Jeffrey Rosen: [00:00:00] I'm Jeffrey Rosen, president and CEO of the National Constitution Center and welcome to We The People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan, nonprofit, chartered by Congress to increase awareness and understanding of the constitution among the American people and what a year of constitutional awareness and understanding it has been. Dear We the People listeners, we have learned together and reasoned together as we explore the series of constitutional debates in the news from the recent p- impeachment of the president to the release of the Mueller Report to key cases involving reproductive rights, free speech and more.

And today we're joined by two great friends of the We the People podcast and two great constitutional thinkers to review this year in constitutional debate. David French is a senior editor for The Dispatch, a columnist at Time and a former senior writer at National Review. He's also a bestselling author, an attorney and the past president of the foundation for individual rights in education. David, happy holidays and thank you so much for joining.

David French: [00:01:17] Thank you so much for having me. I appreciate it.

Rosen: [00:01:20] And Kate Shaw is professor of law and co-director of the Floersheimer Center for Constitutional Democracy at Cardozo law. She is an ABC News legal analyst and host of the great podcast Strict Scrutiny. Kate previously worked in the White House counsel's office under president Obama. Kate, happy holidays and it is wonderful to have you back on the show.

Kate Shaw: [00:01:40] Thanks so much for having me, Jeff.

Rosen: [00:01:42] All right, well let's begin with the constitution and impeachment. The house has just voted as we record to impeach President Trump and it is done so along party lines with not a single Republican crossing over to vote in favor of impeachment and just the smallest number of Democrats crossing the aisle. Given the fact that this is the most polarized impeachment in constitutional history the impeachments of Andrew Johnson Clinton and the near impeachment of President Nixon. All were done with some bipartisan crossover. I'd like each of you to make some constitutional and historical sense of what are We The People listeners should think of this impeachment in light of the extraordinary polarized times in which we live. And Kate, let's begin with you.

Shaw: [00:02:36] Sure. So, you know, I- I do think that one sort of silver lining, kind of whatever your view of the substantive course of proceedings so far in the impeachment and the likely future trajectory, it has been an occasion for a lot of civic and constitutional instruction and debate far beyond just the halls of law schools. And as a law professor, eh, I, I actually think there's something really valuable there. So you have the American public kind of grappling with the meaning of this, a somewhat opaque constitutional language and it's on the Nightly News and it's in the papers and I think there is some value in that. So you know, so the constitution has this fairly difficult to parse just within its terms language that impeachment is for treason, bribery and other high crimes and misdemeanors. So I think there has been this kind of public grappling with what that language should mean.

And I mean, I particularly found the day of law professor testimony before the house judiciary committee, a really valuable event. So I was I was at ABC and sort of doing a live commentary on the hearings and some of the folks at the table were just like, "Wow, l- this is like law school and it's fascinating." And, and I actually hope that the American public felt the same way, which was that it is, you know, just a rich, both intellectual and political undertaking to grapple with the meaning of the constitution.

So, you know, you had the public exposed much more than you typically would to, you know, the language of folks like Alexander Hamilton and George Washington and George Mason and even some kind of lesser known names from kind of drafting era history. And, and it's not, you know, that it was an, a debate either before the judiciary committee c- more broadly, that I think has been had and should be had in purely originalist terms.

But the founding era, kind of the both the drafting history, the English antecedents to the language and the debates around the insertion of this language into the constitution has been a source of focus. And so to have the previous impeachment episodes because, you know, I think that when we're trying to figure out what the constitution means, we look both to sort of why it was crafted the way it was and then how it's been interpreted in intervening, you know, 200 plus years. And so I do think there has been a focus on impeachment precedents in I think what is actually a constructive way, y- you know, sort of to looking at what Congress did in the Johnson and the Nixon and the Clinton impeachments to try to understand how previous congresses understood their responsibilities and grapple with this language. And so, so that is, I think, a very positive spin on kind of what the last few months of the country's history has looked like.

Obviously the partisanship is striking. And I do think that it distinguishes this episode from previous episodes, although I should say that the founders are sometimes, you know, one of the critiques of some of the kind of blinders that the drafters of the constitution had on was that they fail to sufficiently predict the rise of the kind of strength and power of political parties. But you actually do have in some of the drafting history, some acknowledgement that partisanship would always be an issue in impeachment. And in some ways that's I think why the super majority requirement to convict in the Senate is written into the constitution in order to limit the exercise of this awesome constitutional power of actual removal to circumstances involving conduct that could support a very, it could, you know, a, a mass, a very broad base of support. You know, and I think there's obviously a division of opinion about whether the conduct at issue here in, in which President Trump is engaged should rise to that level. But, but I guess those are some opening thoughts about sort of where we are at this moment in time.

Rosen: [00:05:58] Thank you very much for that optimistic reminder that the impeachment has indeed been an opportunity for constitutional education for citizens of all perspective. And also for reminding us that the founders did anticipate a degree of political partisanship as they structured the impeachment. Although of course they could not have anticipated the rise of political parties. David, in, in an interview on impeachment on morning edition you noted that if you're a politician in a red state, particularly a state like Tennessee where you live, which would be one of the last to abandon Trump. Honestly, if you're going to support

the impeachment inquiry, you could, you should consider whether or not you want to continue your political career because it would be a career ender for a lot of people.

And that's a, of an important political point to re- mmh to remember. I want to ask you to elaborate on that. Along with the really interesting article by Philip Bump in the Washington Post, which noted that seven of the w- votes that buck their parties during the Clinton impeachment. And there was m- more crossover then than there is now, came from members of Congress whose ideology is in a moderate zone where no current members of Congress exists. So Bump's thesis was that the reason that this is a more polarized impeachment than Clinton is 'cause Congress is more polarized today than it was under Clinton. And I wonder about your thoughts on that.

French: [00:07:15] Yeah. You know, I think of impeachment as a legally informed, politically p- a illegally informed political process. In other words, it's, it's fundamentally political and designed to be political by the founders, but the law is relevant to the debate, but it's still ultimately a political consideration. That doesn't mean it's ultimately, when we use the term political, it's gotten such terrible connotations in recent years that I think some people sometimes interpret that as meaning it's just ultimately always going to be a nakedly partisan or ultimately gonna be in some way suspect.

But a political decision doesn't have to be like that, but because it is political and because this is taking place before primary season and because of the route of the Republicans in 2018, which was made actually, made impeachment a practical, feasible possibility but left the Republicans in the house to be, the Republicans who live in the reddest of red districts. It meant that bipartisan cooperation in an impeachment proceeding and the absence of sort of the, you know, the, the Trump vow that he could shoot someone on fifth Avenue.

In, in the absence of the shooting on fifth Avenue, it meant that it was... You are going to have a very, very hard time finding any Republicans at all to support this. And, and as I said on NPR, I think i- it's just quite plain that if a Republican votes against Donald Trump, especially on a matter as important as impeachment, their career is over. Now that doesn't explain in full why many of the retiring members or the members who are leaving the house voted against impeachment. Now, some of them voted against impeachment because maybe, perhaps they genuinely believed that this conduct didn't, that Trump's conduct didn't rise to the level of impeachable or perhaps they believe that the im- impeachment vote was premature.

But also, you know, many of these retiring members, it's not that they're leaving Republican politics entirely or leaving the Republican universe entirely, but I feel like in a vote for impeachment would have been in, in essence, like a succession from the GOP, a permanent breach, or at least seemingly permanent. And that's a political c- consideration and it just flat out matters and was an undercurrent to all of the constitutional debate. And so if I can be the pessimist to Kate's optimist, I felt as if a lot of the constitutional debate was involved searching for a pretext to justify a, what was in many ways, a political decision.

And I think the best example of that were some of the Republican arguments about due process in connection with the impeachment proceeding, there was a lot of unjustified

comparison to criminal trials in, in the context of a, an impeachment proceeding, which isn't even a civil trial. A lot of due process arguments that didn't have any real foundation in case law. But because, you know, people around the country sort of have this basic sense of fairness about the term due process, can be very powerful politically. So an awful lot of the constitutional argument was quite frankly or, or, you know, made... A significant amount of the constitutional argument was quite frankly, a bit of disinformation. But Jeff, you had to, and as somebody who as, probably quotes the Federalist papers-

Rosen: [00:10:55] [laughs]

French: [00:10:55] ... more than any other living American.

Rosen: [00:10:57] [laughs] Sorry about that.

French: [00:10:58] You, you had to appreciate the extensive quoting and recitation of the words of the Federalist papers. I, I know that I did and I do think that there was a civic education component that was incredibly valuable. And I do think for a large number of Americans who paid close attention, they did begin to understand the intent of the founders here, that impeachment was not just for maladministration, which is you're doing a bad job as president and impeachment wasn't just for the con- convictions in response to criminal activity because after all, when the founding generation executed the cons- drafted the constitution and ratified the constitution, there just weren't federal crimes really.

It was for something else. It was for an abuse of power and an abuse of power as understood by the founding generation with a rich history of understanding that term and, and so that's where a lot of the discussion, the Federalist papers I thought did shed a lot of light, but I felt like a lot of the other arguments, the due process arguments most specifically were more heat than light even though they sounded kind of sort of constitutional. They were in many ways a misdirection.

Rosen: [00:12:14] And dear We The People listeners, you cannot read the Federalist papers enough. And as part of your holiday reading, start with Federalist 65 on impeachment and then read forward or backward from there to educate yourselves. Kate, let's turn now to the Mueller Report. You noted in an interview on ABC that Mueller didn't take a position on potential obstruction 'cause he was limited by the department of justice rule that a sitting president can't be indicted. And you, he said he was never gonna go there, but the fact that he didn't go there is not some big victory for the president. That was never an option as special counsel Mueller understood.

My question is, was it a mistake or not for the special counsel to interpret the fact that he couldn't indict the president as a mandate that prevented him from making a recommendation about whether or not the president had committed obstruction and on balance with a little bit of hindsight, do you think that the special counsel well discharged the job or not?

Shaw: [00:13:18] I think he was in an extraordinarily difficult position. And I'm sh- I'm not sure even in with, you know, these months of hindsight that I've totally come to rest on that question. I mean, I guess I do think so. The Mueller Report has two volumes and volume two

obstruction of justice is the one that you're referring to and it, you know, quite explicitly both in the introduction and then in the volume fails to take a position on whether the president committed crimes. And yet it's sort of in this somewhat circuitous way goes about showing how the president's conduct would be evaluated against the prevailing federal criminal standards and elements if in fact a criminal charge were a possibility. So it is this very odd exercise, the document and it's unsatisfying. A- absolutely. You know, I, I, I guess I think that, I understand very well that the constraints were extensive, the c- constraints under which the special counsel was operating.

And so I guess my main criticism is that the report is not as direct as it might be about the existence of other constitutional mechanisms for addressing presidential misconduct. There's a sentence that references other mechanisms. There's a footnote appended to that sentence that identifies the Constitution's impeachment provisions, but it never explicitly says, you know, under current j- d- department of justice policy, indictment of a sitting president is not a possibility but the constitution prescribes the remedy of impeachment for certain kinds of presidential misconduct and maybe even just that additional sentence which is, oh, sort of there if you kind of pieced together the footnote and the above the line text, would have more explicitly sent a message both to the public and to Congress that the contents of the obstruction of justice portion of the Mueller Report are better addressed in the halls of Congress. In fact only really addressed in the halls of Congress. I guess I should say only for now in the halls of Congress.

The report does make clear that part of the purpose of the exercise of detailing the evidence in support of a potential o- obstruction of justice charge or charges against the president is that former presidents are certainly subject to indictment and prosecution and conviction and so gathering evidence and writing this detailed report while the evidence is available and memories are fresh might serve the function of some later examination of the possibility of criminal charges, you know, depending on things like statutes of limitations.

So, you know, I, I guess I think that being more explicit about the fact that this volume could well be understood as an impeachment referral might have been a better route. I mean, I think that the, the goal very clearly was both in the report and in director Mueller's testimony, special counsel Mueller's testimony before Congress. The goal was to remain as apolitical as possible. But at a certain point, I think that the decisions stretched so hard to be apolitical that they ended up being political.

They ended up actually providing the president with sort of political support for his position that he had been exonerated when of course, the text of, the body of the report, the 400 plus pages of it was not in any a way complete exoneration and special counsel Mueller did say that when pressed in his congressional testimony, but because y- you really had to reach to understand that the volume may have been serving as an impeachment referral or at least as passing the buck to Congress to decide for itself whether to take some action based on the contents of the repo- of the report.

It, it was, I think that, I think that may have been a tactical error. Of course, I don't believe that special counsel Mueller envisioned that attorney general Barr would interpose himself between the report and the public or between the report and Congress and say I, along with

the deputy attorney general Rod Rosenstein have concluded that there was no criminal wrongdoing, there was no obstruction of justice. And so I think that certainly affected the public narrative and the president's ability to spin the contents of the report. But, but I, I certainly don't think that, that the report or the way that it was presented to the public was perfect in a- in any way. And so I do think that those are the likely, those are the shortcomings that I would point to.

Rosen: [00:17:12] David in your national review piece from April, the Mueller Report Should Shock Our Conscience. You began, I finished reading the entire Mueller Report and I must confess that even as a long time quite open critic of Donald Trump, I was surprised at the sheer scope, scale and brazenness of the lies, falsehoods and misdirections detailed by the special counsel's office. But then you've gone on to say in future commentaries that the appropriate remedy for the, for, for, for the lies as you call them uncovered by the Mueller Report is not impeachment, but is, is, is a political remedy, is, is voting a president out and you, and you say that voters should take them into account and casting their vote.

And yet, as we began by discussing the, both the Mueller Report and the impeachment charges don't seem to have moved the needle on the president's base. Tell us more from your vantage point in Tennessee about whether you think that there are any red state loyalists who are likely to be swayed by the Mueller Report or by the impeachment evidence, or really it's swing voters that you're addressing. When you say that they should take the Mueller Report and the impeachment seriously?

French: [00:18:21] Well, I was trying to address both base voters of Trump and swing voters that they should take the Mueller Report seriously. However, I think that mainly the people with open ears and open minds about that are mainly the swing voters, the very small number of swing voters that exist in the United States. But you know what, what I would say, eh, I w- as I, as I live here in Tennessee and, and spend a lot of time with folks who are just, who are rank and file Trump voters, they're not, you know, on Twitter, they're not, you know, following the big voices, they don't necessarily spend a ton of time watching Fox News.

In other words, they're not political hobbyists like a small minority of Americans are. And, and what I have determ- what I've seen is that the folks who are, your, your rank and file Trump voter are, are pretty darn familiar with the defenses to Trump's actions. They're pretty familiar with the excesses of the Democrats and they're not at all familiar with the core of the claims against Trump. And, and part of this is the result of, you know, our, our cocooning and our news sources. If you, if you're when you do tune into news, if you're not tuning in every day, but when you do, do tune in, it's Fox prime time or it's Talk radio or it's a certain select small number of conservative commentators, that's the message you're going to hear is the defense of Trump and the excesses of the Democrats.

And you'll sort of tangentially get the case against Trump, but it's always, it's, it's more like hearing the case against a criminal defendant through the, through the defense attorney only. You're gonna have a, a bit of a skewed view of it. But I, I would say that the one thing that is really from a constitutional standpoint, fascinating here about the Mueller Report, it, that I think is there, this was a hidden, and this was attention from the beginning. This was

not an independent counsel, like Ken Starr, after the, after the Whitewater investigation, after Iran-Contra, there was sort of this bipartisan consensus that we don't want to do that again.

And so this independent council that was truly independent of the executive branch was done away with and instead you got a special council that is a part of the DOJ under the supervision of the DOJ, subject to supervision by the attorney general, in this case, the deputy attorney general. And so what you had was the executive branch of the government i- investigating itself. And, and so that created an inherent tension. And so when the executive branch is investigating itself, it's gonna feel bound by its own rulings and own guidance such as this opinion that a sitting president cannot be indicted.

Now that's the executive branch saying, that's not a binding, it's not a constitutionally binding ruling. What, it's, it's the executive branch saying that you can't indict the boss. And I don't think it has constitutional foundation. There was a time when I was more sympathetic to it. But the more I thought it through and you look at the constitution itself and you look at the text of the constitution, there isn't any real indication from the text of the constitution that there's this sort of blanket immunity. And when the Supreme court has dit- has answered questions and especially in civil processes, whether there is some sort of immunity from civil process while you're president, the answer's generally been no. And so you have this quote unquote rule against indicting a sitting president. And when you really examine it, what it actually is, is the executive branch putting forward a rule that says that you cannot indict the boss.

And I think that, that is, that is a little bit different from sort of r- r- reading it as if it was, you know, hand in debt, you know, handed down on and written on stone tablets. This is something that is much more of a polit- it's a political determination as well as a legal determination. And I think it's a very flawed determination and I think Congress can and should do something about it. And, but the one thing I will say about the Mueller Report I, I agree that as Kate was explaining that, it's very problematic for him to essentially punt on obstruction of justice.

Th- I think there's a universe where he could've said he engaged in an indicted content conduct but we didn't indict him because of the, oh, you know, the, the DOJ rule. I think that would have been preferable than what he did. But, and I, I think that, that's what the report basically lays out. But I will say that he did his job in a very important respect in a way that was nearly flawless in the, and how it was flawless has been demonstrated by the lack of contradiction since the report was issued. And he took an extremely complicated factual situation of the 2016 election of Russian interference, of the Trump team's reaction to Russian interference in, in efforts to seek Russian help and the help of Russian assets.

And took an incredibly complicated factual situation of the Trump team's response to the investigation itself and laid bare the facts. I mean, the facts are there for all to see. And I don't know the single material fact that has been contested from the report, seriously substantially contested and that's a pretty extraordinary achievement.

Rosen: [00:23:43] Well, we turn from impeachment and the Mueller Report to abortion. And in 2019 there were more than 350 pieces of legislation restricting abortion introduced across the country according to The Guttmacher Institute there's been one outright ban or nearly so in Alabama, five so-called heartbeat bills, which ban abortion after the detection of a fetal heartbeat at about six weeks, two 18-week bans, there have been three so-called trigger bans that would automatically ban abortion if [inaudible 00:24:42] were overturned. And on March 4th, 2020, the Supreme court will hear its first case about abortion since both of President Trump's nominees joined the Supreme court.

That's the June medical services against Gee case, which asks whether the Fifth Circuit decision upholding Louisiana's laws requiring position who perform abortions to have admitting privileges at local hospitals, conflicts with the Supreme court's recent decision in Whole Women's Health against Hellerstedt. Kate focusing on that Louisiana case Whole Women's Health held that there were two provisions in a Texas law requiring physicians who perform abortion to have admitting privileges was placed a substantial obstacle in the path of women seeking an abortion and therefore it was an undue burden on abortion access in violation of the case against planned parenthood case. What's the court likely to do and how would you analyze where the court is on abortion in light of all of these laws that are being passed, restricting abortion?

Shaw: [00:25:09] Well, Jeff, it's, you know, it's obviously no accident that there have been a slew of laws enacted in the last year and that's of course because of the personnel change on the Supreme Court. So you mentioned the two new justices, right? Trump appointees, Gorsuch and Kavanaugh. I think that Justice Gorsuch having replaced Justice Scalia doesn't change anything about the court's likely abortion jurisprudence future. But of course that really consequential substitution is Justice Kavanaugh for Justice Kennedy. Justice Kennedy, you know, voted both just drag down and uphold abortion restrictions very famously upheld a federal law that prohibited a certain type of late term abortion procedure, but had been and particular in recent years a fairly safe vote with the courts more liberal justices to invalidate state laws that quite clearly were impermissible under the court's decision in Roe versus Wade in Planned Parenthood versus Casey.

So the court's most recent abortion case from 2016, a whole woman's health versus Hellerstedt, which you mentioned struck down to Texas law that had a couple of provisions, but the one that, that is related to this l- this Louisiana statute requires doctors who perform abortions to having admitting privileges at a nearby hospital. Now that actually sounds like a very unobjectionable kind of requirement, but in practice it turns out that these requirements are almost impossible to satisfy. And so invariably lead to clinic closures, which of course challenger to these laws believe is the purpose. So some clinics brought a challenge and the district court in this Louisiana case determined that this new requirement would drastically reduce abortion access throughout the state, but wouldn't provide any benefit to women's health and safety. And so struck it down and the fifth circuit reversed would have l- allowed the law to go into effect and, you know, it did this despite the fact that this Louisiana law looked very similar, virtually indistinguishable from part of the Texas law that was struck down in the 2016 Whole Woman's Health case.

So this is, you know, obviously the first big important abortion case the court will consider on the merits with its new membership in place. I will say my, my old boss Justice Stevens had this memoir that I know, you know Jeff that he published earlier this year and he refers in that memoir to every court by the name of the most recent addition to the court. So this court on his terms would be the Kavanaugh court. And you know, I think that we will see how sort of what the future holds in terms of this court. Kavanaugh is obviously going to be a very important kind of median player in terms of the court's composition.

But certainly he seems to be a key vote in the, in this case, and in any future abortion cases that the court might decide. So, you know, I think that it's pretty clear from his DC Circuit writings that he is far less likely to vote to protect the right to abortion announced in Roe and reaffirmed in Casey then Justice Kennedy was. So to me, I think that the big questions are a, Chief Justice Roberts was in dissent in the Texas case from three years ago. Will the change composition in the court and the fact that there is now precedent that a law like this Louisiana law is unconstitutional, will that potentially shift him and his thinking in this case? And if not, it does really all come down to Justice Kavanaugh.

So I think it will be a question of if the court decides that it's going to either, you know, if it, if it's going to devote to uphold this Louisiana law, I think it's just a question of how he decides to do that. So he could try to strain to distinguish this Louisiana law from the Texas law. Basically what the Fifth Circuit did here to say the laws are different, we're not going to touch the precedent of Whole Woman's Health versus Hellerstedt, but we will allow this Louisiana law to go into effect. I think that would be a very difficult exercise, but it's certainly one conceivable outcome.

Another is that a majority of the court could say we are revisiting and overturning Whole Women's Health versus Hellerstedt. We are not touching the precedents of Roe or Casey. We're just going to find that laws like these, these admitting privileges requirements don't impose an undue burden in the language of Casey or the court could do something much, much bigger and, you know, really sort of re-examine the foundations of its abortion jurisprudence, you know, and potentially even overturn those cases.

The third sort of possible route seems to me fairly unlikely in part because I think that Chief Justice Roberts would prefer to move kind of slowly and incrementally, right? Death by a thousand cuts is how some people described what the court may be interested in administering to Roe and Casey. And I think that may be right, but I do think that any one of those three, you know, is a live possibility. And the decision you know, the case will be argued in March and the decision I think is almost c- certain to come at the very end of June.

Rosen: [00:29:27] David, you were on We The People in May for an illuminating episode about the fetal right to life theory and that has undergirded many of the recent abortion bills. And in a piece in the National Review, Alabama and Georgia are throwing down the gauntlet against Roe. Good. You said that the Alabama and Georgia bills share a key provision that declares the personhood of the unborn child. And you quote a sponsor of the Georgia legislation saying the bill wasn't waving its fist at Roe. It's answering Roe. Is that a fetal personhood question likely to come up at all in the Louisiana case? Should it, and as you think about what the court is likely to do, where do you see Justice Kavanaugh going,

given the fact that in previous cases he's tended to be more inclined to side with Chief Justice Roberts than any other Justice. Robert is unlikely to want a frontal assault on Roe and yet he really hasn't told us what he thinks about abortion. So how would you see things transpiring?

French: [00:30:31] Yes. On the, on the easy question on the f- easy part of that question is this, the fetal personhood element going to come up or be particularly relevant in the Louisiana case. And I don't think so. I think that the Louisiana case is going to focus around trying to either get the court to distinguish Whole Women's Health or overrule Whole Women's Health. I think the really and Kate, Kate outlined pretty well, I think the various stakes here. And I think the really important th- the really important aspect of this is that there hasn't been a ton of clarity on the, what are the limits of state regulation of abortion. The ins- in the last four years of Obama second of Obama's presidency, during his last term, there were a, a big pile of state restrictions on abortion that were passed.

In the first couple of years of, of Trump's term, there have been additional abortion restrictions passed by the states. And the way I look at it, we kind of ha- we have a few a few possible outcomes here. If the Supreme court distinguishes Whole Women's Health and the Louisiana statute and rules for the Louisiana statute while maintaining Whole Women's Health, what that is going to tell states is they just, they have a, maybe a little bit more wiggle room to regulate abortion, but not that much.

In other words, the Kavanaugh court to borrow that phrasing, the Kavanaugh court is slightly a more solicitous of abortion restrictions. If the court overrules Whole Women's Health but doesn't call into question the fundamental underpinnings of Roe and Casey, the messages that states are going to have a moderate amount of room to run, but still they're not going to be able to touch the sort of fundamental right to abortion secured in Roe and Casey.

If the court upholds Whole Women's Health and strikes down Louisiana law, it's essentially going to say to a lot of pro-life Americans that all of this you know, a, a, a, an enormous amount of work that you've been doing in the federal judiciary just went down the toilet. And that your expectation that you, you know, one of the, the deals that you struck with yourself to vote for Donald Trump was just that, that justification was just destroyed. And so it's going to be very pivotal. And I think there is, there is an enormous need for clarity on the limits of the ability, of the limits of states to engage in abortion regulation.

And there's an enormous need to understand the breakdown of the court. As I look at the court, I've stopped thinking of it so much as a five, four court, as sometimes a three two, four court or sometimes a three, two, two, two court where they're actually substantial differences between the justices that are just not really as easily explained by that classic five, four division. And I think you raised something about Kavanaugh that's important. I see him so far, at least and time will tell, as far more dispositionally, l- and jurisprudentially similar to a Roberts than say a Gorsuch and I... And so therefore I have not looked at and did not see the Kavanaugh confirmation battle is a battle over whether Roe would stand or fall because I don't think Justice Roberts would get rid of Roe.

I, I think... I heard one conservative legal commentator say once "Justice Roberts, you can count on him to be the seventh vote to get rid of Roe." In other words, that if it was an overwhelming, going to be an overwhelming majority, he might join it. But in this circumstance, I think the most likely outcome is that we're going to, A, discover whether or not Whole Women's Health is upheld. And if it is upheld, then an awful lot of the abortion regulations around the country of the last six, seven years a- are going to fall.

And if Whole Women's Health is not upheld, how much running room under the undue burden standard are state's given I would be, I would be falling out of my chair in shock if the court used the Louisiana case to call into question the fundamental, fundamental ruling of Roe and Casey. But we, we'll see soon enough I suppose.

Rosen: [00:34:49] Well now let us turn to the three pending cases involving the deferred action for children arrival policy or DACA. There are three pending before the court. And Kate in several appearances, you have suggested that there's a connection between those pending cases and the travel ban and census citizenship case that the court decided last year in particular about the sloppiness and recklessness as you called it of the drafting of the executive orders, which has made them more vulnerable to legal challenge. Tell us more about the connection between those cases and, and what you think the court may do in the DACA cases.

Shaw: [00:35:30] Sure thing. Yeah. And, and so, you know, the, the, the three big cases Trump vs Hawaii which involved the third iteration of the president so called travel ban, the census citizenship case, and now the DACA case all involve challenges to executive action. The first is a presidential executive order and then proclamation and the latter to involve agency action, but you know, all executive action and they all involve, I think these broad powers that the executive may well have the right to exercise, but where... The way in which the executive here has gone about exercising those authorities really call into question whether that power will be, w- w- whether the power does in fact exist in these cases. And those in some ways have to do with the insufficient explanations provided, the potentially protectoral explanations provided and the kind of process sloppiness or shortcuts that have called into question the lawfulness of the ultimate product.

And so I do think actually thematically the cases are all quite linked and you know, so you have the Trump administration ultimately prevailing in the travel ban case, although losing, you know, in almost every instance in the first and then second iteration of the travel ban. So much so that the administration eventually abandoned the defense of those travel bans and drafted a new one, subjected it to somewhat more process and rigor. And ultimately, although narrowly prevailed in the Supreme Court, the census citizenship case, the administration ultimately lost in the Supreme Court, I think in part because of both these kinds of process and candor shortcomings that were in entailed through the... With the addition of this citizenship question.

And I think that you have sort of strains of both of those themes in the DACA rescission decision. So you had this very kind of hastily crafted announcement that, involving both an attorney general memo and a DHS secretary memo that told the public that the administration would be rescinding this DACA program. And from the beginning it was clear

there were, the document, the AG memo, and then the DHS memo were sort of riddled with kind of errors. The attorney general pointed to a Fifth Circuit decision invalidating a related program, but suggested that there was a constitutional holding in that case, which in fact was not in that case and didn't really describe in any detail the legal flaws that the j- justice department had concluded doomed this related DACA program.

And then DHS basically pointed to this AG memo and said, "We based on this attorney general recommendation are deter- concluding that this program must be rescinded and a bunch of successful challenges followed and sort of similar to the travel ban episode, the administration subsequently under essentially court order issued a new memorandum that purported to more fully explain the decision to rescind to DACA, although I, I think suffered some of the same infirmities as the original announcement memo.

And so that's essentially... So the basic legal challenge in this case is the same as the one in the sense of citizenship case, which is whether the administration's decision was arbitrary and capricious under the administrative procedure act. And that's a statute that gives agencies tons of leeway to make policy decisions as they see fit. But that does impose certain kinds of procedural requirements and at the kind of core of the Eps requirements of agencies is that their decisions be reasoned, that they be based on reasons and that they be explained through reasons. It's so kind of a reason to decision making requirement. And it's just not clear in the DACA case that the administration has satisfied even that fairly low bar by acting for some set of reasons. You know, whether the reasons are ones that the, a majority of the public or the justices would agree with. The reasons have to be, you know, real reasons, they have to be the actual reasons motivating the administration and then they have to be the reasons that the public is told.

And w- one of the things that challengers here are arguing is that this program and, you know, and it's a very popular program that has given this benefit to an incredibly sympathetic group of young people that the administration has decided to end this program but doesn't want to own, politically to own the decision. And so has basically manufactured this explanation that somehow the courts have tied the administration's hands and that there are legal problems with the program that require the administration to end it. But again, never having really spelled out what those legal problems are and having sort of done this fairly poor job of identifying or describing the problems at the onset, the administration is still kind of struggling to explain what it thinks the legal problems are.

I thought that at the oral argument, Justice Kagan in particular pressed the federal government, you know, on what and Justice Ginsburg too, what exactly the legal problems are. And I'm not sure that they got a very satisfying a- answer. And so if the administration loses in this case, and I, I really don't know which way it will go, but it seems at least possible, the administration will lose. That does not mean that there's no universe in which they could act to rescind DACA. But it does mean that they have to actually go through a rigorous process and then they have to explain to the public why they are ending, ending the program. If in fact they decided to do it again and it may well be that they just don't want to take political ownership of the decision and so designed simply not to try again to rescind the program. If in fact they lose in the Supreme court.

Rosen: [00:40:39] David, I think you have a different view on the merits of the DACA case in a piece called the judicial resistance rescues DACA, again from the National Review in May, you wrote put simply, this means that progressive judges are retroactively granting Obama the discretion to implement DACA, but imposing unilateral limits on Trump's ability to end DACA. Tell us more about th- that legal conclusion. And then more broadly what should We The People listeners make of what you call the judicial resistance? Broadly, you're suggesting the progressive judges are ruling against the president in these executive order cases and conservative judges tend more likely to be supporting him. I'm so eager in talking to our great We The People listeners to urge them not to view law as politics. So what should they make of this striking pattern?

French: [00:41:30] Well, I think that so le- let's talk about DACA first for a minute. The it's a point very well taken to, to discuss the disarray in the administration in its, in its litigation and its policy-making. I think when, you know, when I, when I'm thinking about your chances of prevailing, when you're in a case involving statutory construction, there is also an element that says, yes, the statutes really matter but so does the conduct of the litigants and where the statute is stronger and more clear on the ability of the president have a free hand. Perhaps his conduct is going to matter less where the statute is more clearly limiting the president, the conduct is going to matter more.

And one thing that I think has that, that's born out in the travel ban and then the census case and the travel ban case, this statute was an unbelievably broad delegation of power to the president, just incredibly broad delegation. That's probably quite unwise for Congress to have done it. And so therefore the president had an enormous amount of discretion. In the census case there is a delegation of power to the president to conduct the descensus, but it's not nearly as broad as the travel ban case. And you could see justice, you know, the, the, it tipped the balance with Justice Roberts to see that the pres- the way in which the president's team used the discretion it had been given. He was just completely unconvinced by it, that it was a pr- a legally appropriate.

Now what does this mean for DACA? Now in DACA, it's important to remember DACA was enacted not through a rule making process under the Administrative Procedure Act, it was enacted by a memorandum. So in other words, it didn't, it didn't go through the former rulemaking process. It, it was, it was a memorandum. There was another memorandum that expanded, created a much larger cr- program now known as DAPA that ultimately failed in court.

And when you enact the... One of the core questions here is when you enact a program by memorandum without going through the administrative procedure act, does the administrative procedure act apply if you revoke the memorandum? And so that's going to be one of the core threshold issues here. And one of my objections to the some of the lower court rulings was that there was essentially this v- this view that although the Obama administration ignored these core requirements, the administration, the Administrative Procedure Act, the Trump administration couldn't correct that error. It had to go through the administrative procedure, I'd had to do something that Obama didn't do. And I think that there's a core conceptual problem there.

Now as far as concepts like the judicial resistance. When I'm looking at, when I'm looking at legal rulings in highly contentious political cases, what I'm often looking at to try to determine whether there is political motivation is do these cases in some way seem to significantly expand the power of the judiciary or depart from previous legal reasoning and precedent in substantial ways. And one of the things that I think has become a hallmark of judicial resistance, and it did not begin with a resistance to Trump. There were elements of this in resistance to Obama orders, is the nationwide injunction. In other words, where a district court enjoins a policy or enjoins a the na- the national scope of an administ- of a presidential action beyond its application, either in the district or to the litigants themselves.

You saw some of this in the in the or during the Obama administration with more conservative leaning judges. You've seen a lot of it in the Trump administration with more progressive leaning judges. And, and it's essentially a, a federal district court judge sweeping his hand across the entire United States of America to block administrative legal actions or the, the chief executives legal actions. And sometimes that's appropriate. There are times, I'm not saying that every single nationwide injunction is inappropriate, but there have been many cases where it's not appropriate.

And what ends up happening is it, it creates a sometimes years long delay in the in the i- implementation of executive policy. That is, that can, you know, sometimes it's just a simple, like a, it's like running out the clock in basketball back before the age of the shot clock. When you go into the four corners, you're, you're delaying until an election as opposed to r- ruling in, in re ru- making a ruling regarding the parties before you and only the parties before you. And I think that, that is a problem and I think a lot of, of progressive's who have cheered these nationwide injunctions during the age of Trump will come to regret that cheer if and when, if there or when there will be, not if, when there will be another democratic president, you'll see instead of cases being filed regularly in the Northern district of California you'll see more cases filed in the Western district of Texas or the middle district of Tennessee or in districts in Alabama.

And if those judges enact nationwide injunctions, there's going to be an enormous amount of upset on another side of the political spectrum. And one of the things that I've written about extensively is we need to reign in this practice. Yes, judges should rule on the c- case before them and on the end issue orders applicable to the parties before them. But these nationwide injunctions except in rare circumstances should f- should become a thing of the past.

Rosen: [00:47:26] Well, it's time for closing thoughts in this rich discussion of our constitution at the end of 2019. And Kate the first one is to you and I think I'll ask you to highlight any important constitutional developments, maybe a single one that you think is significant that we haven't discussed. And then to ask, how well do you think the constitution has done this year in achieving the hopes of James Madison, that it would constrain faction, which he defined as any group, either a majority or a minority animated by passion rather than reason devoted to self interest rather than the public good?

Shaw: [00:48:08] So maybe one thing that we haven't talked about is a looming thing. So it's not, it has, the Supreme Court hasn't yet weighed in, all of the lower courts have on these

cases seeking access to the president's financial records, including his tax returns. And I think those will be very important cases decided this spring and I think touch on some of the bigger themes of the last year and likely the coming year. So those are cases too brought by congressional committees, one by the Manhattan DA in conjunction with the grand jury investigation, all seeking documents from third parties that include the president's tax returns.

And in all of those cases, the administration has made arguments that the third parties in question do not need to provide their the financial records that include the president's tax returns to the requesters, either congressional committees or the Manhattan DA. In all of these cases, the administration has lost in the lower courts, although with a couple of dissents and the Supreme Court has just decided to take all of these cases and to hear them in March with the decision, you know, likely in June, although perhaps the court will try to expedite resolution of these cases to avoid deciding them too close to the election. But you know, the cases present this broad question of the president susceptibility to some kinds of legal process.

So the, the last two big Supreme Court cases involving presidential resistance to requests for information or testimony 1974, United States versus Nixon in which President Nixon attempted to resist turning over oval office tapes. And the Supreme Court unanimously ruled against him. And in 1997, Clinton vs Jones in which Bill Clinton attempted to resist participation in a civil lawsuit involving his pre-presidential conduct. And the Supreme Court once again ruled unanimously against him. So these very broad assertions of pre- absolute presidential immunity from ordinary legal process have been squarely rejected in this bipartisan way by previous Supreme Courts in ways that I think were quite significant in terms of the standing of the court in the eyes of the public.

The fact that both Republican and democratic appointees rule against President Nixon and then democratic and Republican appointees rule against President Clinton I think did send an important message at those two moments in time with, you know, quite divided countries about the role of the court in enforcing legal and constitutional principles apart from politics. So I would hope that there is a way for the Supreme Court in these cases to transcend politics in a similar way. I think it would send an incredibly powerful message for the Supreme Court to rule in a unanimous or somewhat unanimous fashion.

And I think that the precedence against which President Trump is arguing here make it very difficult for him to prevail in Supreme Court. So I would think it is just a question of how he loses if as I do think is almost certainly required by the case law he is to lose. Now, I think there are probably ways the Supreme Court could avoid any big ruling and, you know, send the cases back to the lower courts for a closer examination of the legislative purpose in the cases brought by congressional committees or some kind of special solicitude for the status of the president in this Manhattan DA case. But I'm just not sure what the foundations of that would be. I mean, these are cases in which the, the burden on the president is essentially non-existent because these are third parties to whom these requests have been made.

And so I don't think there is much substance to the president's resistance apart from, he doesn't want his tax returns to be either disclosed to congressional committees or to this Manhattan investigator. And you know, in terms of kind of the broad questions of this kind of whether the president is above the law, which of course hangs over all of the impeachment proceedings. And I think a number of other episodes in the last three years is at the heart of these cases. Now, of course, you know, if the president is subject to certain kinds of litigation, he's not an ordinary lit- litigant and he shouldn't be treated like an ordinary litigant. And anything that would involve the president personally would have to be structured in a way that respects the incredibly important demands on the president's time. But to suggest that no ordinary legal processes whatsoever could possibly be used against the president I just don't think a supported either by Supreme Court precedent or by constitutional structure or principle.

So that's something I will definitely be watching in the spring and summer of 2020. You know, I think that the constitution has so far held up reasonably well. I mean, has it controlled faction, no and hasn't held up very well at all I think in terms of where we are in December of 2019, but I do think that the, the role of the courts has been actually quite important in acting as checks against executive overreach. I don't think the performance of the courts has been perfect. I think it's been mixed, but I think that so far they stand as an important bulwark against certain sorts of excess.

And I think there has been, actually, this is kind of, mmh, a sort of structural point, but I do think that this kind of Madisonian vision of inter branch rivalry and competition, which frankly I think Congress has been somewhat derelict in maintaining in recent years, has seen a bit of a revival in just the last, you know, six months, nine months, something like that in which you do see Congress asserting itself in a fairly aggressive way, again, against the, the, the president primarily. But in a way that is quite important that there has been a, a lot of sort of relinquishing, I think of power on the part of Congress to the executive branch.

And I think undoing that is far more difficult than doing it, right? Sort of power kind of atrophies and it's difficult to sort of revive. And yet I think we have seen some of that happening in recent months. So I do think th- th- that, that is an important constitutional development in 2019 and, and we will see what 2020 brings on that score.

Rosen: [00:53:38] David, the last word is to you. Same question. Is there a particular case or event you'd like to highlight? The Fifth Circuit just ruled that the healthcare mandate was unconstitutional and you've in the past written favorably about President Trump's actions about the Affordable Care Act. So you can highlight that or, or anything else and then tell us your answer to the question of how well you think the constitution has performed in restraining faction and helping the courts and citizens rise above partisan politics.

French: [00:54:12] Sure. The, on, on the Obamacare case, I think the primary importance of the Fifth Circuit's ruling, which was that the individual mandate of Obamacare, which the tax penalty for that was zeroed out in 2017. So it sort of became an empty, an empty letter that the individual mandate was unconstitutional, but then it remanded to the district court the determination of whether or not there was a, the entire Affordable Care Act would be struck down. And so what that means is I think there's, there's, as a practical matter, that doesn't

mean any real change in any person's life. It does have some political consequence because Democrats can now say that this sort of Damocles is still hovering over Obamacare and elect us if you want to preserve Obamacare and could give them sort of a way out of some of the infighting that they've had over their own healthcare plans, they may be able to at least circle the wagons around that one very basic point.

But I think I'm gonna agree with Kate on the executive authority cases are incredibly important, but I'm gonna expand it a little bit because it's not just the, what we're going to see in the next year or so and in years to come is not just whether the the president is immune from various different kinds of civil process. Like he's arguing in the tax return cases or the financial records cases. But we're also seeing a what looks like an emerging judicial rethink of the legalities underpinning much of the administrative state itself.

And so when you're talking about, when you hear words like Chevron doctrine or you, when you hear words like non delegation doctrine, what you're, what you've got is a Supreme Court that appears ready to say, "Wait a minute." This, this administrative state that has lumped into executive agencies sort of all three branches of government where through regulatory rulemaking it writes laws. It then enforces the laws that it writes in three administrative law judges, it interprets the laws that it writes and enforces that there is a massive growth in the power of the executive beyond the scope, the intended scope of the executive branch of government.

And, and I would say if there is a long term failure in our constitutional structure, it is the, it is Congress receding often from its intended position, which is I, I think not really a coequal branch. I think Congress is actually a Supreme branch of government. After all, Congress can fire the president, Congress can pass laws over the president's veto. Congress can fire the Supreme Court justices through the, through the impeachment process, Congress can get rid of district court in, in courts of appeals, it's, it's supposed to be the supreme branch of government and in many ways has become the least important branch of government.

My colleague Jonah Goldberg has a phrase that he uses that I love, which is, the Congress increasingly has become a parliament of pundits. It's a collection of people who will race to the TV cameras to opine, but are less eager to do the hard work of legislating. And they have become much more sort of the loyal servants of whoever the president is. And, and it will be interesting to see if what the Supreme Court does with these executive power cases is essentially make Congress do its job. And will it say to Congress, "You cannot punt law making to the executive any longer or your ability to punt law making to the executive is going to be limited much more limited than it is currently."

And I think if that occurs, you're going to have a real interesting cone... you're going to have an interesting dilemma, which will be that no longer will Congress be able to just either applaud or, or bemoan executive regulations on vital issues of public interest, it will actually have to legislate on vital issues of public interest. And I think that would be a, in many ways a welcome change. And I, I would say, you know, one of the th- I would say that the constitution and particularly the, the judicial branch has proven very effective and, and underappreciated in its effectiveness at preserving America's small liberal order and

preventing America from lurching into authoritarianism in spite of oh, a quite a bit more increased extremism in this country.

So I think that the court is very good at preventing America and has proven reasonably effective that permi- preventing America from lurching into sort of illiberal authoritarianism. It is not proven effective at preventing factionalism and negative polarization. I don't know that the... Any branch of government is powerful enough to arrest these really sweeping cultural forces that have pitted Americans against each other in such an emotional and dramatic way, particularly those who are most invested in politics.

And, and I would say over the long term, if there has been a, a constitutional fail in the reaching in the past, it is the loss of congressional power. If there is a constitutional fail that is looking to be stretching that I'm looking at in the future, it is the increasing amount of cultural and personal enmity that Americans feel against each other. And, and if we cannot arrest that enmity, we are going to face a constitutional challenge. And I, I speak often about preservation of liberty and one of the points that I make is that I don't think... Liberty over the longterm cannot overcome in enmity. And I fear the amount of enmity that we have in this country could ultimately defeat liberty and that, that is the, the challenge moving into the future.

Rosen: [01:00:14] Thank you so much Kate Shaw and David French for an illuminating, deliberative and reason discussion of the constitutional year in review. One thing that is clear is that you, dear We The People listeners have been such a central part of reducing enmity and partisanship by listening respectfully to the best arguments on all sides of the constitutional debates at the center of American life engaging thoughtfully and making up your own mind. It's an honor to learn with you. And I'm so grateful to David and Kate for ending the year with such light. David, Kate, thank you so much for joining and happy new year and happy holidays to all.

French: [01:00:58] Thank you so much.

Shaw: [01:00:59] Thanks so much, Jeff.

Rosen: [01:01:03] Today's show was engineered by David Stotts and produced by Jackie McDermott. Special thanks to Paige Osborne and Cliff Gallagher at WAMU. And research was provided by Jackie McDermott and Alana Orrick. Please rate, review and subscribe to We The People on Apple podcasts and recommend the show to friends, colleagues, or anyone everywhere who's hungry for a weekly dose of constitutional debate. And remember, as you begin the new year, that the National Constitution Center is a private nonprofit, we rely on the generosity, passion, and engagement of people from across the country who are inspired by our nonpartisan mission of constitutional education and debate.

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