

Across the Aisle: Excerpts from Midyear's Special Podcast Recording Session

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The Federal Bar Association and the National Constitution Center hosted the bipartisan discussion “The State of Federal Judicial Nominations: An Assessment of the First Year of the Trump Presidency” to a packed room at the 2018 FBA Midyear Meeting in Arlington, Va. National Constitution Center President and CEO Jeffrey Rosen moderated the conversation between John Malcolm, vice president at the Heritage Foundation, and Elizabeth Wydra, president of the Constitutional Accountability Center, on the state of the federal judiciary and the future of the law in light of appointments by the current administration.

The April 5, 2018, recorded session was part of the National Constitution Center weekly series on constitutional debate, *We the People*, and is available in their podcast library. The transcript below has been lightly edited for style and sense.

Judicial Nomination

JEFFREY ROSEN: John, the Heritage Foundation has been credited with helping advise President [Donald] Trump on his judicial nominations, and you are the point person at Heritage, as the man who, more than anyone else, according to most press accounts, along with your colleagues at the Federalist Society, has helped to shape President Trump's judicial picks. Tell us about how you made your recommendations, what your role was in helping the president, and how significant the president's reliance on Heritage and the Federalist Society in making his picks is for the future of the federal judiciary.

JOHN MALCOLM: So how that all came about is an interesting story, which is when then-candidate Donald Trump was running against, I think it was 17, 16 other Republicans, all of whom had run for office and been elected before. He came to a meeting in Washington, which included former president of Heritage Jim DeMint, and I think Donald Trump surprised him by turning to him and saying, in this meeting, “Will you put together a list for me of Supreme Court justices?” To which Jim DeMint said, “But of course we will.”

After the meeting, Donald Trump went on one of

the MSNBC shows or Fox business news with Neil Cavuto and announced that the Heritage Foundation and those federalist people were going to be coming up with a list for him for the Supreme Court.

And we discussed it and decided we really couldn't do that, because if we handed a list to Donald Trump and only to Donald Trump, it would likely be deemed to be an in-kind campaign contribution. But what we could do is we could publish something to the world. So I actually wrote a blog called “The Next Supreme Court Justice,” which was very shortly after Antonin Scalia had died. I deliberately kept the list under-inclusive and said these are the sorts of names of people in character or people whom we would like to see on the Supreme Court, and we published that list. It was actually as available to Bernie Sanders as it was to Donald Trump. I'm proud to say that seven of the eight names on my list are on the president's short list now.

The president was very, very kind about crediting the Heritage Foundation with helping to inform his thinking on these issues, and since that time we, along with a host of others, including, obviously, people at the Federalist Society, but others as well, have, when vacancies occur, when we think we have somebody who would do an excellent job we will send that name to the White House. They gratefully acknowledge receiving it, and how much influence it has is anybody's guess.

JEFFREY ROSEN: Great. Thanks so much for that. Elizabeth, how unusual is this role of the Heritage Foundation and the Federalist Society? Under President [Barack] Obama, did the Constitutional Accountability Center or the American Constitution Society play a similar role, and what should we make of the fact that the president is relying on Heritage and FedSoc to inform his decisions?

ELIZABETH WYDRA: You know, I don't think there's anything inherently wrong with the president seeking outside advice from groups. Certainly there have been, under Democratic and Republican presidents, organizations who weigh in. And look, if Donald Trump asked Constitutional Accountability Center for a list, I'd be happy to give him a list of folks I think would follow the Constitution and be faithful to its

text, history, and values. He hasn't asked me, or my organization, but if he did I'd be happy to give him some names. And certainly, under President Obama, there were many groups that put forth names that they thought would be good people to be on the federal bench.

I can't recall any instances where there was such sort of outsourcing in such a complete way as is apparent. I should say, I don't know the inner workings of the Trump White House. I'm not sure even the Trump White House knows the inner workings of the Trump White House. I can't say exactly how that process goes, but, certainly, the president has an obligation, under the Constitution, to consider nominees, to think who is going to respect the law, and decide for himself. So while we might be tempted to blame John if we don't like some of the nominees, the truth is that we blame Trump because these are Trump nominees.

And I think that it's very clear what he thinks about the type of judge he wants on the bench. During his campaign he had explicit litmus tests that he articulated. He wanted someone on the Supreme Court who would strike down *Roe v. Wade*, someone who would treat evangelical Christians well in litigation, someone who would be, really, what I consider to be hard to the right of what a lot of Americans support. They want a judge to be supportive of civil rights, supportive of women's rights, make sure that the Constitution's promises of liberty and equality are a reality for all.

So, you know, these are Trump's justices through and through, and he has also said, according to his White House counsel, that he picks judges he can relate to. If you're a Trump supporter, that might be something you cheer. But if you are concerned by the apparent disregard that Trump has for the rule of law and for the Constitution, thinking that there are judges that he's picking that he can relate to might cause you some concern.

Vacancies

JEFFREY ROSEN: John, [Federal Bar Association Past-President Kip T. Bollin] said, in his introduction, that there are a number of district court vacancies that remain, and yet I quoted Sens. Ted Cruz and Chris Coons as saying that the Trump nominations were made at "record speed." Can you give us some stats, how many vacancies were there under president, how many under President Trump, how quickly did he nominate, and how quickly did the Senate confirm, and how many vacancies remain?

JOHN MALCOLM: Sure. If I could very quickly respond to something Elizabeth said. I lot of that I consider, frankly, political commentary, which is fine. That's her right. The only thing where I think is worthy of commenting is this notion that somehow the president has outsourced the selection of judges. I mean, when President Obama was President Obama, he had experienced White House counsel, Neil Eggleston and others, who had certainly been around a long time and have a network of people and know the kinds of judges, across the country, through that network, whom he wanted to nominate. And Don McGahn, his White House counsel, is the same. I mean, he was a federal election commissioner, he's been involved in conservative legal circles for decades. You know, he was a partner at Jones Day with people like Noel Francisco and Greg Katsas and Mike Carvin. You know, he knows his own mind, and the thought that this has somehow been outsourced to me or to the Federalist Society, I just think is wrong.

Now with respect to what you just said, it depends on how you look at it. So I will agree that Donald Trump has set a record pace

in one very discrete area, which is that he's had a total of 29 judges confirmed, which is by no means at a record pace. But in his first year he had 21 judges confirmed, which is also by no means a record place. Thirteen of those judges were federal courts of appeals judges, and that was a record for federal courts of appeals judges confirmed during a first year of a presidency. He, of course, also got Associate Justice Neil Gorsuch confirmed, but only seven district court judges, which is a paltry number.

I looked yesterday at the number of already announced current and future vacancies on the bench. There are 179 vacancies. There are 57 pending nominees, one of whom is actually sitting here in the room today, and that is a big problem. I would note, for instance, that in September of 2012, when the Democrats controlled both the White House and the Senate, they declared that there was a judicial vacancy crisis because there were 78 vacancies. I can be happy to go into why and how Trump judges, and, for that matter, executive branch nominees, are being confirmed at a glacial pace, but I think I will turn it over to Elizabeth.

JEFFREY ROSEN: Give us your sense, Elizabeth, about whether the pace is record or glacial, and given the [Republican] control of both houses of Congress and the White House, you know, why isn't it quicker? Give us a sense of the current state of the nomination process under Trump.

ELIZABETH WYDRA: Well, certainly the pace is a record-breaking pace. I mean, that is just a fact, and while John might want to dismiss what I'm saying as political commentary, I'm not really sure what that means other than the fact that it's dismissive. But I assure you that it's not just my opinion. Certainly all the folks who look at these numbers have looked at them and said this is a record number of approvals for these nominations that we've seen, and part of that is obviously because you have the same party controlling the Senate and the White House. And so, of course, that's more likely to happen than when you have, as we saw in the last year of President Obama's presidency, a Senate controlled by a different party than the president.

And part of the reason there are such extraordinary numbers of vacancies is exactly because, during that last year of President Obama's presidency, the Senate Republicans did a very good job of not doing their job, with respect to President Obama's nominees, most famously when he put forth then Chief Judge of the D.C. Circuit Merrick Garland to fill the vacancy on the Supreme Court, left when Justice Scalia passed away. The Senate Republicans refused to give Garland a hearing or a vote on his nomination to the Supreme Court for nearly an entire year, leaving the Supreme Court short-staffed during that time. So part of the reason there are so many vacancies for Trump to fill is because of this obstruction with respect to President Obama's nominees.

Now I think that part of the issue that we've seen—and this gets a little bit into the weeds of setup procedure—we've had a lot of senators express concern that the Senate Judiciary Committee has been, in its effort to rapidly confirm these nominees, having several court of appeals judges being considered in the same committee hearing at the Judiciary Committee. Even in some instances, nominees going to the Judiciary Committee even when the home state senators for that seat have not submitted their blue slips, which is a Senate procedure that indicates that the home state senators have agreed to go forward with these nominees. And tradition has been that the Senate Judiciary Committee will not move forward unless you get both blue slips returned from the home state senators.

So it's a question of both the substance of the nominees that we need to look at—and I know we'll talk about that more—as well as the process by which these nominees are being confirmed. And the Constitution sets forth a specific process for judges to be appointed to the bench, and the Senate is supposed to advise and consent to the president's nominees. And so that's why it's very important for the president to properly consider these nominees, and that's why it's required, under the Constitution, for the Senate to be able to properly deliberate, get a transparent record for these nominees, be able to consider it properly, and then give its advice by voting that nominee out of committee, or not out of committee, and then voting up or down on the floor of the Senate.

The Quality of the Nominees

JEFFREY ROSEN: Thank you. John, Elizabeth raises an interesting possibility. We've heard for years that the confirmation process is broken and is too slow, and she's suggesting maybe it's too fast and nominees are being railroaded through. Give us your estimation of the quality of the nominees. Most have been confirmed. A handful, three or so, have withdrawn. Are unqualified nominees being confirmed or is the process working as it's supposed to work?

JOHN MALCOLM: Sure. Well, when I was referring before to political commentary from Elizabeth, it wasn't meant to be dismissive. It was a comment that the president is interested in nominating judges who are going to roll back civil rights and Constitutional rights.

With respect to the so-called "record pace" at which judges are being confirmed, these are just facts, that during the first 13 months of his presidency, Ronald Reagan had 43 judges confirmed. Bill Clinton had 33 judges confirmed. George W. Bush had 37 judges confirmed. Donald Trump had 23. Elizabeth would, of course, point out that that means that Barack Obama had a fewer number, and that's true. He had 17 judges confirmed in his first 13 months. But, of course, Donald Trump had 86 nominees for the bench after 13 months. Barack Obama had only submitted 42 names. So almost 50 percent of Barack Obama's nominees got through in his first 13 months. A quarter of Donald Trump's nominees have gotten through.

And I think that, for the most part, these people are outstanding. There are three names that have been withdrawn. There really are individual circumstances with respect to each of those. I would be happy to talk about those. But the names of the individuals who have been nominated and so far confirmed are—they're illustrious. I mean, and many of them—nine of them, I think—had Supreme Court clerkships themselves. They were distinguished practitioners. A number of them have already served on the judiciary, people like Amul Thapar and David Strauss and Joan Larsen. These are spectacular people.

And, by the way, the reason why the pace is so slow is not a mystery. So it's true, the filibuster is gone, and at least with respect to appellate nominees, in part, the blue slip process is now advisory. That's not, by the way, a new rule. How the blue slip process has been honored or not honored has waxed and waned over time. I will spot that the one chairman of the Senate Judiciary Committee who said the blue slip was an absolute veto, one Senate veto, was Patrick Leahy, for a brief time, when he was chairman of the Judiciary Committee.

But what the Democrats have left, and what they have taken full advantage of, is the cloture process. They have insisted upon debate and cloture votes on almost all of their nominees. I would note that they have invoked cloture votes on 50 executive branch nominees,

29 out of 29 judges. Barack Obama, during the same period of time, had cloture votes for far fewer nominees on nine of his executive branch nominees and only two of his judges. By the way, there have been no cloture votes on any of the previous four president nominees.

And lest one think that it's because all of these people are highly controversial, out of those 29 times in which cloture was invoked in order to eat up time on the floor, eight of them were subsequently confirmed unanimously. Two of them had been renominated. They had been originally nominated by Barack Obama, and one of them, a circuit court judge, had a single no vote. This is purely a delaying tactic to gum up the works, and it's been quite successful so far.

JEFFREY ROSEN: Great. Elizabeth, your response to those thoughts and then your judgment about the state of the confirmation process, now that there is no filibuster and no firm blue slip, but there is still a cloture, is the bottom line that if one party controls both houses they can get folks through, and if they don't then they can't get anyone through? Or where are we now?

ELIZABETH WYDRA: Well, I think we're in a space where it's not even just one party. You know, we saw Republican Sen. John N. Kennedy [R-La.] expressing great concern with the vetting process by which some of these Trump nominees were coming to the Senate Judiciary Committee. And if the process perhaps seems slow because there are some senators who object to the attempts to ram through nominees and want to have a little more time to consider the record, well, you know, look to Trump himself, who said, to Sen. Kennedy, this Republican senator, that, "Look, if you think my nominees are bad, then do your job and send them back."

And so in order to do that you need time to actually go through people's records. And we're also seeing some instances where people have not been initially fully transparent. I'm not going to ascribe that to any ill intent that, you know, I don't know. It could be people do a lot of speaking events. People write a lot of articles. It may very well be an honest oversight. But the fact is that we've had instances where people have not disclosed controversial writings, have not disclosed potential conflicts of interest from nominees.

So the importance of going through the record is clear, and I think the three withdrawn nominees that John mentioned show the importance of this vetting process and how, perhaps, it is failing with these Trump nominees. You had two nominees, in particular, that raised very serious substantive concerns about whether they were fit to be on the bench. One of them, who, again, was withdrawn, wrote something that appeared to defend the early form of the KKK. Another nominee said that transgender children were proof that Satan's plan was working.

When you have nominees like this get through the vetting process at the White House, to the Senate Judiciary Committee, that raises an enormous, waving-in-the-wind red flag about the types of nominees who are coming forward. And that's just what we know about.

So I would absolutely implore senators of both parties to look very closely at these nominees, to make sure that we're putting people on the bench who will be absolutely faithful to the idea of impartial justice for all, no matter your color, your creed, whether you're rich or poor, straight or gay. We all deserve, and are entitled under the Constitution, to impartial justice, and that's what a nominee who is going to serve for life on the federal bench should be committed to.

JEFFREY ROSEN: Great. John, your thoughts, and I understand Elizabeth has raised it on these three withdrawn nominees.

She suggests that the fact that they were nominated means the vetting process is broken. Does the fact that they were withdrawn show that the confirmation process worked, or what do we make of this?

JOHN MALCOLM: Well, I certainly agree with one thing Elizabeth said, which is that you want to have judges that are going to be fair and impartial and follow the law, and that applies whether you are gay, straight, transgender, black, white. You know, whoever comes before you, a judge should faithfully apply the law with equal justice under law, and I wholeheartedly endorse her comments on that, and would hope and expect that every judge who is nominated and confirmed—and I also agree with her that it is not supposed to be a rubber-stamp process. She may object to that when it happened to Chief Judge Garland, a fine individual. You won't hear me saying anything bad about him. But, you know, I agree. It's not supposed to be a rubber-stamp process.

I don't think there's been any real problem with the vetting process. I'm not working in the White House. There have been almost 100 nominees if you include those who have been confirmed and those that are pending nominations. It's a fairly rigorous process. I haven't gone through it, but I have talked to plenty who have.

I think the three situations sort of need to be looked at individually. I don't really know Brett Talley, and I haven't read his blog. That's the one where she said he was sympathetic, in some way, to the KKK. I don't think, based on what I have read, that that's an accurate characterization. But I can't really comment on Brett Talley's situation.

Jeff Mateer, who is the person who gave a speech that she said was not forthcoming and said that somehow transgender children are proof of Satan's plan or something like that—you know, I know Jeff Mateer, and I have actually watched that entire speech. He certainly used language that I would not have used, but I do not believe that that's a proper characterization of what he said. He was talking about religious liberty in general, and the threats to religious liberty by attacks from the left, and that that was part of Satan's plan. Again, he was speaking at an evangelical church, so, you know, hardly atypical language for that audience.

And with respect to Matt Petersen, who is the third nominee who was withdrawn, I happen to have been in the Senate hearing room when he had his very poor performance in response to questions from Sen. Kennedy of Louisiana about motions in limine, et cetera. I would not have said that that was a vetting problem at all. I would have said that it was a terrible preparation problem. I don't know Matt Petersen, but Matt Petersen was a University of Virginia law grad, honors graduate, served on the law review, worked at Wiley Rein & Fielding, a fine firm. He had been a federal election commissioner for eight years.

I do not fall into the school of people who believe that every district court judge has to have been a litigator, so I think he would have made a fine district court judge. As an FEC commissioner, they conduct all sorts of quasi trials, much like district court judges do. I will say, however, that this was not the first time that Sen. Kennedy had asked questions like this, and whoever was preparing [Peterson] for that hearing did not do a good job.

The Future of the Constitution

JEFFREY ROSEN: Let us turn from this important question of the confirmation process to the substance. Elizabeth, President Trump will, in fact, successfully confirm a great number of appellate and district court judges. Lower court judges hear most cases in the

federal system. The Supreme Court hears only 80 cases a year, and most constitutional and other questions are disposed at the lower court level.

A broad question, and you can dig into particular areas. What will the effect of Trump judges be on the future of the Constitution, and just to start off I'll say in areas like civil rights and civil liberties?

ELIZABETH WYDRA: I think that the substantive areas of the law that will be affected by Trump's nominees are really important for people to think about, because exactly as you said, so much of our attention goes to the Supreme Court because, obviously, they take the highest-profile cases, they set the law for the nation. But the vast majority of cases never make it to the Supreme Court. They end up being decided by the federal courts of appeals across the country. And obviously, of course, before there they go to the trial court level in the federal district court.

So these lower court nominees really are the ones who, perhaps even more than the Supreme Court, issue rulings that define our daily lives. And so these nominees, while they might not get the attention of Supreme Court nominees, are incredibly important.

Now I think that some of the areas that we certainly are looking at are civil rights. Certainly when it comes to women's reproductive rights, that's something that we have concerns about, understanding that the Constitution protects a woman's right to choose whether to have an abortion or not, that there is protection for contraception access. Whether or not judges, regardless of their personal opinions—and I certainly think that you can have personal, for example, religious beliefs that you have in your personal life, that you don't yet necessarily impose through your rulings, so I'm not saying there's any disqualifying fact that you might personally believe that, but I believe there's a constitutional right to those rights to choose and to access contraception, so that's one thing.

Also, I think with respect to racial justice, across the board from housing discrimination to employment discrimination, and, importantly, in the criminal justice system—one of Trump's nominees to the Seventh Circuit Court of Appeals, a white lawyer from Wisconsin, refused to say in his Senate Judiciary Committee [hearing] that there is implicit racial bias in the criminal justice system, which is really concerning when you have someone who is going to be on the bench when there is such demonstrated data that shows that people of color are much more likely to receive, for the same crime, a much stiffer sentence, that they are likely to be prosecuted at a rate more than white people. So the idea that you wouldn't recognize that there is this racial bias in the system, even if you say "I, myself, will not be biased," is very concerning.

I think that another area which gets a little bit more in the weeds, but certainly was raised during the Gorsuch hearings, and I think will probably be an ongoing theme with the Trump nominees, is the respect and deference given to agency decision. You know, there is this idea that the courts, when the agency has a reasonable decision about, for example, environmental protections, consumer protections, civil rights or education protections, defer to an agency judgment if it's a reasonable interpretation of the statute they're implementing.

And a lot of Trump nominees, including now Justice Gorsuch, have expressed some hostility to the administrative state, which I think is going to be an issue that we continue to explore, and is a great topic to explore during the confirmation hearings, which is really where we get some of this information. People often engage

in kabuki theater of some sorts, where they don't really give full answers. I think that I would like nominees from all ideological stripes to be more forthcoming in some of their hearings so we can actually get a better sense of their views, particularly when it comes to the district court.

But those are three areas that we particularly are concerned about, but all of the areas of the law where we see troubling trends from the Trump administration itself, a disregard for democratic institutions, for the rule of law, for protections. For example, we just got the ban on transgender individuals serving in the military. There's obviously been many iterations of the, in my opinion, discriminatory travel and refugee ban against Muslims. And so when we see those disturbing trends in the Trump administration, we are concerned that they will be reflected in the nominees that he puts forth, instead of nominees who will follow the Constitution's text, history, and values.

JEFFREY ROSEN: Thank you for that. A lot there, John, for you to respond to. Elizabeth raised the issue of reproductive choice, criminal justice, racial justice, the administrative state, and then this very broad question of whether Trump judges are more or less likely to check executive overreach. Your thoughts in all of those areas and why you believe the Trump judges are more likely to get the Constitution right.

JOHN MALCOLM: Well, let me say a couple of things that I agree with Elizabeth on, at the outset, which is, she stated that one cannot overstate the importance of the lower federal court judges, particularly the federal courts of appeals, and I couldn't agree with her more. So, for instance, there are 13 federal courts of appeals, if you include the federal circuit. On the day that Barack Obama took the oath of office, the Democrats had a majority in terms of their judges having been confirmed on one of those circuit courts of appeals. No surprise to anybody in this room, it was the Ninth Circuit. On the day that Donald Trump took the oath of office, 10 of the circuit courts of appeals had a majority of Democratic-appointed judges. I am by no means denigrating all or anywhere close to all of Barack Obama's judicial nominees. A number of them are fine. Some of them are friends of mine, which I suppose might frighten Elizabeth a little bit.

ELIZABETH WYDRA: We all have friends on both sides of the aisle.

JOHN MALCOLM: Fair enough. It is true that several of the courts of appeals took a decidedly leftward tilt during the eight years of the Obama term in office. You either think that's a good thing or a bad thing, depending, to some degree, on your political stripes, your judicial philosophy about the Constitution. But it had a very discernable effect. For instance, here in Virginia, in the Fourth Circuit, the Fourth Circuit used to be deemed to be a fairly reliably conservative court. It most certainly is not now. There are 10 Democratic judges to five Republicans.

With respect to a number of the areas that she said with respect to criminal justice reform, let me say that I have frequently spoken in favor of criminal justice reform in a whole host of areas. You know, that is an area that divides conservatives, and I have, on many issues, fallen, if you will, on the leftward side of the criminal justice reform debate. What Elizabeth describes as being beyond peradventure in terms of the racial application of our criminal laws, I would say is a matter that is, in fact, open to debate. But, you know, that's neither here nor there. Look at the figures, and we're all learning more, and I think that's fine.

With respect to her fears about what's going to happen to *Roe v. Wade* or what's going to happen in terms of racial preferences or whatever it is that civil rights side that she might favor, at the moment *Roe v. Wade* and *Casey* are still the law of the land, and I would predict that lower federal courts would follow it. There are, of course, gray areas where people can decide.

And, you know, I am in favor of people who are originalists, who look at the Constitution through the eyes of the original public meaning of what those words meant at the time that they were ratified. I am a textualist. I think it's important to actually look at the laws that were passed by Congress through the bicameralism and presentment process, and not go combing through legislative history to find some statement by some senator that was said in the dark of night to an entirely empty chamber. Perhaps committee reports, when there is some doubt, are entitled to some measure of respect. You know, again, there are gray areas there, but I'm unapologetic for that approach.

She is right, absolutely right, in terms of the approach of judges in terms of deference to executive branch agencies. *Chevron* deference, *Auer* deference. There are judges, including Neil Gorsuch, when he was on the Tenth Circuit Court of Appeals, who have expressed real concern about the constitutionality of *Chevron* and *Auer*. *Auer* has to do with the deferences given to executive branch agencies in interpreting their own regulations. I think that there is a matter of fairness involved in that. *Marbury v. Madison* said that it is decidedly the providence of judges to interpret the law. And I am also concerned, whether it a Republican administration or a Democratic administration, about punting that responsibility to executive branch agencies, many of whom have a political bent or are captured by the industries that they regulate.

So I think that it is a core separation of powers issue, and it's one that ought to be debated, and it's a fair debate, and, frankly, if the president continues to nominate people who, like Greg Katsas and Neil Gorsuch, have expressed skepticism about *Chevron* and *Auer* deference, I say more power to them.

JEFFREY ROSEN: We have time for just a few questions from the audience, and one has to do with this last point, which is worth taking another beat on because it's so important. What impact will Trump nominees have on the administrative state and/or separation of powers? Elizabeth, it's arguable. You both suggested that this might be the area where the impact is greatest, and if the Supreme Court, with the addition of Justice Gorsuch and others, does rethink the constitutionality of the administrative state, what might America look like in five or 10 years, and, in some cases, might that favor liberals as well as conservatives?

ELIZABETH WYDRA: Yeah. So the issue of agency deference is something that is worth unpacking. We have important statutes. All the folks in this room, these lawyers certainly know. But for the benefit of our more general audience, we have important laws, including the Clean Air Act that ensures that the air we breathe is healthy, or at least healthy-ish, with the Clean Water Act, which ensures that there is safe water to drink, although, you know, we've seen, for example, in Flint, Michigan, instances where that is sadly not true. We have important civil rights laws, like Title VII, that prohibits employment discrimination. We have educational protections in statutes like Title IX, that ensures against gender discrimination in our schools. So we have important workplace safety rules that are put in place, workplace safety statutes that are put in place by Congress.

And for all of these pieces of congressional legislation, it falls to

executive agencies, like the Department of Justice, like the Environmental Protection Agency, the National Labor Relations Board, and so on, to Health and Human Services, under the Affordable Care Act, to implement those statutes in ways that Congress can't cover in a piece of generally applicable legislation. So when it comes to air pollution it's the EPA that is determining precisely what particle amounts will be improper and what is safe or not safe with medical devices when it comes to consumer protection.

So all of these somewhat scientifically driven, perhaps more specific rules, agencies determine under authority that Congress has delegated in its statutes to these agencies. And under Supreme Court precedent, the way that the courts have addressed challenges to these agencies' decisions is to say that, if the agency is giving a reasonable interpretation or is working under a reasonable interpretation of Congress' statutory language, then they will defer to that agency's judgment if there is a clear rule articulated by Congress in this particular instance.

Now a lot of people I've heard have said that if you're opposed to this, it's not really conservative or progressive, liberal or whatever. It's just sort of a nonpartisan objection to agency deference. But if you think about the way that more conservative small government, perhaps, administrations approach regulation and protecting our nation, you're probably going to see fewer agency rules. Generally there is a desire to have less federal protection at the federal level. And so if you defer to agencies, if you have a very conservative administration, there's probably less to defer to. If you have a more progressive administration that wants to ensure that we have strong federal consumer protections, strong environmental laws, strong civil rights laws, strong educational, equality and access laws, strong health care protections for Americans, then you're going to have more agency activity and more for courts to defer to. So I think there does end up being something of an ideological gloss on that.

But I would say, more importantly, from a constitutional perspective, there is a debate, and it's a substantive debate, and it's a legitimate debate between whether or not the agencies and court deference to those agencies is appropriate or not. And that, I think, is something that John and I probably have different views on, and that's fine. I think that debating this on the grounds of the Constitution and on what is in the best interests of our nation as a whole, you know, I would say if you look to the original meaning of the 1789 Constitution as it existed then was the desire to create a federal government that was capable of enacting national solutions to national problems, and today the agencies are an important part of that.

But that's something that is really important, and it kind of gets overlooked sometimes because it's a little in the weeds, it's not the sexiest issue. I mean, you know, *Chevron* deference doesn't really get people super jazzed up, but it's something that affects pretty much every aspect of our lives, from the minute we wake to the moment we go to sleep.

JEFFREY ROSEN: Great. John, your thoughts on that, and then it will be time for closing arguments. First, Elizabeth, a suggestion that at least in progressive administrations a failure to defer to administrative agencies might lead courts to thwart progressive regulations, and then her invitation to you to make the case for why you believe that the administrative state may, in some cases, be unconstitutional.

JOHN MALCOLM: Well, so, again, there are areas where we agree. So even back when our government was first founded, there

were administrative and executive agencies that were established. Even from the very, very beginnings of our polity it was acknowledged that there were going to be issues that would actually involve the administration of laws as part of the executive branch's constitutional obligation to take care that the laws be faithfully executed. And I will, of course, agree with her that we have all kinds of laws that deal with environmental concerns, civil rights concerns, health and safety concerns, workplace protections, that are important regulations. While I perhaps have more of deregulatory bent than Elizabeth does, I fully recognize, and in a modern industrialized society that we need to have regulations and we need to have those kinds of protections.

The question, in addition to the fact that, obviously, regulations of all kinds, which dramatically exceed the number of laws that we have. I mean, you can still sort of see, on a library shelf, the entire U.S. code. The Code of Federal Regulations goes on, seemingly, for miles. And there's all kinds of stuff in those regulations that have a daily impact on us. I agree completely with Elizabeth that while *Chevron* and *Auer* deference may not sound like a sexy topic, it ought to be because it's incredibly important. It has more of an impact on our lives—the food that we eat, the things that we do, how we run our businesses—than practically anything in the U.S. Code, or, for that matter, in the entire body of constitutional law as interpreted by the Supreme Court. These regulations, you know, are a lot.

But this, to me, is a matter of separation of powers and accountability. We elect legislators to pass laws. We have to go through the bicameralism and presentment process. They are the lawmakers. They have been vested with that authority under Article I of the Constitution. We don't elect the head of—you name your agency. Just go through the alphabet and come up with one. They are not empowered to make law for us. All of those regulations had the exact same force and effect of law, assuming they've been properly promulgated, as anything in the United States Code. You can be fined, put out of business, or incarcerated based on what some unelected, unaccountable bureaucrat—and that is not meant to denigrate them. I worked for many years in the federal government. Many of them are fine individuals with good intent. They were not elected to come up with the laws that are going to have such a dramatic impact on us.

And they allow legislators to be unaccountable. They allow legislators to sit there and say, "You know, I passed a law that gave to XYZ agency. I delegated them the authority to go out and do good as they see fit. And when they did something that the public doesn't like—oh, I didn't tell them that they could do that." And there's nothing that you can do about it, at that point. And so that is with respect to the problems on the legislative side of delegating this virtually unfettered authority to the executive branch agency officials.

Now, on the judicial side, you have these people whom are not only making the law, they are interpreting the law. That is a core Article III judicial function. And it involves matters of fundamental fairness. People in response to regulations, assuming that they know about them and want to comply with them, want to be able to order their affairs, whether they're their personal affairs or their business affairs. And under the *Chevron* doctrine and the *Auer* doctrine, what this essentially says is an administration can come up with an interpretation so long as it fits within the realm of reasonable. A court is going to say, "You get it your way. Even if we don't think it's the right interpretation, it's reasonable. You get it your way."

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People arrange their affairs. A year later an agency comes in and says, “I don’t like that interpretation anymore. We’re going to come up with a totally different interpretation, and it also fits with the broad realm of reasonable.” So the court is going to come along and say, “Well, I see you changed your mind, but, you know, even if we don’t think either of these is the best interpretation of law, and even though it’s our function to say what the law is, you get to make that call.” And you can go back and forth, and back and forth, which is fundamentally unfair to the people who are actually affected by the regulations, and it also violates principles of separation of powers that are the core of our Constitution.

JEFFREY ROSEN: Great. Well, it is time for closing arguments in this vigorous and superb debate. And these are the three-minute segments where you intensely make your case to our great audience. And, Elizabeth, the first one is to you. Will President Trump’s judicial appointments represent his most significant legacy, and what will their impact on the future of the Constitution be?

ELIZABETH WYDRA: Thank you, Jeff, and thank you for this vigorous debate. I think it’s important for all Americans to model this debate, to care about the judiciary, and to think about the important issues that the judiciary takes up in the role of courts in our nation. It’s an incredibly important issue that all Americans should care about, and I know that many already do.

So whether the judges are Trump’s biggest legacy I think remains to be seen, because with every day of the Trump administration we see things that we never thought we’d see coming from the White House. So who knows? But they will certainly represent a substantial part of his legacy, because while the president might be in office for four or eight years, because judges serve for life and many of his appointees are quite young, under 40 in many instances, in several instances, they will be on the bench for decades. And so while he might only be in the White House for four to eight, or less, years, fewer years, you know, the fact is that his judges will be on the bench for decades. And from the Supreme Court down to the federal district court level, that is incredibly important because, as we noted, the vast majority of cases don’t even make their way up to the Supreme Court, but are decided by the lower courts.

And those issues are issues that are crucial to Americans’ lives and to the issues that we care most about, whether it is the ability to marry who you love, whether it’s the ability to go to a workplace that is not filled with invidious discrimination, a workplace that is safe, a workplace where you won’t be treated differently because you’re a woman or a person of color or a person of a particular creed or status, immigration status, whether it’s the right to have the most basic dignity of determining for yourself whether or not to have a child, whether it’s an issue of democracy, whether it’s an issue of whether everyone is subject to the same laws or some people who consider themselves above the law—and I think we see troubling trends in the Trump administration of an administration and perhaps an individual who thinks that he is above the law. Whether we will have judges and a court system that applies the impartial due process that the Constitution guarantees.

And I believe, firmly, that we can have Republican and Democratic presidents nominate judges to the bench who will follow the Constitution’s text, history, and values ... regardless of their personal agendas. I am very concerned by the judges that we have seen com-

ing out of the Trump administration who have expressed views on racial justice, on women’s rights, on civil rights, more generally, that are not what I think the Constitution requires, and what the majority of American people support.

So it’s something that people should be really focused on, because these folks are going to be there for decades. And if we have a Supreme Court vacancy, regardless of who it is, it’s going to be something that is essentially going to be a question of whether we continue on our arc of constitutional progress or taken backward, potentially.

JEFFREY ROSEN: Thanks for that. John, last word to you. This same question, for the closing arguments. Will his judicial nominees represent President Trump’s most significant legacy, and what will their impact on the future of the Constitution be?

JOHN MALCOLM: Sure. I didn’t know I was going to get to make a closing argument, but here we go.

I agree with Elizabeth that the state of the judiciary is likely to be President Trump’s greatest legacy, for however long he’s there. And, you know, I mean, all you have to do is look at Anthony Kennedy ... who was appointed by Ronald Reagan 30-some-odd years ago, and Clarence Thomas, who was put on by George Bush [and is still on the Court] long after George Bush has left the presidency. And the impacts of those nine individuals is certainly great. I often [said] that it’s Justice Kennedy’s world and we just live in it.

But certainly the lower court judges are going to have an impact on the law, in all of the areas that Elizabeth mentioned. She may prefer that what she views as progress becomes enshrined into our Constitution. I might prefer that many of these issues should be matters for debate, reasoned debate—hopefully common, quiet, and respectful debate, such as the one we’ve had today—among the people, and then among our elected legislators.

But I certainly believe that the individuals whom Donald Trump has nominated to the bench so far are people of fine character and integrity and professional and academic standing, who will adhere to the Constitution and to the text of laws passed by Congress, whether they like the political results of that or not. You certainly have lots of instances of judges doing that. The late Justice Scalia, I can assure you, was as patriotic as anybody in this room, yet he voted to uphold the First Amendment rights of somebody to burn a flag. He was as law-and-order a person as anybody here in this room, yet he was often viewed as being the criminal defendant’s best friend on the Court, and I suspect that among criminal defendants that Neil Gorsuch, who wrote some very criminal justice-oriented opinions when he was on the Tenth Circuit, will prove to be the same now that he is on the Supreme Court.

This is incredibly important. Judges play a huge role in our lives, through their adjudications on statutes and constitutional law, and through their non-adjudications by deferring to executive branch agencies, and so the public does need to pay particular attention to this. And while I might like or not like other things that President Trump has done while he is in office, I certainly applaud him and [former] White House Counsel Don McGahn for the excellent job that they have done nominating judges so far, and I want the Senate to get on the stick and confirm them.

JEFFREY ROSEN: Thank you so much, John Malcolm and Elizabeth Wydra for a reasoned, civil, and illuminating discussion on the

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extremely important topic of President Trump and the future of the federal judiciary.

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