



## The Legality of the Biden Administration's Student Loan Forgiveness Plan Thursday, September 1, 2022

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**[00:00:00] Jeffrey Rosen:** 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. At the end of August, the White House announced a plan to forgive \$20,000 in student debt for borrowers who received Pell Grants. The Biden administration says that the plan falls under the HEROS Act of 2003. Opponents argue that it doesn't. Today on *We The People*, we will examine the legal arguments for and against the Biden administration's power to forgive student debt.

**[00:00:47]** And it's wonderful to be joined by two great friends of *We The People*. Fred Lawrence is the secretary and CEO of Phi Beta Kappa, and a distinguished lecturer at Georgetown Law Center. He's the author of *Punishing Hate: Bias Crimes under American Law*. Fred, it is wonderful to welcome you to *We The People*.

**[00:01:04] Fred Lawrence:** Jeff, good to be here, thank you.

**[00:01:06] Charles C.W. Cooke:** And Charles C.W. Cooke is a senior writer for *National Review*, where he's written several important pieces about the forgiveness plan. Charlie, it is always wonderful to have you on the show.

**[00:01:17] Charles C.W. Cooke:** Thanks for having me, it's my pleasure.

**[00:01:19] Jeffrey Rosen:** Fred, let's begin with the legal arguments in favor of the Biden administration's debt forgiveness plan. The administration invokes the Higher Education Relief Opportunities for Students Act of 2003, which gives the secretary of education authority to alleviate the hardship that federal student loan recipients may suffer as a result of national emergencies. Tell us about this law and why you think it authorizes the Biden administration program.

**[00:01:48] Fred Lawrence:** Thank you, Jeff. In 2003, Congress passed the so-called HEROS Act, Higher Education Relief Opportunities for Students Act. This was designed to give authority to the secretary of education to grant waivers or relief for student financial aid debt that

had been accumulated by these individuals, in, and here comes the statutory language, in connection with war or other military operation or national emergency. That's the language of the 2003 statute.

**[00:02:21]** It allows waiving of statutory or regulatory requirements related to federal student loans for three categories of individuals: active duty military, those who reside or are employed in an area of national disaster, and then here comes the third one, those who've suffered economic hardship as a result of wars, military hardships, or national emergencies. So that is the key authority, that national emergencies language, that has been used not just by the Biden administration but also by the Trump administration to find a basis for debt relief for COVID-19 related issues.

**[00:02:59]** In many ways, this is bipartisan from the beginning. The HEROS Act of 2003 had strong bipartisan support in both houses of Congress, it was signed into law by President George W. Bush, and then in March of 2002, in the last year of the Trump administration the CARES Act was passed by Congress which included a pause on federal student loans. But that pause expired on the 30th of September. So, what was gonna happen after the 30th of September, still during the Trump administration?

**[00:03:32]** Advance of that, August of 2020, two years ago, the Trump administration issued a memorandum instructing the secretary of education in that administration to pause student loan payments through the end of the calendar year, December of 2020, and the authority they used was the HEROS Act, that national emergency language from the HEROS Act. On December 5th, the Trump administration then pushed it out further to January 31st. That was going to give the new incoming administration the ability to do whatever they wished to do with that, and indeed the Biden administration did further extend that pause, just like the Trump administration, using the HEROS Act national emergency language to extend it.

**[00:04:12]** And under the most recent debt reduction plan, that pause will expire or is planned to expire by the 31st of December, 2022, but in addition to the pause on repayment, there is the debt relief, as you said, up to 20,000 for Pell-eligible students, up to 10,000 for those whose grants are not Pell Grants, all based on the national emergency language of the HEROS Act of 2003.

**[00:04:38] Jeffrey Rosen:** Thank you so much for that introduction to the case. Charlie, tell We The People listeners why you think that the HEROS Act does not authorize the Biden administration's plan.

**[00:04:49] Charles C.W. Cooke:** Well, no one thought that the HEROS Act authorized the Biden administration's plan until the Biden administration wanted to follow through on a promise that it had made during the election. Unconnection with Congress as Justice Scalia famously argued, Congress does not hide elephants in mouseholes. And the notion that this law, which was passed in 2003 after 9/11, either says or was intended to allow or was regarded as permitting the president to spend a trillion dollars without Congress, that's more than the 10-year cost of Obamacare is, I think, absurd. It's post-rationalization.

[00:05:37] If you believe that it allows for the delaying of debt collection which I'm skeptical of, fine. But, you know, no more conservative a figure than Nancy Pelosi drew a clear distinction last year between delaying collection and canceling, which is really transferring to the taxpayer, debt. Nancy Pelosi said during a press conference, "The president can't do it," was pretty emphatic. So that's not even a discussion. She said, "Not everybody realizes that, but the president can only postpone, delay, but not forgive." And this was also what the Department of Education found when it looked into the matter in January of 2021.

[00:06:22] So what I see here is Joe Biden following in the footsteps of Donald Trump, and before him, Barack Obama, and indeed following in his own footsteps with the eviction moratorium, and scouring the law books for fragments of sentences that if put together, and in the OLC's memo, they're put together with ellipses, it's fairly transparent, can be held to accord sweeping powers where they don't exist. I think this is a clear violation of the *Major Questions Doctrine*.

[00:06:54] But I also think that even if I'm wrong, even if one could read this statute to permit the president, in case of emergency, to take this sort of action, the justification that Biden has offered to invoke it remains disingenuous. [laughs] COVID-19, it seems, is Schrodinger's crisis. You know, I was criticized on the right a few months ago for praising Biden when he ordered the end of Title 42. And Title 42, for those who don't know, changes the way the government can treat illegal immigrants at the border during a crisis, especially a health crisis.

[00:07:28] But I thought that irrespective of the policy merits, I'm more of an immigration hawk, the waning of COVID-19 meant that the emergency had passed, and Biden was not only allowed to but obliged to acknowledge that. And Biden agreed, and his team argued in court that the emergency powers conferred by Title 42 had expired, because COVID had diminished as a crisis. And now, a few months later we're told that the same crisis, the one that's apparently over on the border, is so bad that it allows the president to spend up to a trillion dollars to redistribute money to people who have the lowest unemployment rate, the best health outcomes, and the rosier prospects in the country. I think it's farcical, I think it is willfully so, and I suspect if it gets to the courts it will be struck down pretty quickly.

[00:08:21] **Jeffrey Rosen:** Thank you so much for that clear and powerful case against the legality of the Biden administration's debt forgiveness program. Fred, let's begin with the first big challenge that Charlie Cooke raised, mainly that there's a difference between delaying debt and canceling debt, and although the law gives the ability to waive or modify aspects of the law, it doesn't allow the secretary to cancel payments.

[00:08:49] **Fred Lawrence:** Charlie was channeling Nancy Pelosi, so I think it's only fair for me to channel Antonin Scalia, and that is to look at the language of the statute itself, not to try to go into the minds of the legislature. Justice Scalia was never one to worry too much about intent as much as the language, to understand what, what did the plain meaning of the statute say, and the statute said that the secretary of education had the authority to grant waivers or relief to recipients. Relief can be given through delaying payments, but relief can also be given through canceling debt. Admittedly, that's a major form of relief.

[00:09:24] But we can't confuse two different things here. One is whether this is good policy or bad policy, and Charlie and I could debate that too, and I actually may agree with him more on that than he might think. My own view, for what it's worth, is that we'd do much better off giving more grants upfront and doubling the level of Pell grants than we would by doing debt relief.

[00:09:42] But that's not the, the issue that we're talking about, right, Jeff? We're talking about, given this action, is this legal? So the first thing it says is grant waivers or relief, and they could have said in the statute, "In connection with a war or other military operation," full stop, and had they said that, we wouldn't be talking about this. But they didn't say that. The plain language says, "with a war, other military operation, or a national emergency." National emergency is not just a term that we can borrow when we want to, national emergency is a, is a technical term, and we are still under a state of emergency with respect to COVID-19.

[00:10:16] Now, it is true the administration took a position with respect to the immigration issue that Charlie was talking about which appears to be inconsistent with that. Courts will have to wrestle that out. But the emergency still exists, and based on that emergency, that language in the statute is still applicable. Again, not going back behind, did anyone anticipate COVID-19 as a national emergency in 2003? Of course not. But they added that language, national emergency, I can only think they added the language of national emergency to give flexibility to this law, and to have it be applicable in times of emergencies that could not yet be imagined, understood, or predicted.

[00:10:53] And whatever I imagine that language may mean, that's the plain meaning of the language. So that's what strict constructionists of statutes would tell us to do, and I think that's what the statute says.

[00:11:04] **Jeffrey Rosen:** Charlie, we're talking about two statutory provisions that you flagged. One has to do with waiving or modifying debt, and whether that includes cancellation, and, and the second, whether a national emergency still exists. On the first question, why you think that the Supreme Court is unlikely to think that waving or modifying includes cancellation, tell us why and tell us about the relevance of the court's recent decisions about the *Major Questions Doctrine* in the *EPA* case and, and also the COVID mask mandate case, and, and why you think that this Supreme Court is unlikely to, to hold that Biden can do this?

[00:11:40] **Charles C.W. Cooke:** Well, I, I think there are a couple of things here. If we look at the text, we'll see that the, the law, and I'll quote from the OLC memo if you like, "Necessary to ensure that," that's part of the law, "student loan recipients who are affected," that's part of the law, "by a national emergency," and here's the main quote, "are not placed in a worse position financially." That's the language of the statute. I don't see how this decision by Joe Biden comports with that law.

[00:12:13] The people who have student loans across this country have not been placed by this emergency in a worse position financially relative to their student loans, in part because those student loans have already been deferred for what's coming up on two years. If anything, it's taxpayers who've been placed in a worse position financially, because that money which was

supposed to come in and cover the costs of Obamacare among other things, has not been coming in. That's not a policy position I'm taking, that is a, that is a legal reading of the language. I agree we should look at the language, and, and there it is.

**[00:12:50]** I think as a broader point and I would note that the OLC memo actually does quite a lot of reading of legislative history, so while I'm absolutely in agreement with Justice Scalia that we should look at the text and not legislative history, much of the legislative history that is mentioned in the OLC memos remarkably weak. For example it suggests that Congress wanted the executive, quote, "To act quickly should a situation arise that has not been considered." And it argues this in favor of Joe Biden's order.

**[00:13:21]** But of course, this order came two and a half years after COVID came along. So I don't think we could [inaudible 00:13:27] those two. It also says, "We have found no statements from the brief floor debate on the act expressly rejecting the secretary's power to cancel student loan debt under the HEROS Act," and I mean, this is just silliness. There are a lot of things that aren't in there, that doesn't mean Congress can do it.

**[00:13:41]** But more broadly there is, of course, a difference between strict constructionism, if you like, or textualism, or looking to the text, and taking from a given law powers that would be better suited to an enabling act. And it is simply not the case that the courts in this country regard any sentence that could be broadly construed to confer unlimited power on the executive.

**[00:14:10]** Now, I think Congress does share some blame for the situation we've found ourselves in in that it does like to pass laws with broad language. Congressional legislators do not like to do any work, and the executive branch is happy to fill the gap. But there is no one who wrote this, who believed that this conveyed a trillion dollars worth of student debt. And one doesn't have to look at the legislative history to determine that, one has to look at the manner in which it's written and the context within all of these sentences that are listed in this OLC memo arise. And I don't think it would be a departure from textualism, or an undermining of textualism for a court to arrive at that conclusion, as the Department of Education did last year in a really tight, well-argued, and convincing memo that came to precisely the opposite conclusion looking at exactly the same text.

**[00:15:05] Jeffrey Rosen:** Fred, Charlie points to crucial statutory language in section two which says that the secretary's authorized to waive or modify any provision described in paragraph one as may be necessary to ensure the recipients of student financial assistance are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals. What is your response to his claim that students are not placed in a worse position because of the pandemic, and therefore the debt forgiveness is not authorized by the statute?

**[00:15:37] Fred Lawrence:** I think that the fact that the administration continued the suspension of debt from the prior administration, was one way of addressing this, but it doesn't remove the issue. In fact, the very fact that debt was suspended speaks to the point that both a republican administration and a democratic administration felt that the appropriate next step was to shield

students under a burden of debt during the time of COVID. So I think they both understood this to be an impact on these individuals. Now the question becomes, what, is there, what is the next step, is there a next step? Has all of it been alleviated or is it necessary to do something more? That's precisely what's left to the Department of Education.

**[00:16:22]** It's true this is a big number and it's true that Congress may not have thought in terms of this being the number. But when Congress passes legislation, they should be held to what that legislation is, and then it is consigned to the administration.

**[00:16:37]** We also have to remember, administration didn't get there from nothing. I mean, administrations become administrations because they receive a national mandate, and they come in with a program. So I think the Congress in 2003 could've written a narrower law. They chose not to. By the way, the Congress in 2003 didn't have to be dealing with the issue of even military emergencies with respect to student loans. So Congress in 2003 was concerned about student loans, they did pass legislation with respect to that, they did give authority to the Department of Education to implement it, and they created this wide provision for national emergencies which to me is only understandable in terms of providing a life for this law beyond the immediate emergency and condition of that time. Then it's for the Department of Education to implement, in a way that is in, fitting with that.

**[00:17:31]** So again, on the merits, one might argue that this is not the best way to address the problem. But I don't think that goes to the question of whether or not it's legal for this Department of Education to make this decision to benefit these people.

**[00:17:43] Jeffrey Rosen:** Charlie, we've had a couple of important decisions recently from the Court about the *Major Questions Doctrine*, most recently *West Virginia v. EPA*, where the Court held in Chief Justice Roberts's majority opinion, that there are extraordinary cases in which the history and breadth of the authority of the agency is asserted, and the economic and political significance of that assertion provide a reason to hesitate before concluding that Congress meant to confer the authority. What's the relevance of the *EPA* case for the Biden administration's debt forgiveness?

**[00:18:15] Charles C.W. Cooke:** Well, I, I think this is a *Major Questions Doctrine* case, and I think if it reaches the Supreme Court it will be treated as one, and I think it should be. And the question you have to ask is why has the *Major Questions Doctrine* suddenly come to the forefront of our national jurisprudence? And the answer is because presidents of both parties keep insisting that the emergency laws we have on the books, or in the *EPA* case, just the laws we have on the books, many of which ought to be tightened or repealed, I do accept, are in effect enabling acts. The profound changes to the status quo that presidents are using them to make represent a difference in kind, not in degree, masquerading as a difference as degree, not in kind.

**[00:19:02]** You know that Obama in 2010, he says, "Well, you know, I'm allowed to evaluate deportations on a case by case basis under the law, so surely I'm allowed to preemptively shield 10 million people from deportation." You know, so Biden says, "Well, I'm allowed to tinker with student loans at the margins during an emergency," and of course he could pick anything as an

emergency, as Trump did with his border wall, "Then I can order also cancellations." And, you know, this makes a mockery of Congress, and frankly it makes a mockery of our entire system of separation of powers. Yes, Joe Biden was elected nationally, he won the election, he won it well, at least on the popular vote.

**[00:19:47]** But the Constitution has the same restrictions on presidents. Article II contains the same words whether or not, a president squeaks through, as George Bush did in 2000, or wins a Ronald Reagan-style landslide. So of course the courts have started to notice this ruse, because president after president after president has done it, usually, it has to be said, after announcing publicly that they are not allowed to. And this is what Obama did. He said 22 times he couldn't do DACA. He said, "I'm not an emperor, I'm not a king, I'm not a dictator, we have a Congress." Then Donald Trump spent months trying to convince Nancy Pelosi and the Democratic House to give him money for his border wall. They said, "No, no, no, no," Trump stormed out of a meeting, famously, and said, "I need to get this done," and then magically they find an emergency power that justifies taking, \$6 billion out of the Treasury without Congress.

**[00:20:44]** And now Joe Biden has done the same thing, having expressed skepticism that he could do this, having had members of his own party tell him that he couldn't do it, he says, "Well, of course I could do it, look at the 2003 HEROS Act. Yes, of course, that piece of legislation we all thought did a trillion dollars worth of damage."

**[00:21:02]** This is a, a growing trend, and it presents an enormous problem for our, our system, under both parties, and I think the Court is right to superintend this and to put some limits on what can be found in the corner of this law or that law to essentially transfer unlimited power to the executive branch.

**[00:21:23] Jeffrey Rosen:** Fred, what would your response be if you were arguing this before the court? How would you say that this is not a major question? In identifying what counts as a major question in the *EPA* case, Chief Justice Roberts noted that the *EPA* claimed to represent a transformative expansion in its regulatory authority. It located this in an ancillary provision of the act designed to function as a gap-filler and have rarely been used, and the agency's discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact for itself. Some analysts, including Charlie Rose, who served as the top lawyer in the Education Department under President Obama, said that, "It's fair to discern Congress has inferred that the Education Department in this case should not decide the question of mass forgiveness of performing loans," how would you argue all this before the Supreme Court?

**[00:22:16] Fred Lawrence:** Jeff, let me first go back to Charlie's contextualization of the Major Questions Doctrine, and, and I, I largely agree with his description of the Court's reaction to it. But I wanna pull the camera back a little bit before just the past few administrations. The administrative state as it comes to us today really has its origins at the time of President Roosevelt and the New Deal, and an understanding that Congress and Congress alone is not going to be able to react to the kinds of challenges and problems that a sophisticated, modern society confronts, the Great Depression being a classic example of that.

[00:22:50] And so you have a balance that has to be struck between what powers could be delegated by Congress to administrative authorities, and there's a whole branch of law now that that arises with that. When pendula swing they sometimes swing too far in one direction and then too far in the other direction, so perhaps the executive branch has gone further in certain ways than it might, and the Court is now responding to that.

[00:23:11] But look at what Chief Justice Roberts said in the *West Virginia and EPA* case. He says, "Congress does not use oblique or elliptical language to authorize an agency to make radical or fundamental change." So even assuming that this is a radical or fundamental change, and I think the only radical piece of it that Charlie mentions studiously multiple times is the number of zeros at the end of the number. And I agree, it's a big number. But that alone does not make it radical. It makes it large, I don't think it makes it a change in, in kind as much as a change perhaps in size.

[00:23:44] But the key piece of it is not so much that. The key piece is the oblique or elliptical language, and I think that is what really triggered the invocation of the *Major Questions Doctrine* to say that a agency can't grab some oblique language and use that as the basis for making some major decision that has political or economic ramifications.

[00:24:05] Here, as we've been talking about, there's nothing oblique or elliptical about the language of the HEROS Act. It specifically speaks to conditions of national emergency. So there is nothing inconsistent with the Court using this as a case to address the *Major Questions Doctrine* again and showing us where the pendulum should rest, and that this case falls on the other side, where the agency action should be upheld, as opposed to the *EPA* action in the *West Virginia* case, where it struck down that action.

[00:24:38] **Jeffrey Rosen:** Thanks so much for that. Charlie, your response to Fred's claim that this is not oblique and elliptical language, that it explicitly authorizes the debt forgiveness? And maybe put on the table the argument that the majority could say that an affected group has to be smaller and more targeted than every lower-middle income American, and therefore that large class of affected people is not covered by the explicit language of the act?

[00:25:02] **Charles C.W. Cooke:** Well, I certainly agree with that. As I say, I think it's almost impossible to make the language of the act comport with what was done, which is provide mass transference of student debt liabilities away from people whose families earn a quarter of a million dollars a year, when those people were already much better off than pretty much everyone else in the country. Again, that's not a political point, that matters, because we're talking here about mitigating the economic effects of COVID. It's worth pointing out that the, the people we're talking about have already had loans deferred for two years, whereas, say, a plumber with an F-150 has not. Congress didn't act, the executive branch didn't find some law to act on their behalf.

[00:25:46] But in terms of the elliptical point, I mean, the, the, the language in this OLC memo justifying this decision is quite literally elliptical. I mean, it is full of ellipses. There are 25 or so in the, in the bits of the law that they put together to come to this conclusion. And they don't



even argue that this is a narrow textual matter. They don't sound like Justice Scalia in this OLC memo. And I'll read you a little of it, if you like.

**[00:26:11]** "Here several contextual clues indicate that Congress used the word necessary in a more flexible and capacious sense." Okay, "As an initial matter, the fact that Congress granted the discretion to deem whether a waiver modification may be necessary signals that Congress understood the word to authorize a range of possible actions. That Congress did not expect a closely-tailored fit between the secretary's exercise of the waiver and modification authority and the [inaudible 00:26:39], it is also evident from," and so on and so forth.

**[00:26:42]** This is an exercise in sophistry. I think that Joe Biden knows it, I think that the lawyer who wrote this knows it, I am absolutely convinced that Nancy Pelosi knows it, and I would like to see a different approach being taken by the executive branch, being taken by Congress in particular, which bears the ultimate responsibility for this, and if it comes to it, and I know we're going to get to standing by the courts. I don't want hand-waving, I don't want squinting ellipses, I don't want a wall full of bits of laws torn up into little pieces of paper and then attached with glue or sticky tape. I want precise laws, and I want the executive branch in such cases as the laws aren't precise, or it is clear that they are trying to do an end run around Congress to desist.

**[00:27:29] Jeffrey Rosen:** Fred, your thoughts on this third point about statutory ambiguity? We've identified three already. First, that waive and modify doesn't include cancellation, second, that this is not an ongoing national emergency, and third, that the affected group has to be smaller and more targeted than everyone. What do you think about the third point?

**[00:27:50] Fred Lawrence:** I, I think ultimately there's a policy argument for that, but I don't think that's required by the, by the statute. I think, again, this is the kind of thing that is properly left to the agency once Congress has provided the authorization for it. We can argue late into the night about whether Congress does a good job structuring exactly how it does those authorizations. But I think we can't do a sensible argument about whether or not, in 2003, Congress intended to give the Department of Education authority to deal in certain ways with student debt certain ways that might be substantial with student debt in cases of national emergency. And now the question is how do we implement that?

**[00:28:30]** Now, one, one approach would be to say that we should assume that it's very, very narrow, and you need another piece of legislation to do something. You, you could argue that. But I don't think that's what the statute itself requires, I don't think that's what the statute itself says. And I think what the memo of the Office of Legal Counsel was doing here is not sophistry in the least. I think it is trying to put this language into context, but at the end of the day, it was about what was the statute designed to do?

**[00:28:58]** Again, go back to 2003, there were many issues that they could've been dealing with at that time other than student debt relief, that was one that they passed a specific statute about. And again, they could've left out language that expanded it beyond that time. For that matter, they could've sunsetted it. Congress knows how to do that, and they have on many occasions put

a sunset provision that requires it to be reaffirmed by Congress. They did none of that. They put national emergency language in which clearly is designed to make this an ongoing statute, an ongoing mandate, and an ongoing authorization.

**[00:29:30] Jeffrey Rosen:** Thank you for that. Charlie, let's put on the table the *NFIB v. OSHA* case, that was the case where the Supreme Court held that the federal government's powers don't include the power to impose a national mask mandate, and Justice Gorsuch, joined by Justices Thomas and Alito said that, "We expect Congress to speak clearly if it wants to assign an executive decision of vast economic and political significance." The majority stressed that the statute didn't authorize sweeping health regulations that affect workers' lives outside the workplace, because unlike regulations inside the workplace, historically outside matters have been regulated at the state level by authorities who enjoy broader and more general governmental powers. How does that cut when it comes to student debt forgiveness?

**[00:30:19] Charles C.W. Cooke:** Well I think the Supreme Court was right about this. There was, of course, a, a different variable here, and that is that there were quite a few, cases related to that law and to OSHA's use of that law that cut against the Biden administration's order. This one hasn't been litigated yet so, you know, we're having this conversation in a vacuum, we don't have 40 years worth of precedence to look at. But, you know, broadly speaking, I think the Gorsuch line that you cited is the key one, which is that Congress is expected to speak clearly that when you are dealing with an issue of this magnitude that is perceived to be a live political issue, where there is profound disagreement in the country and in Congress, you should expect a law that is not within the legislative history, because I'm not a legislative history guy, but in its text, and in its preamble, if need be, open about what it is trying to do.

**[00:31:37]** And I don't think that the OSHA law that the Biden administration tried to use did that as it relates to health crises and their effects outside the workplace, and I don't think that this law, the HEROS Act of 2003 does it either. And I hope that when it comes to the court, this is the precedent that I am looking for. We can build it atop the *EPA* case and the OSHA case, and to some extent the eviction moratorium case which was another example of the Biden administration ... and, once again, knowing that it was acting illegally, saying even to one reporter, Philip Wegman that while he assumed it was illegal, he wanted to keep it going for a month or so while it was litigated, trying to extract out of a much narrower law, broad powers.

**[00:32:30]** I'm pleased that we have a court that has started to demand that Congress is clear. Now, I'll just say again, I do accept that Congress is a villain here as well. But I just don't think we want to have a political system or do have a political system, in which the executive branch is allowed to seize on these, these ambiguities to make extraordinary changes to our law.

**[00:33:02] Jeffrey Rosen:** Fred, if you were arguing before the Court, how would you distinguish the OSHA case, the mask mandate case, as well as the eviction moratorium case?

**[00:33:11] Fred Lawrence:** I think you come back to the statute and the statutory authorization, and I think the *West Virginia against EPA* case fits in with a piece that is gonna require Congress to be careful, and it is gonna require agencies to take Congress at their word. But that's a case

where this has happened in this instance. So I think that's how it is distinguishable, that it, there's no question that we are living with a court that has less of a taste for a broad, free-ranging administrative state. But I don't see that as meaning that it is a court that does not permit Congress, where it is speaking clearly, to authorize to administrative agencies, and if the agencies in fact misinterpret what Congress has said, then it is for Congress to act, not for the courts to act. This is a matter where Congress can say, "That's not what the statute said." The agency is interpreting it within their authority and with a good faith, reasonable interpretation of what Congress did. That's not for the courts to step in at that point, that's part of the political process which falls to Congress to act, or for that matter for voters to respond. I mean, that's how our political system works.

**[00:34:22]** But the notion of holding the agency's feet to this imagined fire of a narrow reading of a statute is not consistent with our whole system. Where you have a piece of legislation that could have been written, clearly could've been written more narrowly than it was, one has to assume that it was written for the purpose of being broader. There's, it doesn't make any sense otherwise. Then that does give authority to the department to take the steps. You don't have that in the OSHA case, that's certainly what the Court said. But I think here you have a different statute that provides.

**[00:34:57] Jeffrey Rosen:** Charlie, let's pick up on your argument that in May, President Biden ended the use of Title 42 at the border, on the ground that COVID-19 no longer represented a national emergency, and yet we're supposed to believe that three months on, COVID-19 remains so much of an emergency that the White House can forgive loans. Tell us about the legal significance of that determination, and how you think the Court will treat it in this case?

**[00:35:21] Charles C.W. Cooke:** Well, there are a lot of laws on the books, far too many in my view, that confer upon the executive branch broad powers when we have an emergency. Now, a lot of these laws, predated 9/11, a lot of these laws were actually written during the Cold War. And they're sprawling, and, I mean, for example, a lot of what Donald Trump did while president on tariffs was the [laughs] result of emergency legislation. So you know, I would like to see these reigned in by Congress. They haven't been.

**[00:35:50]** But what they have in common, irrespective of whether they're good or bad or sensible or outdated or whatever, is that there has to be an emergency. And, you know, if you as an executive are able to declare anything as an emergency, then you've got an enabling act. You've got an act that says, "The president can do this if there's an emergency, the president can also decide whether there's an emergency, therefore the president can do whatever he wants in this area."

**[00:36:13]** Now, the law in question, the one we're debating, requires there to be an emergency. And that emergency apparently, is COVID-19. If the Biden administration across the board were arguing that the COVID emergency is so bad, that it is enabled to do anything it likes to mitigate it pursuant to statutory authorization, that would be one thing. But it's not. Back in May, the Biden administration ended the Title 42 program, which was much loathed on the left, because the underlying emergency, that being a health crisis, no longer obtained. That's not my

interpretation, it said this in court. Again, I thought that the Biden administration was obliged to end Title 42. I defended the Biden administration for this, because otherwise you just have this random 1940s health law that is being used to rewrite American immigration policy in violation of Congressional will, and that is that's a violation of Article I.

**[00:37:23]** But you cannot have it both ways. Joe Biden cannot, on the one hand, suggest that for the purposes of immigration, where it actually really matters, given that this is a transmissible disease, COVID is no longer sufficient as a threat to warrant emergency executive power, but on the other hand, COVID is so bad that two and a half years into the pandemic, when in most other areas, in most states, and in most federal law, it has been either rejected, or diminished in scope, that it applies to student loans. And especially that it applies to student loan transference from people who are on average healthier and wealthier and have better prospects, from to those people, rather, from people who are anything but, from people at the bottom of the economic spectrum.

**[00:38:18]** Again, I don't think this is a political debate. I agree entirely. The merits of this as an economic question or a social question or a political question, are irrelevant. But they do matter when it comes to this law, because the argument here is that COVID is so bad that people who have student loans are suffering, that they are now financially worse off than they would've been, and that the president has to use this law in the midst of an emergency that he says in other contexts doesn't exist to take an extraordinary step, a step that, you know, a, a, a trillion dollars, yeah, it's a lotta zeros. It's also, you know, one-thirtieth of our debt. It's a quarter of the annual [laughs] federal budget. This, to me, is selective. I call it Schrodinger's COVID. It suggests to me that once again that neither nor those who have authored this believe a word of what they're saying.

**[00:39:11] Jeffrey Rosen:** Thanks for that. Fred, Charlie just said Joe Biden can't argue that for purposes of immigration COVID isn't an emergency, but it is one for purposes of student loan debt forgiveness. What do you, what's your response?

**[00:39:23] Fred Lawrence:** That's exactly what they're going to have to explain if this does make it through court. We'll come in a moment to whether this will actually be able to court, and I think the answer will be something along the lines of, the nature of the emergency at the border is different from the nature of the emergency in other places, and that in fact what happened with respect to student debt, this is the, the last aspects of in fact an ongoing economic impact, on students, former students who have debt, which began with a pause, and now this last step is of a certain level of forgiveness. Not a complete forgiveness of loan. I mean, this also shows the political compromise that was involved, which is how one expects these decisions to be made. Not, not by a court making a decision of, of yes or no, but by the political process, making a decision of how much in balance and as opposed to what.

**[00:40:15]** Some of the issues that Charlie and I may disagree on, may agree on, as he says, are quite beside the point. The question is whether there's authority for the Department of Education to, to do this. So on a tactical level, will this be an awkward part of a court argument? Yes, of course it will be. "Isn't it true that you said the following thing in court, six months ago and now

you're saying this today?" Sure. But I think the way it will be explained is that the impact is different at different times, and the impact with respect to Title 42 was of what was happening at that moment, whereas the impact with respect to using the HEROS Act, is the cumulative impact of the full two and a half years of this crisis.

**[00:40:54] Jeffrey Rosen:** Charlie, you had a memorable section in your piece, *The Hidden Authority to Enact Everything Republicans Want*, where you said, "I spent a moment rifling through other federal laws like the Antiquities Act of 1906, which on its face was designed to protect Native American ruins from poachers, but if you dig deeper, you'll find it enacts a national ban on abortion." Give our listeners a flavor of that argument and why you think broad authority, could lead to unexpected results?

**[00:41:22] Charles C.W. Cooke:** Well, [laughs] I mean, obviously that was heavily sarcastic. It was the result of my having just read the OLC memo, which I, I don't think attempts to make a case on textual grounds at all, I don't think makes a narrow case at all. I think involves a lot of hand-waving. William Broad, who writes about the law among other things for the New York Times, said that even section three of the memo, which is the part that concludes that the president has the authority, doesn't really make much of a declarative argument at all. It sort of—I don't want to misquote him, but it sort of says, "Well, if certain circumstances obtain which probably don't but could, and if you read it in this way and if you zoom out a bit, then maybe the authority could plausibly, perhaps be found."

**[00:42:19]** And it just made me think of all of the other laws that we could treat like this, and frankly, that presidents have started to treat like this. Presidents of both parties, where they make a promise ... I mean, Joe Biden in 2019, before COVID, before anyone had ever heard of COVID, started saying that he wanted to do this. And when he did it last week, he said his promise was kept. That sort of undermines the idea that this was driven by COVID, justified by COVID, that the law was invoked by COVID. He also, when he was running for president, said that he would push it through Congress. He didn't say he would do it on his own.

**[00:42:59]** But Joe Biden has done what the last few presidents have done, which is decide he wants to do something, recognize that there is not the appetite in Congress to do it, and task his lawyers to look through tens of millions of words in the law books, find the ones that might plausibly be tieable to his aims, and then say, "Aha, I've found authorization." And this is the crux of our disagreement. I do not see this as an arguable reading of the HEROS Act. I do not see this as a narrow dispute over statutory meaning. I see this as knowing, a willful violation on the part of the president, of his oath of office. And I think at some point Congress, again, Congress has a great deal of blame, is going to have to do something about this, this behavior that we're seeing from presidents who are repeatedly getting away with it and making a mockery of the system.

**[00:44:06] Jeffrey Rosen:** Thank you both for a vigorous discussion of the merits of the statutory argument for and against debt forgiveness. Let us turn now to standing. Generally this is a question that makes people's eyes glaze over, but in, in this case, several commentators have argued that there's a serious question about whether anyone would have standing to challenge the

legality of this act. Jack Hoover, in the Virginia Law Review, considers a series of people who might bring a challenge, including taxpayers, former borrowers, Congress, state government, and loan servicers, and says that none of these parties could assert Article III and prudential standing. Fred, as clearly as you can, 'cause we all know how, how technical this question is, tell us why you think that there might not be standing to challenge this forgiveness?

**[00:44:55] Fred Lawrence:** Jeff, it might be useful, instead of saying, you know, what is standing, to say why is there a standing doctrine? 'Cause you're right, nothing makes law students' eyes glaze over, let alone the general public, faster than talking about standing. But there's a reason we have a standing rule. Our courts, as a matter of constitutional law, and I would say as a matter of very good policy, are courts that are designed and authorized to decide disputes, cases in controversy, to use the constitutional language. It's not a decision-making body, it's not an advice-giving body.

**[00:45:29]** There's a famous story in the early days of the republic of President George Washington asking the court for an advisory opinion about some matter, and the court says, "We're not in that business." And by the way, there's nothing undemocratic about courts doing that. In the commonwealth of Massachusetts, for example, the Supreme Judicial Court does in fact give advisory opinions, but our federal courts do not. And I think there's a good reason for it, because we want issues that come before courts to be actual cases, actual controversies, where somebody was directly hurt and then brings a lawsuit about that, and that's what courts adjudicate.

**[00:46:03]** In a way, the most honest group with standing, if you will, and I'll stay in a moment why that, it doesn't work, would be all taxpayers who could say, "We're having to spend this money for student debt relief, and that's not what we wanna do." And the court I think also for good reason has been very wary, in fact, extremely restricted on the use of taxpayer standing. Why would they do that? Because broad taxpayer standing turns the courts into the political forum. We have a political forum, it's called the ballot box. If you don't like what the administration has done, you ought to vote them out. If you don't like what your member of Congress has done, you oughta vote them out. But you don't go to court in order to challenge the policy of a statute. The Congress or the policy of a regulation pursuant to a statute, in this case.

**[00:46:52]** So, that brings us back to the question has somebody actually been hurt? I think individuals are gonna have a very hard time saying that. This does not hurt any particular individual. It's a policy decision. Like any policy decision, it has winners and losers. It has a lot of money involved, so it's got some winners and losers who feel very, very strongly about it. That doesn't change the underlying question of whether somebody has the right to sue.

**[00:47:17]** One other issue that's come up in terms of who might sue, there's been a rising trend recently of Congress, members of Congress or one of the houses of Congress bringing suits, and of course one of the things that's been written about, should either or both houses of Congress, change the party in control as of the November elections, it's plausible that as of January of 2023, that house, with a Republican majority, might seek to bring a lawsuit on this.

**[00:47:40]** Let me share with you what Professor Vicky Jackson wrote about this, I think she's got this one right. And she said, "Courts declare winners and losers based on legal principles. Legislatures should be the form of good political compromise. To expand the capacity of congressional actors to litigate political disputes with the executive branch is not only a departure from our existing practice, but risks being fundamentally corrosive of whatever hopes exist for regaining a sense of moderation, compromise, and respect for one's opposition in Congress. If there's a debate about this issue, by all means let's have it, and Republicans in the House and Senate ought to express their opposition of what the administration is doing. And candidates who run for president in 2024 might express that as well. But not by way of litigating it, because there's no individual who can assert this claim before the court.

**[00:48:33] Jeffrey Rosen:** Charlie, Fred has made the case against taxpayer standing and congressional standing. Other groups include loan servicers, who Jack Hoover concludes would be the most likely plaintiffs, because broad student loan cancellation would strike at their pocketbooks, or former borrowers, and in fact a coalition of small business owners who successfully challenged the mask mandate has also announced their intention to sue. Which group or individual do you think is most likely to have standing?

**[00:49:01] Charles C.W. Cooke:** I do think this is a tough one. And I should say I mostly agree with the description we just heard. And I agree that we should have a, a narrow set of standing rules for precisely the same reason, which is to avoid turning the courts into arbiters of purely or mostly political disputes. I also think that this presents the specter of an enormous hole in our constitutional order. And we're having a discussion here about standing. So before I answer your question, let's just stipulate that nobody has standing. That is true, or would be true, irrespective of the merits of this case.

**[00:49:58]** So let's stipulate, too, that we agree that this is a terrible and illegal move with no statutory warrant whatsoever. What we are essentially saying in such a circumstance is that the president of the United States is able to violate the law and there's nothing anyone can do about it in court. I mean, suppose for example that President Biden, in flagrant violation of Article I, increased taxes on his own, and the IRS started sending out notices reflecting this and processing returns on the basis of executive-led changes to the tax code. There would be no one, I hope, in America who would say, "Yes, of course he has that power," that much is made clear by Article I. But who would have standing? Maybe nobody. That's horrifying. That is absolutely horrifying. And I'm afraid that if that is the case, then the only remedy left is impeachment. If the executive branch is freelancing [laughs] and violating congressional prerogatives, then it has to remove him.

**[00:51:15]** So if we are looking here at a situation in which there is no likely standing for a plaintiff, then I think Congress has to impeach President Biden. It won't, but at some point it's going to have to impeach a president, or this is going to keep going.

**[00:51:28]** Now, on, on the specific question, I agree that the standing issue here is tricky. And also the standing issue has been made more tricky deliberately. President Biden is smart to have set this up so that would-be recipients of this largess have to actively apply for it. It's not the case

that students will log into their bank account or their student loan account and see the number drop by 10 or \$20,000. They will have to affirmatively ask for it, and that actually takes a lot of potential avenues for standing off the table, because you aren't suddenly hit with, say, a state income tax bill for the money that you've received against your will. The court would then say, "Well, hold on, mate, you applied for it. You incurred that liability yourself."

**[00:52:17]** Also in last year's American Rescue Plan, last March, Chuck Schumer pushed in at the last moment a line that exempted from federal income taxes until 2026 any student loan cancellation. So there's no federal income tax standing case either that could be brought by the recipients of this even if they applied.

**[00:52:42]** So they've been quite clever, in laying the, the wayposts and the groundwork for this. And I find it difficult to see who has been directly harmed. I do think that there is a chance that the court will accept a case from Congress, and I think that would be appropriate. We see in recent cases, the Obamacare mandate cases, for example, where Congress managed to get in front of, of the court, and Congress is what's being directly harmed here. [laughs] Article I is what's being directly harmed, and it would not bother me at all to see that happen, because that's not really taking a political question so much as it's litigating separation of powers, and I think the Supreme Court has an important role to play in superintending separation of powers.

**[00:53:28] Jeffrey Rosen:** One last beat on standing, and then closing arguments. Fred, the trend in recent years at the court has tended to be to accept standing. A couple of exceptions, the Obamacare case, where the court held state and individuals have no standing to block a federal individual mandate of zero dollars, 'cause there's no penalty. But generally when it's an important case with a lotta money involved, the court's been taking it recently. Predictively, do you think the court will take this case on standing grounds or throw it out?

**[00:53:57] Fred Lawrence:** The court's gonna have, first of all, the benefit of two sets of lower courts to, to help them think it through. Some, some district judge, who right now is minding his or her own business is gonna be the first person to have to decide this, or quite possibly a number of them, 'cause there could be a number of cases that come up, so we'll have a chance to see this aired out.

**[00:54:15]** I think the arguments against standing are, are really quite, overwhelming here. And I think that the, the court would be well-advised not to get into the business of saying, "If it's important, then the court has to decide it." We've never had a system like that. The court has the role of interpreting the Constitution and laws of the United States where there's an actual case in controversy. That's their limited mandate. That's what, my hero, and, I think, Jeff, one of your heroes, Louis Brandeis, made very clear about, that courts should do the smallest thing. Justices like Felix Frankfurter, who seems to be much more spoken about recently. He, he kind of faded from the scene for a little bit, but talking about the, what the great scholar Alex Bickle called the passive virtues of the judiciary have made something of a comeback.

**[00:55:06]** I have to smile a bit, and I suspect that my friend Charlie will share this smile, that the shoe is most decidedly on the other foot and literally the left and right foot. It was about half



a century ago when it was the left that was seeking to end-run around the political process and looking for courts to play all of these roles, and many of us said, even if we shared the outcome of those decisions, that was a bad strategy. It was a bad strategy tactically and it was a bad strategy constitutionally.

**[00:55:34]** So now the shoe is on the other foot, It doesn't appeal to me any more now than it did then. Then, I guess I liked the results of it, so I made my peace with it. Now it's even harder, because I don't necessarily like the results of it. I think it's time for this court to say this is not how these things will be decided. If nobody is harmed, then we have two political branches, and they're going to have to figure it out.

**[00:55:54]** Just to return to, to Charlie's point about the horrific outcome of there being no remedy against a president gone rogue, of course there, there are two major remedies against a president gone rogue. He mentioned one, impeachment, but that's not the major one. The other one is the ballot box, and by ballot box I don't just mean every four years in election, I also mean the legitimacy that the president has. There's a limit on what a president can accomplish in part by what the public will, will accept. If this is overwhelmingly unacceptable to the public, we'll see that at the midterms, and we'll see that in many other ways that will make it very hard for this president to function. That's called the political process. You bet it is messy. But the answer has never been to tee this issue up before nine unelected people to make the decision.

**[00:56:39] Jeffrey Rosen:** Charlie, your prediction about whether the court will or won't hear this case on standing grounds? Fred, mentioned, Justice Frankfurter, who emphasized the passive virtues. Chief Justice Roberts has been a Frankfurter fan recently, and in the Dobbs case he invoked Frankfurter, "A thoughtful member of this court, who emphasized that the most important thing we do is not decide." But Chief Justice Roberts didn't get anyone to join him in that case, and I don't see a effulgence of Frankfurterian, passivity taking sway on this court. So, you think the court will hear it or not?

**[00:57:13] Charles C.W. Cooke:** I find it difficult to predict, and I'm not an expert in this area. There are so many different theories of standing that I've heard, and it's hard for me to, to evaluate them. You know I don't so much have the problem of, of sort of turning off and, and rolling my eyes when standing comes up, I have the problem of drinking from a fire hose [laughs] 'cause it's such a, a complicated topic. So I'm not sure how useful my prediction will be. I predict that the courts will take it. Whether or not it will get up to the Supreme Court, I don't know. But the number of challenges that will come in, one court is going to take them. If there's a split on it, the court above it might say, "No," and then the case will be done.

**[00:57:56]** I do think there's been a harm. I do think there's a real harm to Congress, and to the system, and I'll just say in, in closing that while I accept that we have a, a democratic system and I accept that that is a check and an important check, we don't just rely on democracy in the United States. We have a constitution for a reason, and we require our politicians to take an oath to it. And they don't say, "Well, I'll take an oath to this constitution, but ultimately, I'll do what I want, and then I'll see how that plays out in the opinion polls or in the midterms, or if and when I run for reelection." There is an expectation, that our politicians will fulfill that oath.

**[00:58:41]** You know, I'm everyone's favorite person this week, 'cause I've written both that Biden should be impeached over this, and that Donald Trump is completely unfit for office, once again, for what he's been saying on TruthSocial about being reinstated as president. Now you could say, "Well, yeah, Trump says he wants to be reinstated as president, tried, Trump tried to stay in office last time around, but, you know, the democratic system will" ... Yeah, that's true, that's true. That is ultimately true. That's the ultimate backstop. But I think we should expect more from our politicians if they take an oath, and this to me is a violation of Biden's oath. And so I don't have so much of a, a structural problem with Congress impeaching him or with the courts stepping in, but whether they will, it's very difficult to say.

**[00:59:29] Jeffrey Rosen:** Well, it's time for closing thoughts in this superb discussion, and in the crisp, beautifully-constructed paragraphs that both of you are offering We The People listeners, please tell them why you believe that the HEROS Act of 2003 does or doesn't allow President Biden to cancel the principal amounts of student loans. Fred, first closing thoughts to you, why does the HEROS Act authorize loan forgiveness?

**[00:59:53] Fred Lawrence:** HEROS Act was written at a time of national crisis and emergency and specific did not limit its own reach. It did not put in sunset language. It instead created an authorization to deal with a particular ongoing problem that the American higher education system has to face which is a lot of debt that students incur. That was considered to be one of the things that would have to be dealt with at a time of any national emergency, and that is what has happened in this incidence.

**[01:00:23]** Do I doubt that the president wanted to do this before he was president and before we knew about COVID? No, of course I don't doubt that. But one of the things that a president will always do is to look at circumstances to try to accomplish an agenda. You can't twist it to, to accomplish something that's not legally justified. In this case, it is. In this case, it causes him to reach back to a statute that dealt with precisely the question of indebtedness, the last time Congress dealt with it, and they dealt with it in a robust and an open way. And the Department of Education has now implemented that to the current time, in a way that's appropriate to our time, our crisis, our circumstances.

**[01:01:02]** If Congress thinks this has been overreaching, Congress will have to respond to that. And they very well may. Or for that matter, Congress may wish to appropriate even greater funds to say that the crisis is even greater with respect to higher education, separate from COVID-19. But for right now, the issue in front of us, I believe it is authorized, I believe it is a reasonable interpretation of it, and that the Department of Education should be permitted to implement what President Biden has announced.

**[01:01:26] Jeffrey Rosen:** Charlie, the last word is to you. Please tell We The People Listeners why you think the HEROS Act does not authorize President Biden to cancel student debt.

**[01:01:34] Charles C.W. Cooke:** I think the HEROS Act does not authorize President Biden to cancel student debt because no one 'til about seven minutes ago considered that it did, because the OLC memo outlining the case is weak, because waive or modify, as was confirmed last year

by the Department of Education itself, does not allow the executive branch to reduce the principal or interest of student loans, because students have not been placed in a worse position financially in relation to that financial assistance because of a national emergency, and because the national emergency that's being invoked does not exist according to the Biden administration itself in its last foray into federal court. And so the law doesn't provide for it, and even if it did, the conditions that the law puts, on its use, are not met.

**[01:02:26] Jeffrey Rosen:** Thank you so much Fred Lawrence and Charlie Cooke for an illuminating, thoughtful, and wonderful discussion of the statutory and legal arguments about the forgiveness of student debt. Fred, you're speaking from us to Paris, so I'll say merci on behalf of We The People listeners, and Charlie, that was-

**[01:02:43] Fred Lawrence:** [inaudible 01:02:43]-

**[01:02:44] Jeffrey Rosen:** It was really magnificent, and, and both of you are just models of reason and light, and you've taught us all a lot. Fred, Charlie, thank you so much for joining.

**[01:02:58]** Today's show was produced by Melody Rowe and engineered by Dave Stotz. Research was provided by Sam Desai, Sophia Gardell, Samuel Turner, and Lana Ulrich. Please rate, review, and subscribe to We the People on Apple and recommend the show to friends, colleagues, or anyone, anywhere, who's eager for civil, thoughtful, and illuminating constitutional debate. And always remember that the National Constitution Center is a private nonprofit. We really on the passion, the generosity, the engagement, the devotion to lifelong learning and civil dialogue of people who are inspired by our nonpartisan mission, and who wouldn't be? You can support the mission by becoming a member at [constitutioncenter.org/membership](https://constitutioncenter.org/membership), or give a donation of any amount to support our work, including this podcast, at [constitutioncenter.org/donate](https://constitutioncenter.org/donate). On behalf of the National Constitution Center, I'm Jeffrey Rosen.