Dana Bash on America's Deadliest Election

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[00:00:04.5] Tanaya Tauber: Welcome to Live at the National Constitution center, the podcast sharing live constitutional conversations and debates hosted by the center in person and online. I'm Tanaya Tauber, the senior director of Town all programs. In this episode, CNN anchor and chief political correspondent Dana Bash joins for a discussion of her book *America's Deadliest Election, the cautionary tale of the most violent election in American history*. The book explores the little known story of election violence in 1872 Louisiana. Which nearly pushed American democracy to its breaking point. It also examines what we can learn from that moment today. Jeffrey Rosen, president and CEO of the National Constitution Center, moderates. Here's Jeff to get the conversation started.

[00:00:57.4] Jeffrey Rosen: Thank you so much for joining Dana.

[00:00:58.5] Dana Bash: Thank you so much. It's great to be here. What an honor.

[00:01:02.9] Jeffrey Rosen: I'm so excited to discuss your book. I was telling you before we started that I read it from cover to cover this summer as part of my research for a book I'm writing about the Hamilton Jefferson battle and how it defined all of American history. And it's just the definitive history of the remarkably important Louisiana election of 1872 and its aftermath. So I learned so much from it and I'm so eager to share with our great we the People and America's town hall listeners and viewers the story. So what I'd love to do is just have you tell this riveting story. And let's start with the incredible character of Henry Warmoth. He's a Louisiana governor. You resurrect him from having been forgotten in history and really make the case that as a kind of populist demagogue and predecessor, literally and figuratively, of Huey Long, he really deserves our close attention and can teach us a lot today. Tell us about Henry Warmoth and how he started off this story.

[00:02:07.0] Dana Bash: Well, again, it's great to be here and I will just say that as I learned more and more about this time in history, I was really embarrassed that I didn't know so much of this, not just as a political journalist, but just as an American citizen who I feel like I might have spaced out somewhat in my history classes, but not this much. And it's because it really, it wasn't taught in a way. And when I say it, I'm talking more broadly about my experience about Reconstruction. We learned at least when I went to public school in New Jersey. I had a great education, but it was like the Civil War and then Reconstruction happened and then it was sort of like a comma, and then you got to the rest of history. It's so much more than a comma, right? I

mean, it really did set how Reconstruction got messed up and how it ended somewhat abruptly. It set up the really big social, societal problems in the US that continued well beyond, especially in the south, the Civil War. So, that's one of the reasons I feel very lucky to have worked with my co-author, David Fisher on this.

[00:03:36.2] Dana Bash: And to go back to your original question, Henry Mormon. So again, it's the Civil War has ended and there were some northerners who were wily and saw opportunity in the war ravaged south to go and make their mark and as we say in the book, to go and make money. At the time, you could make a lot of money going into politics, particularly in Louisiana at that time. So Henry Warmoth was a very young guy. He was in his early 20s, and he was a carpetbagger. And he made his way down to Louisiana because he saw that opportunity and he quickly got the lay of the land and understood that there were all of these new voters, the freedmen, the new black voters. Of course, they were only men at the time. And if he could ingratiate himself with them, then he could leap into power in a place where he has no roots in Louisiana, because they're new to the political system, they're new to the system of voting. And why not? So he went into the black communities, he went to campaign among these black men and where they lived and said all the things that of course, they wanted to hear, which is, I understand your plight, I will look out for you, and so on and so forth.

[00:05:15.5] Dana Bash: And he won elections, and he won up until he became governor of Louisiana as this carpetbagger. And he did so with the support of the black community. And he was a Republican, of course, because that was the part. He was the party of Lincoln. Not only was he the party of Lincoln, he knew Abraham Lincoln. He was at Abraham Lincoln's funeral. And he, you know, of course, as much as this guy who didn't really have any particular set of political or philosophical scruples other than power at the time, if he had it, it was to be a Republican. So then what happened was within the next few years as his term, well, during that time, he amassed a ton of power. And he did enough to change the laws in Louisiana and change the rules in Louisiana, things that nobody paid attention to in a way that made it so that the governor had a lot more power than they had before and things that nobody thought about, like the returning board, which is effectively the canvassing board, and these are the people who are in charge of certifying the elections, he made sure to staff that and to be in charge of that, he came up with an entirely new bench, Like a new part of the judicial system.

[00:06:53.1] Dana Bash: He added a part that he could control and things like that. So he was so sophisticated, frankly, at such a young age in understanding what it takes to amass power and keep power. And then his party turned on him and he got too big for his britches. And when it came time for the next gubernatorial election in 1872, so he'd won in '68, this is 1872, he didn't want to be governor. He wanted to be a senator. And at the time, senators were appointed by governors. They didn't get elected by the people like they do now. And he, forgive me, he got sideways with his party, and in order to become a senator, he started to cozy up to the southern democrats, who were also fractured. And he helped to form a new party, the fusion party. And very long story short, as part of his maneuvering, he aligned himself not with the republican party, but with the segregationists. And he kind of sold out the people who brought him to the dance, the political dance, and those were the Black Americans. And there was so much maneuvering and there were so many backroom deals that he was trying to be a part of.

[00:08:37.3] Dana Bash: That he pushed for the Democratic candidate for governor in the 1872 election. He helped to put people in place who were very comfortable with literally stealing the election from black voters. All of the things that we know happened throughout 100 years of Jim Crow, but this is pre Jim Crow. They took ballot boxes from black communities. They made the black men come up with things that they couldn't possibly come up with in order to vote. There was a lot of physical, violent intimidation of these black men. And the reason I kind of buried this important point, but this is really the key here, is because of how he won so quickly the election before knowing that the power that black men had at the ballot box was so unique, it could change the political landscape. What the Democrats learned was, we have to stop them at the ballot box, and this is how we're going to do it. And through intimidation and just full out fraud. And he was part of that. And what happened was the election was such a mess, and nobody knew where the votes were coming from. Nobody knew who. Who really won and who really didn't.

[00:10:22.0] Dana Bash: That there was violence, There was total fracture in who was in charge to the point where nobody would concede. And it ended up that there were two governors inaugurated. I do that in air quotes. There were two legislatures inaugurated or sworn in. There were multiple slates of judges, and nobody knew who was in charge. And Grant was the president. He, a couple of different times, sent federal troops down to try to keep the peace. And eventually Congress kind of tried to ask them, okay, or tell them, okay, this is the deal, the Republican one, and this is the way it's going to be. But nobody really sort of believed that. And the violence got so bad, not just in the streets of New Orleans, but elsewhere in the state of Louisiana, that there was an outright massacre called the Colfax Massacre. And Jeffrey, you probably knew about the Colfax massacre. Again, as a girl who went to public school in New Jersey, I didn't learn about the Colfax massacre. And by the way, a lot of the kids who go to school in Louisiana, they don't learn the real story about the Colfax Massacre.

[00:11:51.9] Dana Bash: And effectively what happened was you had hundreds of black men holed up in a voting center saying, we're not going anywhere. We want our votes to be counted. And the white men who did not want that to happen came in and there was a pitch battle. And the white men literally set the place on fire. And the black men who were there, many of them burned to death. Those who didn't burn or were trying to escape were shot in their tracks. The savagery with which a lot of these men were killed was just beyond. And following that massacre, there was a desire to find justice for the black men who were killed. But because the federal government understood that there was no way that white people being tried for the death of black people in Louisiana were going to get a pair of trial on a local level, they took it into the federal courts and they prosecuted, not on the murder, but on the notion it was, I think, one of the first times that they were prosecuted, on the notion that it was their civil rights were not upheld because they couldn't vote. And it went all the way up to the Supreme Court.

[00:13:23.1] Dana Bash: And the Supreme Court ruled, no, this is a state matter, this isn't a federal matter. And that led the way for states rights to be paramount in federal elections. And most importantly, it led the way and paved the way for the Jim Crow laws for 100 years. It was that election in 1872, the violence that came as part of the election, which was so messed up in 1872, and the true desire to find justice for those black men that got everything into the courts and effectively backfired and made society even More just absolutely segregated. And the people

in the north, who fought so hard for all the things that they fought for in the south, just kind of gave up because they totally screwed up Reconstruction, which I've talked about for a while, so you can ask me about 1876 next. But that was really the final nail in the coffin of Reconstruction. Jim Crow and that decision was one, but the next one was even worse.

[00:14:48.9] Jeffrey Rosen: Superb. You tell the story so well. I'm so glad that you gave us a sense of it from beginning to end. And you really make the case for the centrality of the election in the end of Reconstruction. Before we go to the end, let's go back to the beginning. I just want to ask you a little more about Warmoth and the events leading up to the Colfax massacre. You really make the case that he's a despot who tries to consolidate all legislative, judicial, and executive power in his own hands. You quote the Times Picayune describing him as a governor who's above the law, who's the very essence of despotic rule. He says, as chief executive of the state, I have control of all the militia, of all the sheriffs, all the constables, all the police forces organized in the state. They're under my orders whenever, in my judgment, it's necessary to use them. I couldn't help but think of our current debates about the consolidation of legislative and judicial power in the hands of the executive. And you really do make the case that Warmoth, along with Huey Long in Louisiana, were the two demagogues in American history who most tried to consolidate all power in their own hands. What can his, you know, his efforts and his success in consolidating power teach us about the dangers of populist authoritarianism?

[00:16:08.5] Dana Bash: Just before I answer that, obviously the title of the book, America's Deadliest Election, which came up before this last 2024 election, people looked at it and thought, oh, Is this about 2020? No, it was about the 1800s. But one of the things that we said without saying was, is this a cautionary tale for what happens when people just lose trust in the electoral system? And that was really where my head was. But now that we are where we are, it is true that there's another cautionary tale or cautionary question, I guess, which is what happens when a chief executive, governor, mayor, president decides that they want to consolidate as much power as they possibly can. And I do. Yeah, I mean, I do think that it is what happened with Warmoth in that election where he did gobble up a lot of power and then used those positions to try to benefit him in the next election. It shows how screwed up things got. And again, even the sort of third branch, even on a state level, the judges, that was screwed up, too. And they were at a complete and total deadlock.

[00:17:43.3] Dana Bash: Because that was the state level, you did have the federal government who came in at various times to try to help fix things, and eventually kind of did until the '76 election. But it's definitely a cautionary tale. I know I keep repeating that, but it's because it is. And there are definitely kinds of I say, you know, they say history doesn't repeat itself. It rhymes. There are some rhymes that we are hearing as Trump tries to figure out if there are limits to the executive power. Congress is not pushing back very much because they're run by Republicans. But the big question, of course, right now is the Judiciary.

[00:18:42.0] Jeffrey Rosen: It's a very powerful historical lesson to learn from. And you do make the case federal power is crucial. And until President Grant decides to intervene on behalf of Kellogg, the Republican candidate, and the judges supporting Kellogg, it's not clear who's going to win. And you make that case that Warmoth has appointed rival judges. You have a courtroom scene with two judges, each claim sole authority over the courtroom, and it's not until

the federal government sides with one that they can actually enforce their orders. Say more about that the chaos that led to two judges being appointed, the lack of a secret ballot, the two returning boards, and the role of the media, also, which Warmoth controls, literally feeding information to his sympathetic newspapers in the election and also ultimately implementing violence.

[00:19:40.4] Dana Bash: Well, the first part of your question, and I think the media is such an important point to get to, which I will in a second. But the first part of your question about the sort of the federal government and Congress needing to step in, you know, everybody kind of trekked up to Washington and there were hearings and there was an investigation, and the commission didn't happen until '76. But there was so much pressure on Grant and on members of Congress to figure it out for lots of reasons. First and foremost, because Louisiana was a mess, but also because it affected the way the Senate was run. Because the whole reason why Warmoth did this is so that he could be a senator, and he was stuck. He wasn't able to be appointed because it was such a mess. So that kind of messed things up in the Congress. But eventually the federal government did make a decision. But by that point, the information that people were getting was so twisted and the actual facts were so unclear because the voting process, the electoral process was so messed up and so tainted and so fraudulent, like really fraudulent, not pretend fraudulent, as we've heard recently, like really fraudulent, that nobody trusted anything.

[00:21:16.9] Dana Bash: And that leads me to the second part of your really great question, which is that there was obviously no CNN. There was, but there was no, you know, the New York Times or a place where even people who are so in their philosophical and political silo knew in their heart of hearts, like these people, these journalists are trying to be objective. There were partisan papers and you knew that the Times Picayune, like you said, if you went to the Times Picayune and you bought the Times Picayune, which was. Which was coming out like multiple times a day during this crisis, that you were going to get a point of view. And that's. And if you had that point of view, that's all you bought and that's all you bought into. And so, because that was the sort of. The printing press helped this back then. And the fact that, I mean, not just the printing press, but, excuse me, the telegraph way that people were getting information at the time, it was like, you know, warp speed. Even though they still had to print newspapers, that was kind of their Internet for where we are now.

[00:22:36.9] Dana Bash: And so the warm myths of the world and all the politicians could get information to their supporters relatively quickly, certainly relative to how they could before by feeding these newspapers, which were making so much money coming out multiple times a day and getting their information to their supporters by whipping them up through the newspapers. And they contributed in a big way to the distrust and the mistrust of society and of the voting electorate.

[00:23:14.7] Jeffrey Rosen: Completely. And the media and the polarization, we're seeing echoes of today. But one difference, of course, is that it takes a lot longer to travel. And you tell the amazing story of the railroad race for control of Louisiana, where there's literally a race between Warmoth and his rival Pinchback to get back to Louisiana from New York and the winner of control, Louisiana, tell that story and what it says about just how quickly information and people could travel.

[00:23:41.2] Dana Bash: Yeah, well, so Pinchback was African American and he was one of these. Again, nowadays we say, oh, somebody is elected in modern times and who's black. It's the first black senator from Bluff since Reconstruction. Well, the reason that is a thing is because for that very short period of time, there were blacks elected before the white racist segregationists realized that they could actually use the power at the ballot box to try to stop the integration and the aspiration of the newly freed slaves and Black Americans to succeed in the southern American society. And including that was in politics. And so those first elections, these freed black men, they went and they elected not just the sort of allies or people they thought were allies like Henry Warmoth, but people like Pinchback who are black. So of course Pinchback was a Republican and because, you know, he was newly freed. Well, he was a freed man and he was joining up with the party of Lincoln and Warmoth was still a Republican but he was trying to again consolidate power and he was trying to get to the point where he could control everything.

[00:25:20.2] Dana Bash: Well, first of all, because he wanted to control everything, but also because he wanted to be senator. And there was this. He came up with this plan too. Or the Pinchback people and the people he was aligned with. These are intra Republican fights at this point. Came up with this plan to get Warmoth out of Louisiana in order to stage a coup against Warmoth. And they were in New York and Warmoth somehow was tipped off to it and started to by somebody who was attending this conference that was kind of a made up thing. And Pinchback was there too. And he started racing back on a train to get back to Louisiana because he physically had to be there in order to stop the coup. And he started all of these, you know, this power grabbing. He started calling people he knew who worked for the railroad in order to get him on the trains that could get him there faster, rerouting the tracks. And it was a race to get back. And Bournemouth got there before Pinchback and won the race. But it was incredibly dramatic. And again by the most advanced technology and advanced transportation at the time, which were train travel.

[00:26:45.2] Dana Bash: It's pretty remarkable. And then sort of learn and a lot of this is researched through the newspapers at the time. Even though they were very partisan. They told us the story of what each side wanted to tell. But the drama is such that the train was going so fast that it almost didn't make it. And if he had to go just a few miles more, the whole thing would have got the train literally would have gone off the tracks and he wouldn't have made it.

[00:27:21.4] Jeffrey Rosen: It's absolutely unbelievable. And then he kind of calmly beats Pinchback and says. And then Pinchback realizes he's been beaten. It's incredible. You talk about how the conservative media is kind of reinforcing the rapidly spreading belief the election has been rigged. Is that kind of misinformation or disinformation typical at the time? Is it because Warmoth controls the media? And what was the effect of those, you know, false reports on public opinion?

[00:27:52.1] Dana Bash: It was because he controlled it. He had his allies there. And the effect was that public opinion was split. And now I will say that, and I think this is important, that in modern times, when we hear the election was rigged or the election was stolen, we know the facts about what happened in the 2020 election. Yes, some Democratic mayors and Democratic governors changed the rules in order to allow people to vote more freely because we were in the

middle of a pandemic. But the votes, we know for a fact that the election was not stolen, that Joe Biden won the votes. Back then, they didn't know. They didn't know what the votes were because so many of the votes were destroyed. And people who went to vote, black men who went to vote were not allowed to vote or were intimidated from voting. And so I think the notion of it being, "rigged" or fraudulent was true back then. But what Warmoth did, to use the friendly newspapers to stoke, was the idea that they shouldn't give up and that this is rightly ours and we kind of earn this. And the fact that it was already so ingrained in Southern culture and society that white culture and society, that, I mean, there was obviously defeatism because they had lost the Civil War, but so much concern about their way of life.

[00:29:49.6] Dana Bash: Air quotes again, changing because of the loss of the Civil War. And then they had this person who's like. And these people who figured out that if we just keep the black men from voting, we can find a way to keep our lives the way that they were before and keep the power that we white people had before is really stunning. When you look now, maybe it seems kind of obvious, but the fact that they figured it out real time and relatively quickly after that first election when blacks were represented, they had power at the ballot box. They were elected to positions of governor or lieutenant governor in the case of Pinchback, and some in Congress, in the House and the Senate, and that was sort of taken away so quickly because of the effects of this election in Louisiana, it's like. Have you ever seen that Gwyneth Paltrow movie, Sliding Doors? Where, like, you take one, you take. Okay, so it's like you take. It's almost like the roadmap taken, right? Like, you take. If only that. If Warmoth hadn't existed. If things had gone differently in that forgotten election in 1872, would society, would Jim Crow have happened? Maybe because there would have been another avenue that the white races would have found. But maybe not.

[00:31:26.6] Jeffrey Rosen: It's, it's so true. And, and that's also because of the Colfax massacre and the judicial response to that. And you make such a powerful case that this really is one of the worst decisions in all of Reconstruction. In fact, the scholar Eric Foner agrees that the Colfax massacre case was the most shocking and destructive in all of Reconstruction. And the villain of this case is Justice Joseph Bradley. And he's the Zelig of Reconstruction. He keeps popping up at every stage. First in the slaughterhouse case, which Warmoth is also part of, and then he's so eager to strike down the Ku Klux Klan Act of 1871, which allows for federal enforcement of black voting rights, that he literally takes a train back from DC to New Orleans so he can deliver his opinion that this exceeds constitutional power and violates states rights. So tell us the story you talked about the brutal murderousness of the Colfax massacre. Tell us about how Joseph Bradley wrote the Supreme Court decision that made it impossible to enforce black voting rights.

[00:32:41.0] Dana Bash: Well, you know, he saw an opportunity. He obviously was racist and believed in, for lack of a way to say it, white supremacy. And he was not alone back then. And he, it's like you think about now, people are saying, you know, activist judge or activist jurist. I mean, by definition he was one of the most activist judges because. Or jurists because he was determined to put his finger on or put his stamp on how he felt about blacks, how he felt about the way that race should be in society, and used his position in various ways to make sure that the Supreme Court of the United States of America took this attempt by people trying to do the right thing in the Justice Department to find some justice for these hundreds, even people think even more than hundreds of black men who are so brutally murdered. And by doing so, it put the

decision in the hands of a racist Bradley who decided, who was able to use his position on the Supreme Court in order to turn it on its head. And maybe this is what you're getting at. I mean, part of where we are right now is the question of what the modern day Supreme Court will do.

[00:34:31.6] Dana Bash: Because in that case it was those who are more aligned with the underdogs, with the blacks who were killed, who were trying to find justice. But they went up to an, they went down an avenue that ended up making it 10 times worse for 100 years for blacks in the South. And now we're in a position where you have a Republican president and the people around him who are obviously testing the bounds of executive power, but in some cases and in some areas, and some of the people intentionally trying to pick fights to get things to the Supreme Court, obviously coming from a very, very different topic, very different perspective, very different point of view. But we're soon going to be, for various laws and norms that affect our society in a place where the Supreme Court has, as it is, wanted to do, since the beginning of our republic, going to make some pretty big decisions on how much power this president has. And I just find it fascinating to be covering these current events with the backdrop of what happened back then still sort of rattling around in my head.

[00:36:03.6] Jeffrey Rosen: It really is fascinating, and it's so clarifying to realize that Bradley is appointed specifically to transform the court in a more pro federal power direction. He's appointed specifically to overturn the gold cases. Lincoln says, we want someone who sustains his power to issue paper money and greenbacks. The Supreme Court strikes that down, and then Congress literally gives two seats to Grant so that he can overturn the gold cases. He appoints Bradley. The same day the opinion comes down, Bradley promptly overturns the gold cases. You'd think that he'd be an incredibly profound power, but then when it comes to race, he construes federal power with Jeffersonian strict construction. And in trying to figure out how that can happen, I came to agree with you. The only explanation is that he was a white supremacist and he actually ran for Congress saying, we've got to preserve white supremacy. So that's why he's pro federal power on everything except for race. And in the process, as you said, he cripples Reconstruction for the next hundred years. Because John Bingham, when he wrote the Ku Klux Klan enforcement Act, said, this is central. We have to have federal power to enforce black voting rights.

[00:37:22.0] Jeffrey Rosen: Without it, we won't be able to allow black people to vote. And by striking that law down, there's no enforcement until the Voting Rights act of 1965. It's an extraordinary act of judicial activism. Tell us about the response to the Cruikshank decision, which basically emboldens the white league to swarm into New Orleans and leads to the Battle of New Orleans, which involves claims of, you know, hang the opponent and hang Kellogg and to tell us that incredible story of violence.

[00:37:58.5] Dana Bash: Yeah, I mean, that was another. You know, especially working on this after the 2020 election, hearing that there were calls in the streets to hang a leader who didn't agree with the people who they supported. It's like, oh, okay, versions of this have happened before, but, yeah, I mean, as soon as that ruling came down, it was. I mean, the floodgates opened. And people who wanted to suppress Black Americans, suppress their power, suppress their rights, felt that there was nothing stopping them. There was really nothing stopping them. And of course, they were encouraged and egged on by the racist leaders in Louisiana. And so,

yeah, so they flooded the streets of New Orleans. There was violence, There were calls for murder of leaders, and there almost was. There almost was an assassination, and there were assassination attempts of leaders. And once again, you had the federal government, with Grant still as president, trying to balance this political reality that he was in, which is another fascinating dynamic of the time, which is people still saw him as the war hero that he was for winning the north, but in the south, he was the president who burned it all down.

[00:39:53.5] Dana Bash: And so he was trying to bring everybody together, the north and the south together. And particularly, obviously, when he was trying to placate or not placate. Placate is the wrong word. Trying to heal the rift between the north and the South. And I don't know what you think. I mean, you're the historian. Maybe he went a little overboard, and he was trying too hard in order to try too hard to sew everything together. And he let the south run wild a little bit in a way that I don't think that he expected.

[00:40:37.0] Jeffrey Rosen: That's a really crucial historical question, and I'll just offer it back to you. How much discretion did Grant have given the state of public opinion? One of our star teachers, Ryan Warnecke, asks, what was the state of public opinion toward reconstruction in 1872? Did President Grant and Congress feel pressure to begin a drawdown of federal oversight of the Southern states? And this, of course, leads to the election of 1876, where famously, there's a deal to allow the certification of the Republican candidate, Rutherford B. Hayes, in exchange for the withdrawal of federal troops. So how much wiggle room did Grant actually have?

[00:41:17.5] Dana Bash: Not much. Not much. That's an important point, is that he was in political trouble. People were, you know, not. Not thrilled with his stewardship. It was. I don't think it was entirely clear that his abilities on the battlefield translated to his abilities in politics. And he was having trouble finding his way. His popularity was definitely in taking hits Left and right. And there's no question that. And also his kind of toing and froing about I'm going to send troops, federal troops down to help and then I'm not going to send them. And some of his reluctance to send federal troops really allowed things to explode. But on that note, I mean, the whole question of federal troops and Grant's lack of popularity and the lack of confidence that people had, obviously in the south they didn't like him, but even more so in the north. He really wanted Reconstruction to work and he really wanted the idea of rebuilding in the south to take hold. He wasn't the only one. And it just, we didn't get too far into the sort of nuts and bolts of how Reconstruction works. So maybe you know more about this than I do, but it wasn't executed properly.

[00:42:54.7] Dana Bash: It was not executed properly at all. Which is why if you fast forward to 1876 when there had to be a deal, because the problems that we described in Louisiana, in Louisiana in 1872, spread to three other states to the point where when the election results got to Washington for the election certification in the House, they had to throw out four states, including Louisiana, because it was just impossible for them to know who really won the elections in those states. Which led to an electoral tie, which led to a commission, because that's what Washington did even back then. They came up with commissions and the commission was made up in a way that you had balance, but then you had the tiebreaker, which was effectively the guy who decided the election. There was a backroom deal and it was, okay, Hayes, you can be president, you're the Republican, but you gotta pull a federal truce out of the South. And so as

much as the Colfax massacre really laid the groundwork for Jim Crow, it was pulling those federal troops out of the south that did it. That cemented the notion of Jim crow against until 1964 and then really 1965.

[00:44:25.0] Jeffrey Rosen: And you tell the story of the election so incredibly well and then who's at the center of that commission? Well, it's our friend Joseph Bradley, who initially votes for Tilden. And then he has this coming of age moment in the middle of the night and his wife supposedly prays and he cast the tie breaking vote for Hayes and it literally predicts Bush v. Gore down to the wire. You have two competing states from the state of Florida. The question is which you should recognize? And Bradley seizes sides with the Republican slate and that throws the election. It's just remarkable how history repeats itself. And then Congress tries to respond by getting the Supreme Court out of the business of deciding elections and passing the Electoral Count act, which the Supreme Court then, in Bush v. Gore, ignores and decides anyway.

[00:45:15.7] Dana Bash: Can I just add one other thing which was fascinating to learn. Again, one of the things that I wish I knew more about before the election of 2020 and going into January of 2021, when there was so much tumult as they were trying to count the votes and trying to figure out what to certify and whatnot. After the 1876 election, there was a question of whether the vice president, who was presiding over the House count of the Electoral College votes certification, could decide what to throw out or not, or whether the vice president's role was more ceremonial. And the decision then was ceremonial. Fast forward to 2021 and Mike Pence's attorney, his top counsel, weirdly, I found out afterwards, and maybe you knew this already had done, like a whole law school thesis on that election.

[00:46:27.8] Jeffrey Rosen: Yes.

[00:46:28.4] Dana Bash: And so was intimately familiar with that decision, which is why he felt, among other reasons, so comfortable and confident advising the vice president, Mike Pence. This is not something you can do. You have to tell Donald Trump this is not constitutional. It is just ceremonial. There is precedent in American history for this.

[00:46:50.7] Jeffrey Rosen: Absolutely. And he was supported in that decision by Judge Michael Luttig, who's on the National Constitution Center Board of Trustees, and advised him that precedent was in favor of the vice president not having any discretionary rule. However, in your book, this is one of the amazing things you unearth. You show that Republicans in 1876 actually did argue the same way that Vice President Vance argued in 2020, that the vice president could reject the returns. I thought that was. That just showed us how, even back then it was contested. And it shows how history was absolutely repeating itself. Well, and then Hayes is elected, troops are withdrawn, and Reconstruction's over for 100 years. Let's try. We have just a few minutes left to draw some more lessons from this extraordinary period, which just presages our own in so many ways. First, what does it say about the power of judges to enforce their opinions? That's one question in the chat. Is there any law that gives the Judiciary the ability to enforce their decisions? You show that it really did take Grant, saying, I'm going to side with these judges over those without executive power. Can judges enforce their decisions, or are they at the whim of the political actors?

[00:48:16.1] Dana Bash: Well, I think largely they're at the whim of political actors. Again, I'm not a lawyer. Everybody here is, including especially you. But, I mean, there is a way for a judge or a justice, I'm sure, to hold a political leader in contempt if they don't abide. But does that ever really happen in practice?

[00:48:43.4] Jeffrey Rosen: You know, the closest precedent may be Lincoln trying to suspend habeas corpus during the Civil War. Chief Justice Taney is sitting as a kind of district court judge, orders him to, you know, release the prisoner and tries to hold the government lawyer in contempt. But Lincoln essentially ignores the decision on the basis that it's not a final decision of the Supreme Court, but just Taney acting on his own. And then he calls Congress back into session and they ratify his decision. So that's the closest example of a president trying to ignore a contempt order. But as you suggest, you know, a district court judge holding a Justice Department official in contempt may not stop the president from doing what he likes.

[00:49:26.1] Dana Bash: Right. And you also have. I have been so fascinated to listen to the language of Stephen Miller in the last two weeks, who spent, you know, his professional life, but particularly the four years they were out of office, really studying the ways in which to extend and to challenge and to test the bounds of executive power. And he put out a tweet, or an X or whatever it's called now last week, saying that, whatever I don't remember which federal judge it was or frankly, which of the topics that is being challenged it was about. But his tweet basically was something along the lines of, if this activist judge can do whatever he decided to do, then what's to stop the judge from sending troops abroad? What's to stop the judge from doing other things that are normally done by the commander in chief. And so, again, from a totally different angle, could not be more different when it comes to the subject matter, but it's the same pressure point of trying to test these largely previously untested notions of where power lies in order to maybe get the Supreme Court to make a decision.

[00:51:05.6] Dana Bash: Now, it's perilous, because for them, if they want much more executive power, which obviously they do, it's perilous, because what at the Supreme Court says no, then it goes to your question about whether or not the executive divides. And that's when I think that whole notion of constitutional crisis is one that we can really be asking.

[00:51:35.9] Jeffrey Rosen: Absolutely. The most rigorous definition of constitutional crisis is the president ignoring an unambiguous order of the Supreme Court. Hasn't happened yet. But as you suggest, if it did, everyone agrees that it would be a crisis? Well, you know, in just the final moments. What are the lessons, the broad lessons? Did it all happen because we'd lost faith in the neutrality of the rule of law, starting with warmth, consolidating power in his hands, all the institutions became politicized. The Judiciary, the Legislature, the Executive, the Media. And therefore there was no, no place for the public to trust. And as a result, it all became about power and violence. How about that as a thesis? Is that, is that what you're.

[00:52:23.2] Dana Bash: That's 100%. To me, the takeaway is that when people. It's totally normal and the most democratic small thing in the world, to challenge institutions, and particularly for somebody like me who's a reporter, and to challenge the people who are trying to, or supposed to be abiding by the laws or even the norms of the institutions. Where we are in the danger zone is when people genuinely do not trust these institutions, particularly all of them

that you just listed, because they have been told not to by somebody for whom it is in his interest for the people not to trust the institutions. And that happened, that happened in our history. And the consequences were vast, the biggest of which was an entire race of people who had been enslaved for hundreds of years by that point, still didn't get the rights that they deserved and lots of other consequences as well. And I just think remembering that and understanding that is so key. But it's really hard when people are getting their information on TikTok in 30 second videos. And the actual algorithm designed by the people who created these social media sites is such that if you watch one thing, it only pushes like minded things to your phone and you think that's the reality. And so if those things are, you know, don't trust the media, don't trust Congress, don't trust the Supreme Court. It's very dangerous.

[00:54:33.5] Jeffrey Rosen: Absolutely. Beautifully said. And you're so right that when people get their information from TikTok as opposed to books like yours, they cannot think for themselves. And that's why it's so important that you've written this marvelous book of intellectual and constitutional history. And it's so great you've taken the time to talk about it with us. And it's so great that all of our We the People in America's Town hall listeners are taking an hour of their evenings to learn about history. Because we cannot understand the present unless we learn about history. And it is urgently important that we study history so we can avoid its errors and live up to its best ideals. Dana Bash. Thank you for and for a great conversation.

[00:55:16.8] Dana Bash: Thank you for having me. It is really such a pleasure. I'm such a fan and I'm the one who learns from you all the time. So it really means a lot that you read our book.

[00:55:28.0] Tanaya Tauber: This episode was produced by Lana Ulrich, Bill Pollock, and me, Tanaya Tauber. It was engineered by Bill Pollock. Research was provided by Yara Daraiseh, Gyuha Lee, Samson Mostashari, and Cooper Smith. Check out our full lineup of exciting programs and register to join us virtually@constitutioncenter.org as always, we'll publish those programs on the podcast, so stay tuned here as well. Or watch the videos. They're available in our media library @constitutioncenter.org/medialibrary. Please follow, rate and review live at the National Constitution center on Apple Podcasts or Spotify. On behalf of the National Constitution Center, I'm Tanaya Tauber.