forced their way into the Senate chambers. The standoff resulted in five deaths.

Rogers Smith:

There's no real precedent for private citizens taking over the Capitol Building in the ways that we witnessed. We've had violence in the Capitol before, we had Puerto Rican nationalists shooting congressmen in the 1950s, we've had violence amongst members of Congress as most famously when Preston Brooks of South Carolina caned Charles Sumner of Massachusetts in the Senate chamber. But we have not had a takeover of the building by private citizens. Those were British troops in 1812. So this really is an unprecedented event.

Alex Schein:

Rogers Smith is the Christopher H. Brown distinguished professor of political science and a constitutional law scholar. He is the author of eight books and scores of major essays on American political ideology, civil rights and constitutionalism. The events of January 6th were precipitated by the suggestion that Vice President Mike Pence had the ability to reject certification of the electoral college results. Smith discusses whether this scenario was plausible.

Rogers Smith:

As a political scientist, as a citizen and as a non-lawyer, I might add, I have always taken the view endorsed by Frederick Douglass, Abraham Lincoln, and many others that the constitution is something that all citizens of the United States are entitled to interpret in judging their government and in deciding on their own civic duties. Having said that, the particular interpretation that was being put forth that the vice president of the United States has somehow been empowered by the 12th Amendment, unilaterally to decide what electoral college results are valid and which are not, this is one of the most preposterous arguments that has ever been advanced in American constitutional discourse.

There's simply no way that makes any sense at all on any plausible version of the constitution or constitutional democracy. So I think that that particular argument will be embedded in the dustbin of history very rapidly.

Alex Schein:

Senator Ted Cruz of Texas called for a 10 day audit of the electoral college votes, citing the Hayes-Tilden presidential race of 1876, after which Congress appointed an electoral commission to address charges of voter fraud. Professor Smith provides historical context.

Rogers Smith:

Well, the differences vastly outweigh the similarities, although it is the only election that's remotely comparable in US history. The 1876 situation occurred when the Republican Party, through the federal government, had reconstruction governments in place in several Southern states that were being ardently resisted by the white southerners who had supported the Confederacy.

One big thing that's changed since 1876 was that in those days, the federal courts almost always refused to get involved in election disputes regarding those as political questions to be settled by the elected branches of government. Now we have, really since the 1960s, had a pattern of federal courts frequently being involved in election disputes and the country has accepted that role so that unlike the Hayes Tilden dispute, the disputes over the elections this year have gone to court over and over again nearly 60 times. And there have been no successful efforts to show fraud or any really serious misconduct of these elections of any sort. So, there's a whole judicial record that wasn't present in 1876.

I'll also note that the members of that commission in 1876 did vote a straight party line on the disputed results with the Republicans winning by one vote, allowing Hayes to take the White House. This did not create an air of legitimacy about the result, it was seen as a partisan result and it's commonly thought the Democrats accepted it only because the Hayes people made what is often called an infamous bargain to agree to withdraw military troops and those reconstruction governments from the Southern states if the Democrats would accept the results of the election, which the Democrat Samuel J. Tilden had won in the popular vote by a significant margin in the ensuing years as white southerners regained control of those states, which they referred to as redeeming the states.

But what they meant by that was restoring systems of white supremacy in those states, which included the spread of Jim Crow segregation laws, the exclusion of African Americans from juries, and most significantly of all, the disfranchisement of millions of African Americans in the South. Those were results of the bargain, that one acceptance for the results of the 1876 election commission, and they are results that have burdened American democracy right up to the present day.

Alex Schein:

Speaker of the house, Nancy Pelosi and Senate minority leader, Chuck Schumer are among hundreds of members of Congress who called upon vice-president Pence to invoke the 25th amendment used to remove a sitting president. Smith discusses the protocol for such an action and whether there's any precedent.

Rogers Smith:

Vice President Pence has reportedly refused to invoke the 25th Amendment, although on Wednesday afternoon, when president Trump refused to call out the US National Guard, vice president Pence did so. And so there's some evidence that they were operating tacitly around the president as if the 25th Amendment had been invoked.

And I think that's probably the way Vice President Pence prefers to do it, and that's what he will do unless the president does something so egregious that the 25th Amendment seems necessary. Vice President Pence is the lead figure in invoking the 25th Amendment.

The vice president and the majority of the cabinet members have to send notice to the leaders of Congress that the president is unable to continue in office. Then the president has an opportunity to reply and say, "No, I'm perfectly fit." And then the vice president and a majority of the cabinet have to come back and say, "No, he isn't either."

And then it goes to the two chambers of Congress to decide, and you need a two-thirds vote in both the House and the Senate in order to find the president unable to continue in office and elevate the vice president to the president's powers and responsibilities. And achieving the two thirds majority in the House in particular is going to be extraordinarily difficult. So since at this point there's less than a dozen days to inauguration, I think it's unlikely the 25th will be invoked.

Alex Schein:

House Democrats introduced articles of impeachment on January 11th citing incitement of insurrection. Professor Smith elaborates on whether a successful impeachment would disqualify President Trump from running from office in any form in the future.

Rogers Smith:

That is a question that has never been decisively answered, but the question is not whether Congress can, through the impeachment process with a conviction, prevent the president from ever being eligible for the presidency again. They can do that. The question is whether that happens automatically with impeachment and conviction or whether it's necessary for them to specify the ineligibility. And in the late 19th century, there were some indications that a president could be impeached in conviction but remain eligible to run again. The constitution makes it clear, however, that if the Congress wants to make the president ineligible for future office that they can do so.

Alex Schein:

There've been reports that President Trump has inquired about whether a president has the power to self-pardon. Smith discusses the constitutionality of such an action and whether there's any precedent.

Rogers Smith:

There is no precedent for a presidential self-pardon. And constitutional scholars are debating whether the pardon power is so extensive or not. There are no explicit restrictions placed on the pardon power in the constitution so that you can argue that in theory it is possible. The pardon power would extend only to crimes already committed.

The president would not be in a position to pardon himself or herself from any future crimes. That is not something the pardon power could extend to, it's a pardon for acts already committed. A pardon can be used as a blind check almost. You don't have to specify the particular crimes for which you're being pardoned. And the rationale for that is that you can't know in advance exactly what the specific charges will be. So the pardon is allowed to say that whatever charges are brought for these activities say on January 6th, no prosecution is possible. Now, this clearly involves the president being the judge in his own case and there is a long standing maxim in Anglo-American law that no person should be a judge in his own case. And so that's the reason why some argue that a self-pardon should not be viewed as constitutional.

Alex Schein:

Professor Smith analyzes the effectiveness of President Trump's policy making and how it will affect his legacy.

Rogers Smith:

I think that Trumpism, the set of policy positions that Donald Trump stood for and did so pretty consistently will remain a potent combination in American politics. In some ways, as I've been stressing, they go back to the Republican Party positions of the 1920s. And those positions included low taxes, little governmental regulation, but at the same time, immigration restrictions and the use of tariffs as a foreign policy instrument.

Rogers Smith:

Though that package departed from the post-World War II Republicans that mostly emphasized free trade and many supported free movement of labor immigration as well, I think that the Republicans going forward are going to continue the Trump package, which in the eyes of most Trump supporters has been very successful as a set of policies for the United States. And I think therefore Trumpism will remain a significant phenomenon in American political development and one that many Americans will see as a success.

Alex Schein:

Professor Smith has spent his career examining impactful political events throughout history. He reflects on the significance of January 6th in the long-term.

Rogers Smith:

I don't think that there's any doubt that January 6th, 2021 will be known as one of the most infamous days in American history. It will be seen as a great failure of American constitutional democracy, that a mob was allowed to occupy the Capitol and delay, but not prevent, the certification of the election of the president of the United States.

This is a major event that will not be forgotten. If we have patterns of violence reflecting the deep divisions in this country that we're not capable of dealing with successfully, reducing, eventually eliminating, then this will be seen as the beginning of the breakdown of American constitutional democracy. And it really will be for the people of this country to decide in the years ahead what the significance of January 6th 2021 really proves to be.

Alex Schein:

Much of the conversation in the days since the attack on the Capitol has focused on reactions to the powerful and disturbing images of that day. A Confederate flag outside the Senate floor, a law enforcement response that could only be described as muted in comparison to what we've seen in cities across the country, during a summer of protests and defensive black lives.

Commenting on these images and what they have to say about the state of our country today is Tukufu Zuberi. He's the Lasry Family Professor of Race Relations and a Professor of Sociology and Africana Studies. A demographer by training, his work focuses on African and African diaspora populations and more broadly on race. In addition to his work as a traditional social scientist, he examines culture and society through documentary films and has curated several museum exhibitions. Here's Professor Zuberi commenting on the symbolism of what we saw on Wednesday, January 6th.

Tukufu Zuberi:

A Confederate flag in the Capitol, on the Senate floor in 2021, how did it happen? Why did it happen? That's what's at risk in this country. Do you go back to the 19th century and those racist thoughts, or do you go forward to a world in which diversity of human experience, human cultural articulation, human contributions to making the world a better place tomorrow? Do you go forward to that world or do you go back? So there is a struggle right now. And people are struggling to define what the future of the United States would be. But now we know, okay? That that depends on how we interpret the past. Look, it's no accident that when they invaded the Capitol that one of the gentlemen had on his shoulder, a Confederate flag.

The Confederate flag symbolizes the slave owners in the civil war. It's no accident that he would be there protesting for making America great again, just to give you where the historical points are for his make America great. People look at those who are the obvious descendants of the enslaved as if they are second-class citizens.

It's the only way the police would treat those two groups of people different, one call in about Black Lives Matter, which the police should be 100% for, and the other talking about make America great again. It's two different interpretations of the same paths and these different narratives are leading us to a point of destruction.

Alex Schein:

While the Confederate flag was an overt symbol of attachment to a racist past, the images documenting the rioters' easy access into the Capitol and their freedom to exit were emblematic of the continuing impacts of that destructive legacy.

Tukufu Zuberi:

Can you imagine a group of African American men attacking the Capitol? How would they get out of the building? Police would not have been opening the doors and fanning them through. What we think that Capitol represents to America was violated. That violation necessitates a positive response from us. How do we educate this next generation not to be so ignorantly arrogant? How do we create another generation that will confront the bigotry that's in front of us so that the future looks like something we want our great grandchildren to live in? The United States is in need of reconciliation. To reconcile with

its future, it will need to change how it looks at its past. To move forward as a nation of a people who think they're related to each other, you will have to change the narrative of the past to be more inclusive of the voices left out.

Alex Schein:

This concludes our bonus episode of In These Times. We'll be back with season two, Towards Racial Justice this spring. The Omnia Podcast is a production of Penn Arts and Sciences. Special thanks to professors, Roger Smith and Tukufu Zuberi. I'm Alex Schein, thanks for listening.