

'I'm more worried today than I was on January 6': top conservative's warning to America

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Retired judge Michael Luttig is battling to stop a Trump victory - which he says would be 'catastrophic for America's democracy'

Michael Luttig knows the eye of the storm. On the night of 4 January 2021, the retired federal judge advised Mike Pence, the vice-president, against trying to overturn the results of the presidential election. Last year on live television he [delivered compelling testimony](#) to the congressional panel investigating the January 6 insurrection.

Now, with less than a year until the nation goes back to the polls, Luttig recognises that the battle to save the American republic from the [demagoguery of Donald Trump](#) is far from over - and he is more worried than ever before.

"I am more worried for America today than I was on January 6," he warns in a phone interview with the Guardian. "For all the reasons that we know, his election would be catastrophic for America's democracy."

Luttig, 69, is an unlikely hero of the resistance. Born in Tyler, Texas, he was assistant counsel to the president under the Republican Ronald Reagan, and clerked for then judge Antonin Scalia and the supreme court justice Warren Burger. He served on the US court of appeals for the fourth circuit from 1991 to 2006 and was committed to an "originalist" interpretation of the constitution.

He endorsed the George W Bush White House's post-September 11 policy of declaring terrorism suspects "enemy combatants" so that they could be held by the military without charges. He was an advocate of the death penalty - including for [the man who killed](#) Luttig's own 63-year-old father, John, in a carjacking outside his home.

Luttig retired in 2006 and entered the private sector, working for Boeing and Coca-Cola before sliding into what seemed a quiet retirement. But at the dawn of 2021, America was on the brink of a constitutional crisis after Trump lost the election to Joe Biden and pressured Pence to reject the outcome.

On the night of 4 January, Luttig [received a call](#) from old friend Richard Cullen, who was working as a lawyer for Pence. Cullen explained that John Eastman, who had previously clerked for Luttig, was making the claim that Pence had the constitutional authority to stop certification of the election results.

Luttig told Cullen to advise Pence that this was flat wrong and further [set out his views on Twitter](#): "The only responsibility and power of the Vice-President under the Constitution is to faithfully count the electoral college votes as they have been cast."

The vice-president duly stood his ground and spurned Trump, who reportedly branded Pence a “wimp” [and complained](#): “I don’t want to be your friend any more if you don’t do this.” On January 6 a mob of Trump supporters stormed the US Capitol and demanded that Pence be hanged, leaving a trail of death, destruction and excrement, but the results got certified all the same.

Testifying to the House of Representatives’ January 6 committee in an almost painfully slow and deliberate manner, [Luttig recalled](#): “On that day, America finally came face to face with the raging war that it had been waging against itself for years. So blood-chilling was that day for our democracy, that America could not believe her eyes and she turned them away in both fear and shame.”

As Biden was sworn in, proclaiming that “[democracy has prevailed](#)”, and Trump slunk back to his Mar-a-Lago redoubt in Florida, there were hopes that the worst of the storm had passed. But it soon became apparent that Trump wasn’t going anywhere. He continued to hold rallies, call the shots in the Republican party and push the “big lie” that he, not Biden, was the true winner in 2020.

Now, despite 91 criminal indictments in four jurisdictions, many of which relate to the attempted coup, he is running to regain the White House in 2024. He is the clear frontrunner for the Republican nomination and, according to a recent [New York Times and Siena College poll](#), leading Biden in five of the six most important battleground states.

Should Trump win a second term, the Washington Post newspaper [reported this week](#), he already has plans to use the federal government to investigate or prosecute perceived enemies including his former chief of staff John Kelly, former attorney general William Barr and Gen Mark Milley, the chair of the joint chiefs of staff.

Michael Luttig testifies to the January 6 hearings in June last year. Photograph: Rex/Shutterstock

A presidency guided by such authoritarian impulses would be “ruinous” for democracy and the rule of law, Luttig predicts. “He did what he did on January 6. He’s continued to maintain for three years that the election was stolen from him. He’s done that with now complete and total support of the Republican party.

“All that he has done beginning with January 6 has corrupted American democracy and corrupted American elections and laid waste to Americans’ faith and confidence in their democracy to the extent that today millions and millions and millions of Americans no longer have faith and confidence in their elections.

“He’s the presumptive nominee of the Republican party in 2024 and indeed many people believe that he will be the next president.”

Luttig, however, has a plan to stop him. In August he joined with the liberal constitutional scholar Laurence Tribe to publish an article in the Atlantic magazine under the headline “The Constitution Prohibits Trump From Ever Being President Again”.

The pair argued that section 3 of the 14th amendment automatically excludes from future office anyone who swears an oath to uphold the constitution and then rebels against it. Irrespective of criminal proceedings or congressional sanctions, they contended, Trump’s efforts to overturn the election are sufficient to bar him for life.

Luttig elaborates by phone: “The former president is disqualified from holding the presidency again because he engaged in an insurrection or rebellion against the constitution of the United States when he attempted to remain in power, notwithstanding that the American people had voted to

confer the power of the presidency upon Joe Biden.

“That constituted a rebellion against the executive vesting clause of the constitution, which limits the term of the president to four years unless he is re-elected by the American people. I cannot even begin to tell you how that is literally the most important two sentences in America today.”

Luttig draws a fine but important legal distinction between a rebellion against the constitution, as described by the 14th amendment section 3, and rebellion against the United States. He claims that groups that filed lawsuits in [Colorado](#) and elsewhere to [bar Trump from the ballot](#) are [confused on this issue](#).

“They do not yet understand what disqualifies the former president, namely an insurrection or rebellion [against the constitution](#). They have argued the cases as if he is disqualified because he engaged in insurrection or rebellion against the United States.

“That’s why they have, unfortunately, focused their efforts on establishing or not that the former president was responsible for the riot on the Capitol. The riot on the Capitol is incidental to the question of whether he engaged in a rebellion against the constitution.”

But he adds: “All of these cases - and there’ll be others in the states - is the constitutional process by which the American people decide whether the former president is disqualified from the presidency in 2024. All of these cases are going to roll up to the supreme court of the United States and it will be decided by the supreme court whether [Donald Trump](#) is disqualified.”

Even some Trump critics, however, have argued that a legal ruling banning him from the race from the White House would enflame America’s divisions, whereas beating him at the ballot box would be more satisfying. Luttig naturally takes a lawyerly view: “The constitution tells us that it is not disqualification that is anti-democratic. Rather, it is the conduct that gives rise to disqualification that the constitution tells us is anti-democratic.”

America’s founding document does not allow for second guessing about the political fallout, he adds. “It is the constitution that requires us to decide whether he is disqualified, whatever the consequences of that disqualification might be.”

In the meantime Luttig this week helped form a new conservative legal movement, relaunching an organisation formerly known as Checks & Balances as the [Society for the Rule of Law](#). The move was billed as a nationwide expansion aimed at protecting the constitution and defending the rule of law from Trump’s “Make America great again” movement. Its [leadership includes](#) Luttig, the lawyer George Conway and former Republican congresswoman Barbara Comstock.

“We believe that the time has come for a new conservative legal movement that still holds the same allegiances to the constitution and the rule of law that the original conservative legal movement held but has abandoned,” Luttig explains. “There’s a split in the conservative legal movement that mirrors the split in the Republican party about Donald Trump.”

On other side of that split is the Federalist Society, a group that for decades has played a crucial role in [grooming conservative judges](#) - its prominent figures have included Leonard Leo, who advised Trump on his supreme court picks - but has said little about the threat posed by the former president to the constitutional order.

Luttig, who, unlike Conway, has never been a member of the Federalist Society, said: “We believe that the Federalist Society has failed to speak out in defence of the constitution and the rule of law and repudiate the constitutional and legal excesses of the former president and his administration

and, most notably, failed to repudiate the former president's efforts to overturn the 2020 election."

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P.S.

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- <https://www.theguardian.com/us-news/2023/nov/13/january-6-michael-luttig-trump-warning>

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