

Can President Trump unilaterally lay off 1,400 Department of Education employees?

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[00:00:00.8] Jeffrey Rosen: On July 14th, 2025, the Supreme Court delivered its decision in *McMahon v. New York*. Hello, friends! 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. This week, we'll unpack the Supreme Court's recent emergency docket decision in *McMahon v. New York*, which paved the way for the Trump administration to proceed with large-scale workforce reductions at the Department of Education. To help us explore the case, we have two of America's leading commentators on education and the law. Derek Black is professor of law and the Ernest F. Hollings Chair in Constitutional Law at the University of South Carolina Law School. He also directs the law school's Constitutional Law Center and is the author of a leading education law casebook, *Education Law: Equality, Fairness, and Reform*. Derek, it's wonderful to welcome you to We the People.

[00:01:07.2] Derek Black: Yeah, thanks for having me on.

[00:01:08.8] Jeffrey Rosen: And Neal McCluskey is the director of the Cato Institute's Center for Educational Freedom. He's the author of the book *The Fractured Schoolhouse: Reexamining Education for a Free, Equal, and Harmonious Society*. Neal, it's wonderful to welcome you to We the People.

[00:01:23.3] Neal McCluskey: Oh, it's great to be with you. Thanks.

[00:01:25.9] Jeffrey Rosen: Well, let's begin with the Supreme Court's order. The majority opinion was unsigned. We do have a dissenting opinion from Justice Sotomayor, joined by Justices Jackson and Kagan. So perhaps we'll begin with that. Derek, the dissenters talked about the fact that the order might violate the Take Care Clause and the Administrative Procedure Act, and that it was titled "An Effort to Eliminate the Education Department," which only Congress can do. Tell us more about Justice Sotomayor's arguments in the dissent.

[00:01:57.5] Derek Black: Yeah, I mean, there's this sort of generalized obligation of the Constitution, of course, for the president to take care to execute the laws and do so in good faith. And so there's the argument that rather than implementing the laws, the president's doing something else. But that really gets down to sort of two, I think, sort of key pieces. And one is this idea of usurping Congress in a couple of ways. One would be around spending. Congress has

allocated money for various programs to do various things, and now they're saying the president's not doing those, so you are usurping Congress's ability to spend money and to create programs. And then there's also this statutory organization or reorganization. So what Congress originally did with the department was to bring together some functions from health, education, welfare, treasury, and agriculture and bring them all together under the department. And there is a provision that allows the president to engage in certain reorganizations inside the department. And so the argument here is that Congress put all these in one place, right, and said if the president's going to change the organization, well, there's a limited scope of things that he can do to reorganize within, and he cannot sort of eliminate those that are put there.

[00:03:18.2] Derek Black: So that's the basic thrust of the reasons why Justice Jackson and others are saying that the president did violate the Constitution and also violate statutes. It's a little bit hard for me to know exactly what the majority is doing here. I mean, is the problem the specific injunction that was entered to reinstate the employees? And if that's the problem with the lower courts, like I think reasonable minds could probably disagree about the nature of the injunction. And we've seen the Court in some other cases recently be concerned about injunctions and the idea that the judiciary is sort of going too far in dictating to the executive, right? So in the same way that the executive shouldn't be usurping the judiciary or Congress look, Congress and the courts shouldn't be usurping the president either. And so is that's what's concerning the majority here? You know, it's not entirely clear to me. But on the substance of the arguments regarding whether an injunction is appropriate here I think we really have to take apart a lot of what has been going on in the department to really answer those questions fairly.

[00:04:35.7] Derek Black: Because Congress gives the president certain funds for the president to take care, to sort of do his job to enforce things, right? And so how the president sort of deals with his staff, how many staff precisely he has, like those seem to me to be things that are within executive power. At the same time, if Congress says that anyone who meets these criteria for a Pell Grant, right, are eligible to receive funds to help them go to college, well, the president has no authority to not spend that money, right? That would be a usurpation both of Congress deciding that money should be spent on private individuals and also a violation of individual rights. And there's so much that's been going on in the department. I think you could put some of it in the bucket of saying, yeah that's in the president's wheelhouse of how many employees, but these other things, right, really are sort of spending of money and issues. Same thing with the reorganization. You had these sort of gray areas. Could the president tell all the employees of the Office of Civil Rights to pack up their bag, go over to the Department of Justice, and answer to Attorney General Bondi?

[00:05:55.3] Derek Black: The answer is no, right, that they are statutorily assigned to be in a specific place. But he didn't tell them to pack up and go work for Attorney General Bondi. He let some of them go. He closed some offices. And so I think the question then becomes, is he expressing an intent to do something illegal, or has he already done something that's illegal? And you sort of see Justice Jackson talking about that. And then there's this sort of key factual question, right, which is has the president let go of so many workers that the department cannot discharge its duty? And, I mean, that's in my mind, the answer to that, and I just say my mind from my perspective, the answer is, yeah, he has let go of so many people in the Office for Civil Rights that I cannot imagine a set of circumstances under which they can respond to the civil

rights complaints in the timely matters that Congress has set out by statute. At the same time, like could he have let go of X number of employees and that not been a problem?

[00:07:05.3] Derek Black: Surely he could have, right? And so there is this sort of difficulty, this sort of the Goldilocks problem is like how much is too much? And my estimation is that some of this is too much, but not that every single action was per se unconstitutional.

[00:07:21.6] Jeffrey Rosen: Thank you so much for that. There was a claim in the dissent that President Trump's real purpose was to eliminate the Education Department, not just to pare it back. And Justice Sotomayor cited the title of the executive order, which is called "Closing the Department of Education and Returning Authority to the States." And Justice Sotomayor also quoted statements by President Trump on the campaign trail that he wanted the Secretary of Education to put herself out of a job, as he put it when he nominated her, and that he intended to close the department without Congress's involvement. Neal, how much hangs on the difference between intent and effect? Does it matter that the executive order says that its purpose is to close the department? And does the president have the power to close the department on his own?

[00:08:16.0] Neal McCluskey: Well, I think if you look at the executive order, it does have something important there, saying that it has the secretary prepare within the confines of the law. And so it doesn't say, well, she should just take the whole thing apart. And I think that it would be helpful if we knew what the majority was thinking in this case. But the minority seems to conclude that the cuts made to the department are really the same as eliminating the department. And they draw upon some things Trump has said during the campaign. And the president, and as he was a campaigner, said a lot of things. And I don't know that you can hang everything based on what he said. I think, as Derek sort of said, you've got to kind of see what they do. And I think if you look at the facts so far, you cannot conclude that these cuts and employees is the same as trying to shut down the department, nor can you look at the executive order and say the executive order is saying, well, the secretary should just shut it all down herself. And if that was the idea, then the first thing I would ask is, well, why did they fire only 1,300 people?

[00:09:28.2] Neal McCluskey: There was another about, I think, 600 or so that were voluntarily could leave. So slightly less than 50% reduction to various routes. But if the goal is just to shut it all down, why wouldn't they eliminate everyone? And then even the secretary said later, well we discovered that we let too many people go. We were just trying to cut fat and we ended up cutting muscle. And so they brought back 74 or so people. If you look at much of what she has said, she said, look, yes, we would like to eventually get rid of the Department of Education. But she said many times that has to be done with Congress and that what she's doing now is cutting bureaucracy and cutting fat and making things run more efficiently. And in that way, returning power to the states, not eliminating the department. So I think that what this decision was is, yes, we think or I'm speaking for the majority, and obviously I don't know what they're saying, but this is my supposition is that they said, well, the president has the authority to determine staffing levels in executive departments.

[00:10:36.5] Neal McCluskey: As long as Derek said, as long as they can still execute the jobs that we've given the department. I think the way these cuts have been framed was, well, we're becoming much more efficient and we're going to still deliver what Congress requires. And then

to eliminate the department, we will work with Congress. And since they didn't eliminate the whole department, since they did bring back people to work there, I think that it's the right decision because the evidence doesn't indicate these cuts are the same as eliminating the department. But I think the minority went so far as to say, and the lower courts, that, well, we know that this is really about eliminating the department, but they're not the same thing. And I don't think the administration has ever said, at least when they've been talking other than if you see the president speaking off the cuff, or as a candidate, I don't think they've ever said anything that sounds like they can unilaterally eliminate the Department of Education. I've always, or repeatedly at least, heard the secretary say when she's been asked about this, we have to work through Congress.

[00:11:41.5] Neal McCluskey: So I don't think that unilateral elimination by the president is in the cards.

[00:11:47.6] Jeffrey Rosen: Thank you so much for that. Derek, how much hangs on those statements of intent and what is their legal effect moving forward?

[00:12:00.2] Derek Black: Yeah, I mean, again, I'm someone who's put it out there from believes in the federal role in education, believes that it's played a seminal role in desegregating our schools, creating access, ensuring poor kids have lunch, supplemental resources, so on and so forth. And so when someone says that they're going to eliminate that department, that it's a mess, and then they take steps that fire half its employees, my perspective is like that sounds good enough to me, or at least bad enough to me. At the same time, the court's approach here may not be entirely inconsistent with some of the things it did before. So if we think back to Trump versus Hawaii from the first administration, the president said a lot of things about the Muslim ban and things of that sort. And the court said, well, what he said doesn't really matter. What he did is what matters. Now, in that case, actually, which is a good analog, a couple of the quote unquote liberal justices said at the very least we should be remanding back to the trial court to figure out are they actually just excluding Muslims or is this more tailored in the way the administration says.

[00:13:17.4] Derek Black: Here in this current case, we had a preliminary injunction, so maybe we haven't gotten to all the facts, maybe we need to get further. But it also reminds me of Trump versus US, right, in which dealt with presidential immunity from criminal prosecutions, totally different subject matter area. But the court said, look, intent is irrelevant in assessing whether the president is immune. And so what you really have arguably is a sort of stack of cases or growing body of evidence in which the court seems less concerned with the stated or explicit intent and maybe more concerned with the actual effect of a thing. And again, from where I sit, that's dangerous if someone says I intend to do something that's unconstitutional and you just wait until they do it and they've sort of wrecked the thing, that's problematic. At the same time, I understand that we have to be careful about a judiciary getting out ahead of a president, exercising valid power just because they think that he's gonna do something unconstitutional. So again, I know where I come out on this case, but I do acknowledge there's a lot of tricky issues involved in it.

[00:14:25.8] Jeffrey Rosen: The district judge, as Justice Sotomayor notes, suggested that the executive order might violate the Take Care Clause. Neal, what is the Take Care Clause and what limits does it impose on the president's ability to make unilateral spending decisions?

[00:14:43.0] Neal McCluskey: Well, the first thing I should say is that I'm not actually a lawyer. So if I get any of the legal stuff wrong, it's not my fault. But I'm familiar with the Constitution. I kind of like it. And Derek, you can correct me if I'm wrong, but it's to take care that he executes the laws and the responsibilities that the president is given. Obviously, the laws come through Congress. The president has some responsibilities also of his own. And that is the core question is basically, well, in making these cuts, is the president making it so that he cannot, so that the executive department cannot execute the jobs that Congress has given them? And the first thing I'd say is, well, there's several things. One, I certainly understand people's concerns. When you see these cuts, you think, well, that's a lot of people, especially relative to overall staffing. And I don't think you're not crazy if you connect this to what the president has said about eliminating departments and you think, well, they're the same things. But the reality is the facts don't support that. But certainly the rhetoric can be seen that way.

[00:15:45.9] Neal McCluskey: And then so you can be concerned that he's not going to be able to faithfully execute and take care to execute the laws. But I don't think we have evidence that that's the case right now. So a lot of what the minority said was, well, in particular, they're worried about student loans. So actually probably the biggest thing, definitely the biggest thing that the federal Department of Education does is run student aid. A lot of people think of the Department, and they tend, I think, first to associate it with K through 12 education. But its bigger function is student aid programs. And the concern is, well, with the big cuts to the student aid parts of the department, that they couldn't execute the loans, that they couldn't administer their loans. And there was some concern in May. There was a survey of student aid administrators that came out and said, well, we're seeing some delays and we're kind of worried about it. That came out in May, and I looked and I haven't seen any further reports that there are any major problems processing federal student aid. So if that's the case, what the evidence is suggesting is you can make these cuts and still deliver what it is that Congress has tasked you with delivering.

[00:16:58.1] Neal McCluskey: Now, the other thing I'd say is it's kind of early, right? So it's going to take a little while before all these things work their way through. What we could find out is yes, definitively, you can do these jobs with fewer people. What we might find out is you can't, but I think it's too early to say that we know the president's cuts keep him from doing what he wants because of the evidence we have now. There was some initial scare, but I at least haven't seen anything after looking for it that suggests that there are major problems ongoing.

[00:17:26.7] Jeffrey Rosen: Derek, what are your thoughts on the Take Care Clause and the limits it imposes on the president's ability to make funding decisions unilaterally?

[00:17:35.0] Derek Black: Well, I mean, I think Neal is right. Maybe he's even being a little bit nice in that the Take Care Clause is not something that we have. What does that mean, I guess, right, at the end of the day? We don't have a lot of cases enforcing that, and there's some other provisions with Congress as well that it's sort of like it almost seems like hortatory statements.

What does that mean? At the end of the day, you've still got to prove somehow or another that the president has violated the Constitution or that he's violated a statute. And so it's almost sort of be good, Mr. President. I'm sure there's got to be some limits there, but you really have to look to the underlying statutory framework or the underlying constitutional violation to figure out whether he's violated the take care clause. I mean, I would say, though, that I wouldn't in my mind put eliminating the department as the goalposts here. I mean, certainly I think Neal is right that if you're eliminating, that's a big problem. But I think if you begin to think about the department as carrying out multiple different functions, the question is, have any of those functions fallen short?

[00:18:48.6] Derek Black: And he's far more advanced on higher ed than I am. But on the K through 12 side of things, I'll say that the Office for Civil Rights has persistently and consistently given me enormous worries. I mean, this is a department that for the last decade or more has said, we're understaffed, we're understaffed, we cannot process the complaints we're receiving. Moreover, we're not even processing them often within the time frame that the law did to us. Now, we could say, hey, maybe they're not working as efficiently as they can, but in terms of are we processing complaints that come through the door in a timely manner with existing staff, I think the answer was not really even under prior staffing, right? If you get rid of 50 employees, does that make things decidedly worse? Maybe, maybe not. But if you look at where the cuts were, they really were concentrated in the Office for Civil Rights and actually concentrated amongst attorneys. I think like half or maybe even over half, right around half of the attorneys at the Office for Civil Rights lost their jobs.

[00:19:55.0] Derek Black: And so those really are the final sort of technical decision makers about whether Title IX had been violated, so on and so forth. And so that's my concern. Not only did they lose those attorneys, we literally closed field offices entirely, completely, that had been open for decades. And again, those attorneys and investigators, they leave the Cleveland Office for Civil Rights, for instance, and go to Columbus and interview people and do on-site work. So at the very least, we're increasing traffic times and driving times. I cannot imagine, this is where I sort of started earlier, cannot imagine certain circumstances in which the Office for Civil Rights is now sufficiently staffed to process those complaints. And to be clear, and this is a point I don't want to dismiss, this isn't about the department. It's about students' right, legal right, to file those complaints and get a response, right? And so that's what really concerns me more than who's got a job or doesn't have a job at the Department of Education.

[00:21:08.5] Jeffrey Rosen: Let's talk about the history of the Education Department and political support and opposition to it. Neal, you've written a book, *The Fractured Schoolhouse: Reexamining Education for a Free, Equal, and Harmonious Society*. Tell us about the history of the involvement of federal involvement in education and conservative opposition to it ever since the department was founded. And is the effort to eliminate the Education Department a good thing or not?

[00:21:39.9] Neal McCluskey: Sure. So I appreciate the plug for my book. I should also say I wrote one called *Feds in the Classroom*, which is more specifically about the federal stuff, but it was a long time ago. But if people want to read both of them feel free. I encourage reading anything I wrote. I will try and get sort of a scope of the history. Derek has also written a very

good book about this. And so Derek, you can if you can correct me on some things, because I'll try and be as expansive as I can. I'll say the first thing is, so we think about the current Department of Education, and I don't think there's any disagreement about where the current Department of Education comes from. It was created by Congress in 1979. It was essentially driven by, or a major supporter of it, I shouldn't say driven, but a major supporter was the National Education Association, which has long been a supporter even before that of federal role in education. But it had become a union rather than kind of a professional association in the '70s, early '70s. And they said they would throw their support behind a presidential candidate that said they would create a federal Department of Education.

[00:22:56.1] Neal McCluskey: Again, this was something the NEA wanted for a long time, but this unionization gave it sort of extra oomph politically. And then at the time, candidate Jimmy Carter said, well, he would work for that, and he got their support. About a year and a half after his election, there wasn't much movement on it. The NEA said, we'd like to see movement on it. And so the president, President Carter, pushed this. There was a lot of actually kind of bipartisan opposition for it. Clearly not a majority of Democrats were against it, but you had, not surprisingly, his Carter's Secretary of Health, Education, and Workforce, Secretary Califano, was against removing education from other welfare and child welfare programs. You had people like Patrick Moynihan who were concerned. But it ended up passing some close votes, but was passed and then created in 1980. So that's the current Department of Education. I'm kind of going backward in time, but that might make it a little easier. There was a previous version of it, and unless my memory is falling apart, it was 1876, and it was part of essentially the Reconstruction effort. And there was a very small Department of Education created after some debate about whether or not the federal government had a role in it, and it was to collect data.

[00:24:15.7] Neal McCluskey: It was quickly, I think in a year and a half, downgraded to a, I think it was an "Office" is what it was called. The person in charge of it, Henry Barnard, who was a pretty famous education guy, he quit. He's like, this is not what I thought. We were expecting. It was just him and three other people collecting data. The people who were sort of congressional supporters of it said this isn't really what we wanted. But you do have that that you can point to to say, okay, well, there was a department in that year. It just didn't last very long. And then prior to that, the federal government was largely not involved in education. Other than, Derek's going to, I know, going to say this, no, I don't. But the Northwest Ordinance, the land ordinances said, look, we're going to set aside a portion of every sort of section of land that we give out where either that land or the proceeds from its sale would be used to maintain schools. And I think Derek has argued, and I'm putting words in his mouth so he can obviously correct me, that this shows that the federal government actually was expected to have a role under the Constitution.

[00:25:28.9] Neal McCluskey: I disagree with that. I think that that was under a legitimate federal role, but that was control over territories, not that it could then also have a power to do things in education within states. But there was a federal role then, and it's certainly true that there were many founders who said, look, education is important. Mainly they said it was important because you need to have a virtuous citizenry in a republic, which then leads to lots of questions about, well, what are you teaching? Because many of them thought virtue was grounded in religion of some type. But so there were sort of bits of federal involvement. But for

the most part, you can go at least to the 1940s, and it was widely believed that education in the Constitution was a state and local matter. Under FDR, a commission that he chaired about the Constitution, one of the many FAQs in it said, well, where is education in the Constitution? It said it's not there. That belongs to the states and local governments. So the idea that there should be any sort of significant federal role is, I think, pretty new. I also failed to mention in the 1860s the Morrill Act, which provided funds for colleges.

[00:26:40.6] Neal McCluskey: But again, that was really about land, not really about the federal government controlling or dictating anything about education.

[00:26:49.5] Jeffrey Rosen: Wow, that was great. Thank you so much for that fascinating history. Derek, you've also written, as Neal mentioned, some important books on the history of federal involvement in education, including *Schoolhouse Burning* and *The South's Long War on Black Literacy*. Why don't you take us back from the beginning till today? As Neal mentioned, George Washington called for the establishment of a national university that would instruct students in the principles of government and also the habits of civil dialogue and would teach virtue, but because of resistance to federal involvement, the national university really never got up and running. From the beginning to today, what has the history of federal involvement in education been, and what does that teach us about current opposition to the Department of Education?

[00:27:41.4] Derek Black: Yeah, I mean, I think that I would just sort of supplement a little bit of Neal's great overview and just say I think there's another piece, though, that goes beyond the territories that has lived with us for the last 150 years, which is the idea of statehood. So the United States Constitution has a guarantee clause in it, and it says that the federal government shall guarantee a republican form of government in the states. And so the idea, and this is at the high level, ideological level, is that states, which I think Neal and I are probably still on the same page with, and this was just like a republican state theoretically is always supposed to provide public education to its citizens. It wasn't that the United States government was supposed to provide public education to citizens, but that states would. And so what I've focused on in a lot of my scholarship is that Congress has treated statehood as requiring the state to provide public education. And so not only were they dictating land resources in the lead up to statehood, they required states to sort of put those constitutional provisions in their constitutions. Now, you don't find that in many of the early colonies because they weren't subject to statehood.

[00:28:55.2] Derek Black: But as we get into the 1800s, and I think Ohio, it's basically starting with Ohio, which is the Northwest Territories, all those states have education in their constitutions. New Mexico tried to enter without one. That wasn't the only problem in New Mexico's constitution, but then it had to go back and rewrite, and it put one in there. So you do have, I should say, Congress pointing a direction for statehood, but I would agree with Neal that at the nuts and bolts aspect of it, of course, it was the states that was doing that. But then, and Neal was almost right, or maybe I'm wrong, it's 1876, it was 1867, I think it was, Neal, but that the department was created. And that's a really important moment in American history for a variety of reasons, right? That is when slavery has fallen, the 13th Amendment has passed, the 14th Amendment is on the verge of being passed, and Congress is now dictating terms to

Southern states to reenter the Union. What does it mean to be a state and a member of the Union in this post-slavery society?

[00:30:05.7] **Derek Black:** And Congress is dictating to the southern states. You need to get your public education systems up and running because the south really didn't have them, so to speak, at that point in time. And you know, Neil's right, it's a very small department, but the idea, and I've read that legislation probably more than I want to, but is that that these state. It was going to collect data, but it was basically going to help all these states get up and running by sharing information amongst. It wasn't sort of federal dictates, but sort of taking all of the experiments and maybe coming up with something better because a lot of states were. Had completely mismanaged their education systems and their resources and were really struggling at that time. And the elimination or sort of the downgrading of the department is in my mind, less about objections about education itself, but sort of a backlash against reconstruction. Right. So there's a lot of stuff wrapped up in now Andrew Johnson is president now we then. And he was against the whole sort of reconstruction package. So there's just a lot of states rights conversations that aren't unique to the public education that are going on there, and concerns and uneasiness about, about an expanding federal control over the south in particular as well, which is part of that story.

[00:31:24.2] **Jeffrey Rosen:** Neal, in Derek's book *Dangerous Learning: The South's Long War on Black Literacy*, he argues that opposition to the Education Department and federal support for education is centrally connected with race. He talks about the violent lengths that Southern leaders took to repress black literacy, and he argues that this opposition to federal involvement in education continues today to have a racial dimension. To what degree is he right, and to what degree is he wrong?

[00:31:56.3] **Neal McCluskey:** Sure. The first thing I would say is, one, is you're correct, 1867, not 1876. I'd like to think I transposed numbers, or I'm thinking of Blaine Amendments, which was an effort actually to make it in the federal constitution illegal to have money go to sectarian institutions. But good catch on that one. I'd also want to say, again, I think the constitution is clear, certainly at the beginning of not having the federal government involved. And we mentioned National University. If you read the notes on the Constitutional Convention, that was actually dealt with by saying, oh, we don't need to keep debating a national university. Within the power we give the federal government over the District of Columbia, you could put a national university in there. So that's not something we need to worry about. It doesn't need to go in the Constitution. So they sort of recognized that they are giving very limited powers and that there are things that could be done within those powers. So just as a sort of expanding a bit on what at least originally the Constitution was supposed to do in education, that is a pretty clear indication that they didn't think that education was supposed to be a federal concern.

[00:33:14.7] **Neal McCluskey:** In terms of the matter of race, I think we need to be clear. I can only speak for myself, but I think this speaks for probably a lot of people who oppose the Department of Education. But I think most or everybody maybe, I can't say everybody, who supports eliminating the Department of Education. I haven't run into anyone who said that the federal government doesn't have a role and an important role in enforcing civil rights. The question is, do you need a Department of Education that does a whole lot of other things in order

to do that? My answer is no, we have a Department of Justice for that. But certainly civil rights enforcement is something that the federal government should do. And I think that when you look at a lot of the opposition to the federal Department of Education, a lot of it is grounded, I think, in the Constitution. People saying, look, this is not something that the federal government is authorized to do, so it shouldn't. And then there are a lot of concerns of, do you end up having this federal entity that if you look at the debates about having the federal government first enter in sort of a large way into education in the 1960s with a lot of funding, there were concerns of people who said, look, once you get the federal government doing funding, which it shouldn't do, you then get control.

[00:34:30.2] Neal McCluskey: And what you see with the Department of Education is people are concerned, well, now you're heading even deeper into this dangerous area of federal control. And then actually you can see where we get a lot of federal control, which kind of reaches its peak around 2010 with something called the Common Core, which was not federal, but was sort of coerced adoption of states all in an already existing no child left behind framework where the federal government was on the verge of saying, okay, we're going to tell you that your education systems have to have at their core state standards and state tests and schools are held accountable based on those state tests. And now we're going to tell you what those state tests have to be on. And oh, by the way, you have to use common tests among a whole bunch of states. So we actually were very close to that federal control. And I think a lot of the concern about a Department of Education is about that federal control, which one, many people think is unconstitutional and two is dangerous because you have a very diverse country diverse states, communities, and people.

[00:35:33.9] Neal McCluskey: And it's very worrying that you might have one education answer imposed on them all. So I think that that's the big driver. And I haven't seen that most of the people who are opposed to this are opposed because they think that it is somehow going to do something in race that they don't like. In fact, one of my major concerns is that the current administration is using the power of the federal government to eliminate things that people think are good for correcting lots of problems that we have that are remaining vestiges of terrible discrimination. So when the administration says, well, we're going to get rid of DEI offices, we're going to punish any institutions that have them, that's the sort of thing I worry about the federal government doing, and I wish it wouldn't, but it can because it got heavily involved in funding education.

[00:36:28.8] Jeffrey Rosen: Derek, Neal suggests that current opposition to the Federal Education Department is more based on opposition to the control that comes from federal spending, which he says is unconstitutional and dangerous rather than race-based. Do you agree or disagree? I learned that what sparked the opposition to *Roe v. Wade* and the modern culture wars was the Carter HHW. To the Department of Health and Human Welfare's decision to withhold federal funding from schools that discriminated on the basis of race and religion, and that was a big driving factor. So to what degree are those culture war race questions central to the current debates over the Education Department, and to what degree is the opposition broader?

[00:37:17.1] Derek Black: Well, I want to disagree, agree, and then maybe agree or disagree again with Neal, because I think he had a lot to say that I agree with. I mean, my point about the

sort of the echoes of the past, if you sort of think back to the aftermath of Reconstruction, the aftermath of the civil rights movement, both of those were stated as states' rights movements, but were really about resisting the federal government's attempt to stand up for Black students, right, and sort of African American students' rights. And I'm certainly don't mean to suggest that everyone or even a majority of the department, the people who oppose the department are sort of taking that position now. But, right, that sort of echo of states' rights, at least the first two major ones, and now this being a third major one, does have some of that echoing in my mind. And we saw a lot of complaints about the, and it's not just race, to be clear, right, a lot of complaints about what the department's doing in terms of, or had been doing in terms of race, in terms of gender, also in terms of racial equity and all these sort of things.

[00:38:25.4] Derek Black: And there was a backlash against racial equity and gender in the last political election. And then the department becomes, can become a symbol of those things you don't like. And so let's go to state rights so we don't have to deal with that enforcement. Again, not suggesting that's what Neal's saying. But I think Neal is spot on, I'll say. I don't know if I've ever said that before, but I'll say it to you now, Neal. I mean, I think the Department has gotten into a lot of stuff that it shouldn't be involved in. I'm not going to give you a sort of list of those, but this is sort of this continual accretion of power or attempt to absorb power. Because I do think the department's role actually is relatively narrow, and in my opinion, actually hasn't done that narrow job as well as I would want it to do over the last 30 years. And I'm like, spend more time doing your core job and less time on all this other stuff trying to rule the overall education system, the overall higher education system, because now you're becoming a sort of freestanding sort of policy mechanism.

[00:39:27.3] Derek Black: I mean, I actually to the surprise of some I had been a member of the Obama-Biden transition team, but I was expert witness for Bobby Jindal in Louisiana saying, hey, on this stuff around Common Core, etcetera, etcetera, the department is exceeding its statutory authority. And so it does concern me when the department is trying to impose its sort of policy prerogatives on states in a way that, again, to me, it's not about whether Common Core is good or not good. It's who has the authority to decide. And I don't want to put words in Neal's mouth either, but I at least thought I heard him sort of expressing some displeasure around the way the current department is handling DEI issues. And again, not taking sides on DEIs. I've said, it doesn't matter whether you like DEI or not, right? That's not really the issue. The issue is, can the administration just wake up one day and tell you we're going to take all your money if you don't talk the way we want you to talk. And I think that that's highly problematic. So, I mean, if I'm not misstating Neal, I think we probably have some similar federal power concerns there.

[00:40:41.8] Derek Black: But I guess I would disagree on this sort of bigger question of can and should the federal government occupy some space and how does that align with the Constitution? Because if you look at a lot of the stuff that the, particularly the Office of Civil Rights and Special Ed and other agencies do or departments do, there's two things going on. One is spending clause legislation and the founders didn't have any objection to Congress spending money on education, right? So when Congress is doing things in education, it's not unilaterally imposing its will, it's giving money to the states for a contractual agreement, so to speak, right? So that doesn't create a problem if what we're really talking about is just spending legislation.

And then there's this other side of what the department can do, which is really about the Constitution itself, right? The 14th Amendment guarantees equal protection. It guarantees due process, etcetera, etcetera. And so if what we see are states violating the Constitution, then the federal government certainly has a role in stopping them from violating it. And Section 5 of the 14th Amendment gives Congress the authority to pass legislation to enforce the 14th Amendment, for instance.

[00:41:53.4] Derek Black: So I think we really have to think also about, well, what is the basis of the authority that Congress is acting on in Title IX or in other actions? And then also acknowledging that sometimes, in my opinion, Congress is going outside of those, not Congress, the agencies are going outside of those authorities. And those are concerning to me as well.

[00:42:20.6] Jeffrey Rosen: Neal, where is this likely to go when it comes to the Education Department? You have both noted the irony that the Department of Civil Rights is the one that's negotiating with Harvard and Columbia and other universities over antisemitism at the same time as the Office of Civil Rights in the Education Department is one of the divisions that saw some of the most significant cuts. If the administration continues to get a green light from the courts, what is the Education Department likely to look like in three years?

[00:42:56.5] Neal McCluskey: That's a good question, and so I'll try and read the tea leaves as best I can. My sense is that there are not going to be more major cuts of employees. Now, I could be totally wrong on that because I don't think this administration is always that easy to read, but I felt like actually a lot of the cutting, yes, was connected in many ways and certainly rhetorically to eliminating the department, but they were also going on as DOGE was sort of in its riding high and cutting all sorts of things and doing the kind of Silicon Valley approach of you break everything and then figure out what needs to be put back together to operate. And so I think a lot of those cuts were actually more a function of DOGE going through the federal bureaucracy and destroying things more than it was part of a particular effort to get rid of the Department of Education. So my feeling is we're probably done with major cuts. However, what I'm starting to see, and maybe I'm just reading into a pattern, but there's been things that were not just the Department of Education, but for instance, now they're doing some handover, which I don't know whether it's legal or not.

[00:44:16.1] Neal McCluskey: It was just announced basically as we're talking, doing handing over some career education and other workforce issues where the Department of Education and the Department of Labor are going to work hand in hand, but it sounded like most of the legwork would be done in the Department of Labor, though still officially overseen by the Department of Education. You've seen the Department of Health and Human Services. Actually, I think they were in fact the lead, their Office for Civil Rights, I think, and I could be wrong on this, but in some of the investigations and actions against universities, I don't think Harvard, but I think maybe UPenn and some of the others. I think even the Department of Agriculture was involved in some of these. So I think you might see more of things that at one point might've been more just the Department of Education where the administration is pulling together a bunch of departments to do what they are saying is civil rights enforcement. And so there could be a diminution of the Department of Education's role by partnering them up with a bunch of other departments. But I do think that ultimately this administration has said, at least Secretary

McMahon has said many, many times that they don't believe they can unilaterally eliminate the Department of Education.

[00:45:38.2] Neal McCluskey: Congress has to do it. So I think that that's what they're going to stick with, and we'll see if Congress acts. There are a couple of bills. Well, there are four bills that I've counted in Congress right now. Two of them are really sort of gimmicky, which just say one sentence, the Department of Education is no more, basically starting January 1st of whatever the next year is. But there's a legislation from Senator Rounds and then one in the House, and I've forgotten the House sponsor's name, but do a much more detailed dismantling of the Department and moving its parts elsewhere. I think there's still, I'm sure they have work to be done on that. I'm sure they'd like more people, but there is some action in Congress, but I don't get the feeling that there's a major groundswell, at least right now, of congressional action, but we'll see. They just finished reconciliation, which sort of sucked up all the oxygen, and now I think they'll start to look at other things.

[00:46:38.4] Jeffrey Rosen: Derek, same question to you. Where is this going? What will the Department look like in three years? And are there statutory functions you think it will be unable to carry out or not?

[00:46:51.8] Derek Black: Well, I mean, first, I will say, and it came out during some of the discovery recently, I did find it fascinating that Secretary McMahon had entered into these agreements with the other agencies to sort of transfer some work or share some work with them. I'm sure that this issue will filter through the courts. I will just say that on the sort of top level, when you look at the original organic act creating and organizing the Department of Education, the point was we don't want these functions scattered across 15 different agencies, that it makes sense to have them in one place. And so whether that's going to be a constitutional or statutory violation sort of remains to be seen. There may still be some Goldilocks problem, but it's certainly inconsistent with this idea of spreading. I mean, I think whatever the size of the federal role should or shouldn't be in public education, whether it should be the larger one I like or the smaller one that Neal likes, I think it does make sense for it to be a coordinated role regardless of where it's at.

[00:47:58.7] Derek Black: And so you do have concerns with five different chefs in the kitchen. Now, if the department or secretary is still running it all, making the final calls and getting all the information, then maybe that makes a bit of sense. But I think that's what Congress was trying to combat originally, at least one of the things it was trying to combat and deal with. In terms of what it sort of looks like more practically, I mean, I worry, you mentioned the other investigations, I really worry about its ability to deal with bread and butter stuff. I mean, half of the complaints that the Office of Civil Rights receives are disability complaints, right? That's not what sort of dominates the media. We talk about race, we talk about gender, but those are increasingly smaller slices of what it actually does. But we've lost half of the staff attorneys, and a good number of those that remain seem to have been turned into, I mean, I hate to sort of use the used language, but sort of like attack dogs on some universities. I'm not saying that they should or shouldn't be attack dogs, but they really are sort of unilaterally going after individual universities to try to bend their policies to the will of the administration, which to me goes, well, again, how are you doing bread and butter daily stuff when you've lost half of your employees,

and it seems to me at least a substantial chunk of them have now been redirected to doing other stuff.

[00:49:21.6] Derek Black: And so I really do worry, because I said, look, the Office of Civil Rights operates on the premise that when it comes to young people's civil rights and education, it's not a pay-to-play game. It's actually very easy to file a civil rights complaint. You could do it while you're listening to this podcast by going on the Internet, right? And that really fills a huge gap for low-income students who can't go out and afford attorneys and they have disabilities or whatever, experiencing a sexual harassment or racial harassment, whatever it may be. But if you shrink that Department so much, as it seems to me to have been shrunk, it's turned children's civil rights into a pay-to-play game, right? That for you to really be able to receive a civil rights remedy, you're going to have to be able to go out and get private counsel. And that's certainly not what Congress was thinking when it moved the Office of Civil Rights to the Department of Education. And that one worries me tremendously. But I'm with Neal on sort of what Congress is, what I see in Congress. I mean, I don't think this type of sort of dealing with the minutiae of what should be where and coming up with a new plan or coming up with a new theory of how we fund schools, that doesn't really seem like something that Congress is too interested in.

[00:50:44.3] Derek Black: And I don't see where the votes come from that. So I imagine, right, we have a department that limps along, right? Unless the courts do something to require otherwise, it probably limps along as a former shell of itself in many respects.

[00:51:02.7] Jeffrey Rosen: Well, it's time for closing thoughts in this superb discussion, which has spread a lot of light. Neal, first to you, are the Trump administration's staff reductions at the Education Department legal or not? And are they a good idea or not?

[00:51:24.0] Neal McCluskey: So I'd say they are legal. And I think the argument that they're not has been primarily premised on the idea that the cuts are the same as eliminating the Department. And I think the facts are clear that that's just not the same thing. Because if they'd wanted to eliminate the department, they would have cut everyone, not just some of the people. And I think that it is a good idea as a policy matter to look at cutting the staff of the Department of Education. Ultimately, my goal, what I think is best as a department, is eliminated, and I should be very clear about that. And I do think the Trump administration is working on that. I just don't think the cuts are tantamount to that, and I hope they continue to work on that. But so going back to just as a matter of, okay, well, we have these jobs that Congress has given us. We have this department. Can we make it work with fewer people? I think one of the ways you learn whether you can make something work with fewer people is you use fewer people. Our tendency is always to say, well, we have a problem, so we create something to deal with the problem.

[00:52:27.0] Neal McCluskey: And if it doesn't work, we need to just put more into that thing that we say is created to fix the problem. And you have to have very kind of real-world constraints on your resources, and that can make you find more efficient ways to do things. It may not be the case that you needed all the offices, the field offices of OCR to do their job. It may be that you can do fewer, and you use technology to make up for what was previously done by having physical placement somewhere. But I think the thing that we can look at right now, and again, it's early to say that these cuts aren't having the devastating effect so far that people

are saying, is student aid in higher ed. And that was a big part of what the minority wrote about from the Supreme Court. And after just a survey made some ripples in May of student aid officers saying, well, we're worried about it, I just have not seen any reporting, and I looked for it, of universities saying, well, we can't get student aid processed as we head into the next school year. So the worst-case scenario that they talked about, at least so far, hasn't come true.

[00:53:35.9] Jeffrey Rosen: Many thanks for that. Derek, the last word in this fine discussion is to you. Do the Trump staff reductions violate the law or not, and are they a good idea or not?

[00:53:47.4] Derek Black: I would say to the extent that the reductions preclude the Department from processing Office of Civil Rights complaints, I'll just sort of stick with that, yes, they violate the law. That's a question of fact, and based upon my knowledge and experience, I don't see how it's possible that they could be discharging them. So on that basis, right, which could be disproven, but on that basis, I would say they do violate them. I mean, we had, we have had individual complaints. I have heard of what we have is sort of summary dismissal of complaints now without investigations. And I think the K through 12 context, a lot different than higher ed. I mean, you're just processing money basic qualifications, just processing money. But with these discrimination complaints, they're he said, she said things, right? They are labor intensive in a way that that higher ed is not. Second it was the smallest agency out there. So it's not as though this was some huge agency. It only had 4000 employees, which is fractional compared to a lot of the others. So we're cutting an already small one.

[00:54:54.5] Derek Black: And I think the other thing is like Congress decides the size of the department, not the president. All right. It is it is Congress that decides the size. And so there's got to be wiggle room. It doesn't define exactly how many employees you have, but you see the president taking a radically different view of what its size should be as opposed to Congress. With all that said, I'll end on this. Look, hey, I wrote an article about eight years ago that was extremely critical of the Every Student Succeeds Act, and it was called Abandoning the Federal Role in Education. Now obviously we hadn't quite abandoned it. Yeah, I wasn't suggesting that. But like there are problems in the department that I don't think it's done its job well. And so as displeased as I am about this moment, as constitutionally problematic, as much as I think it pushes the bounds of separation of powers as far as you can I think it crosses them in various ways.

[00:55:53.8] Derek Black: I do think, right, that by destroying, maybe it does give the American public, not now, but maybe when we have another election, an opportunity to think more seriously about, right, not whether we should or shouldn't have a department, because I think the vast majority of Americans say yes, but rather what really should its job be and how can we build something better? And so I don't think you break things just to break them, but I do think we should be thinking about how we build something better than what we had.

[00:56:22.3] Jeffrey Rosen: Thank you so much, Neal McCloskey and Derek Black, for a civil, thoughtful, and illuminating discussion of *McMahon v. New York* and the future of the Department of Education. Neal, Derek, thank you so much for joining.

[00:56:34.8] Derek Black: Thank you.

[00:56:35.7] Neal McCluskey: Thanks.

[00:56:40.8] Jeffrey Rosen: This episode was produced by Bill Pollock and Griffin Richie. It was engineered by Bill Pollock. Research was provided by Gyuha Lee, Griffin Richie, Cooper Smith, Trey Sullivan, and Tristan Worsham. Please recommend the show to friends, colleagues, or anyone anywhere who's eager for a weekly dose of constitutional debate. Friends, last week I told you about the exciting civic toolkit and interactive declaration that the NCC is launching in September. It convenes America's greatest historians to write about the big ideas of the declaration and the Constitution. I can't wait to share it with you. Sign up for the newsletter at constitutioncenter.org/connect, and always remember that the National Constitution Center is a private nonprofit. This podcast and all our work is made possible thanks to the generosity of people from across the country who are inspired by our nonpartisan mission of constitutional education and debate. Please consider supporting our efforts by donating today at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.