

Judge David Tatel on Vision- A Memoir of Blindness and Justice

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[00:00:00.1] Jeffery Rosen: Judge David Tatel, who recently retired from the US Court of Appeals for the DC Circuit, has a new book out, *Vision: A memoir of blindness and justice* about his remarkable legal career. 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. In this episode, I'm honored to have a conversation with Judge Tatel about his wonderful book, his career as a civil rights lawyer, the landmark cases he presided over and how he overcame the challenges posed by blindness. Judge Tatel, it is wonderful to welcome you to the show. I want to begin by reading a passage from your book. The writing is so vivid, and I want to share it with We the People listeners. Here you say, I had my vision for so long, I still have vivid visual memories of growing up.

[00:01:05.1] Jeffery Rosen: The gray mouse that met its demise in the trap in our pantry. The brown and white cow my grandfather slaughtered in his butcher shop right in front of me. My mother's long, white, Pall Mall cigarettes. The gigantic steaming locomotives at Union Station. Passover seders with my aunts and uncles sitting around my grandparents' huge table. The gaudy circus next to the railroad tracks. The model boat with our handmade brass fittings and varnished deck. El Misti, that toaster. You're conjuring up images that you remember seeing from your childhood and capturing them so beautifully. Tell me about that.

[00:01:40.6] David Tatel: Well, first of all, Jeff, it's a thrill for me to be here with you. You know, I've been an admirer of your writing and your books for years, and it's thrilling for me. So thank you. Yes, I was diagnosed with this eye disease called retinitis pigmentosa when I was 15 and actually had vision problems basically for all my life. I didn't lose my sight until my mid-30s. And so I have 30 years of visual memories that I can call on for lots of things in terms of understanding the world around me. And the wonderful thing about those memories is that Edie, my wife, knows about many of those memories, and she's able to describe things to me in terms of things she knows I remember. And so those visual memories are very much an anchor for me.

[00:02:38.9] Jeffery Rosen: It's really remarkable. And you also describe a writing process of listening, of course, to books and then reading your drafts out loud and refining them. To what degree does that process allow you to write so well?

[00:02:57.9] David Tatel: I think you can only describe how you yourself write. But I've always thought that the fact that I have to listen to what I receive as opposed to seeing it and retain it has forced me to think more deeply about what I hear and retain because I don't, I can't look back at the page. So I think that that has a lot to do with how I write and how I think. I also think, I mean, there are two other reasons why I think you like my writing style. One is that I read lots of books. And I've read often that the more you read, the better a writer you become. And also, this book was a joint writing project between myself and my wife, Edie, who is also a fine writer. And, you know, as Edie and I, I look back at this book, I see my language and her language and the language of other editors who helped us along the way.

[00:04:14.6] Jeffery Rosen: This is a time when people are reading less but have the opportunity to listen more. Do you think that listening to books as opposed to reading them may give you a sense of the rhythm of language that could help you write well?

[00:04:27.8] David Tatel: Yes. You know, as I explained in the book, Jeff, everything I write, I read out loud. I have to have it read out loud to me. But I've been telling my law clerks for 30 years that they have to read everything out loud. And it's quite remarkable. When you write a paragraph, you're absorbing that paragraph at one level. But if you read it back, you will hear things that you didn't see. I can't tell you how many times a law clerk would be reading me a sentence or a paragraph that she wrote. And she would stop in the middle and say, wait, that sentence doesn't make sense. And whatever it is, it's the process of hearing what you write that allows you to pick up nuances that shouldn't be there, mistakes. It gets lots of little words out of the writing. I think little words are disruptive to the reading process. Too many A's and Does and And's. And for whatever reason, I think it dramatically improves writing and I suspect that most of my law clerks over the years are now reading out loud what they write.

[00:05:41.3] Jeffery Rosen: You are extremely attentive to good writing. You describe a neighbor of yours, a journalist, who helped improve the writing of federal agencies by being attentive to passive voices and witches and VATs and, give examples of how reading the opinion allows you to take out those passive and mush words and improve the structure of the prose.

[00:06:05.7] David Tatel: First of all, her book, which is called Civil Writing, I actually think I have the only existing copy on the planet, but I would share it with anybody. It's just full of treasures, and I keep it on my desk right next to Strunk and White. You should try it, Tiff. If you read, you will hear the little words, and you will hear the awkwardness that you don't see when you're writing. At least that's been my experience, and it's stood me well over the, over time.

[00:06:37.0] Jeffery Rosen: Justice Elena Kagan allowed me to share with listeners that she reads her drafts out loud before she publishes them, both with her clerks and also to herself which, and she's a remarkably good writer. It's not a usual practice. Do you recommend it for others? And does it give you a sense of the rhythm of language as well?

[00:06:58.7] David Tatel: Yes, I think everybody should do it. I learned it originally from my wife, who taught college English, and she had her students read things out loud. I've talked to other authors and asked them this question, and many of them read out loud. I think it's an important skill that will really improve writing. You pick up everything that you might otherwise

miss. As I said, you pick up, you mentioned rhythm and tone, and also spacing. You get the spacing right when you listen to it, and meaning, Jeff. I really do think it adds to your perception of the meaning. You can write a sentence and then reread it, but if you read it out loud, you might suddenly realize, wait, this sentence doesn't say what I wanted it to say. Or you might discover that the sentence would have a better spot elsewhere in the paragraph, or even more so, not be there at all. Everybody should try it.

[00:08:02.4] Jeffery Rosen: I agree. I've learned the pleasure of reading out loud from a great college teacher, Walter Jackson Bate, who would have us read aloud Samuel Johnson. The greatest pleasures of the human imagination are not from pleasure to pleasure, but from hope to hope. You just feel the rhythm. I do it. But, what you really show is that it can be crucially important in legal writing, both in clarity and also memorableness. I want to share with you, too, that at GW Law, where I teach a constitutional law class, we started a practice called slow con law, where we read decisions out loud, both the majority opinions and the dissents, and it takes a long time. You get through less material, but it's so illuminating. You get the meaning and the vibe of the opinions in a really deep way. Do you think it's useful to read, for students to read opinions out loud as well as judges in writing them?

[00:08:56.3] David Tatel: Yes. I have a great deal of personal experience with that because, although I have a full, or I had a full-time reader, I also have my law clerks read a great deal to me and when we're discussing a case, or getting ready for oral argument or writing an opinion, I'll have the law clerk read it out loud to me and I think both of us have a deeper understanding of it when we read it out loud. There's no question about it.

[00:09:25.1] Jeffery Rosen: And does it seem true when you read it out loud? Or you, false notes or things that are less convincing present themselves to you when you hear them?

[00:09:35.0] David Tatel: Yes, both ways. I mean I think you'll be listening to it out loud, and your reaction will be, wow, that sentence is really exactly right. Or you might hear a sentence which says, you may have read it quickly, but when you're reading it out loud, remember, when you're reading out loud, you're not skimming. You're reading everything, and therefore everything the judge wrote in it is being absorbed and I think you have a deeper understanding. I'm not a linguist, so I don't know the process but, and I assume people have written about this, Jeff, but I know from 50 years of experience of writing and listening without sight that it dramatically improves both reading and comprehension. If I were taking an SAT now, I would ask for a separate room so I could have it read out loud to me.

[00:10:38.1] Jeffery Rosen: Oh, that is great. And you just said you're not skimming. That's so crucial. You're, it's deep reading. You're getting completely absorbed in each word, and yet you listen quickly, and the technology allows you to go pretty fast. Tell us about that.

[00:10:51.7] David Tatel: Yes. Text-to-speech technology has improved dramatically in the 30, 40 years I've been using it. It's clearer. The quality of the voices are better. They're closer and closer to humans, and you can make adjustments that make them quite clearly understandable, and most importantly, you can adjust the speed easily and the tone. And so, they're very easy to listen to. For people who are just coming to it, it takes a little practice to learn to do it, but it's

easy to do. The whole world has gone digital, so virtually anything I need, I can listen to with text-to-speech technology. In fact, when I started on the DC Circuit 30 years ago, I had a reader, a full-time human reader, and a backup reader. So I had one and a third or one and a half people, and they read everything to me, everything that came across my desk, briefs, opinions, letters, memos, the morning newspapers, everything. In my last year on the court, I had just one reader, and I'd say she read 5% to me, and now that I've left the court, I don't have a reader because I don't need one. Everything I need is digital, and everything can be translated by text-to-speech technology. It's been revolutionary.

[00:12:17.6] David Tatel: It's a lot easier to be blind now than it was 40, 50 years ago. It's not easy, but it's easier.

[00:12:23.4] Jeffery Rosen: It's so inspiring to see your appreciation of the technology in the iPhone, and you have a pay-in to the iPhone and the apps that allow text-to-reading, and you talk about the early technologies and how cumbersome they were. You say you weren't a fan of Braille, which you didn't find easy to use, but it just became easier and easier, and it's really an example of technology improving things for the better.

[00:12:47.6] David Tatel: You mentioned the iPhone. Let me just say one thing about that, not as an advertisement, but just as to why it's so important. At least to me, and I think to lots of blind people, the goal is to achieve as much independence as you can. There are many things we can't do. So, achieving independence on everything else is really important. And the wonderful thing about the iPhone, and I'm sure this is true of the other smartphones, I've just never used them, is that I buy an iPhone just like you do. We buy the same iPhone, and all I have to do to use it is to activate the accessibility functions that are in the phone. I don't have to go buy anything else. I don't need an attachment. I don't have to pay extra for it. It's all there. And if you and I were sitting next to each other, both looking at our phones and reading, people would have to look twice to see that I'm using mine differently than yours. So, the point of that is that it allows me, as a blind person, to function completely independently, on my own, without any assistance from anybody else and that's liberating.

[00:14:05.6] Jeffery Rosen: It's so exciting. And one more thing, of course, now all the books in the world are accessible with a click through Kindle and the fact that they're online. Does it, and it's such a striking difference between when you began your career and you describe the lengths that you took to conceal your blindness. You resisted using a white cane for a long time. Tell us about the evolution in societal attitudes that made it possible for you to embrace your blindness at a time when you initially resisted it.

[00:14:37.2] David Tatel: Well, when I was a teenager and diagnosed with RP, I already had a lot of trouble seeing at night, but I was 15 years old. I didn't tell anybody about it. I didn't want to be different. Everybody wants kids to be like their friends, right? And I was a little ashamed that there was something wrong with me. I didn't want to explain it to anybody. And so, I developed, I explain in the book all the various tools I developed to hide my declining eyesight. Some of them are funny. Some of them are sad. They were all anxiety producing. As I got older and went off to college and law school and began to practice law, a new factor came into play, which was, you know, would my visual disability affect my future employment? One of the things I focus on

in the book is how important role models were to me. I mean, really important in my career. The great lawyers and judges who became my role models, but I didn't have any blind role models. There weren't any. And so as I look back at young David Tatel and try to understand what he did, and that's what writing this book did for me, Jeff. It wasn't just writing down my story. It required a great deal of thinking about why I did what I did and probing deeply into it.

[00:16:04.7] David Tatel: It was really a personal revelation. But as I look back on David Tatel, I don't criticize him for hiding it. I think he was right that at that time in our country's history, employers knowing about a serious visual disability would have been a problem. But it soon got to a point where I couldn't hide it anymore. By the time I was in my mid-30s, I needed help moving around and I used an assistant. That was at the Lawyers' Committee at the time. I started using my secretary to read to me. I remember I said to her one day, she popped the letter down on my desk and I said, I think I need to have you read it to me. And then that's when I got a Braille tutor. And then, but even then, Jeff, I didn't want to talk about it. I mean you've known me a long time. You know, you were aware of my visual disability, I'm sure from the beginning as many of my friends were, but people understood it wasn't something I wanted to talk about and almost everybody respected that. Even when I got the cane when I was 35, which was a story in itself, so I'm now visibly a blind person. There's no hiding it anymore. It still wasn't something I talked about because I didn't want, when I was looking for opportunities, I didn't want in any way to get the job because I was blind.

[00:17:48.4] David Tatel: I didn't, I wanted to be, when I went on to the DC Circuit, the President didn't mention blindness in his press release. Same thing when I became OCR director at HEW 20 years earlier. And that's the way I wanted it and looking back on that, I actually regret that because I think I missed an opportunity to provide the inspirational role model for younger people that I never had. In fact, that's what I hope this book will do. It's kind of why I wrote the book. But eventually, I became more comfortable with it. It's probably personal maturity, but writing this book forced me to deal with it in ways I never had and also finally biting the bullet and getting a guide dog. All of those things coalesced to make me think in ways about my blindness and my history that I never had. You move through life quickly. You don't often think about what you're doing. These couple of years of writing were quite extraordinary for me.

[00:19:00.7] David Tatel: So, that plus the guide dog has kind of freed me from my constraints, and I'm now comfortable talking about it. I mean, as I said, you've known me for a long time. If you had asked me these questions, even five years ago, Jeff, I would have been uncomfortable answering.

[00:19:17.3] Jeffery Rosen: Well, it's extraordinary, David, because we met in 2000. I was writing an article for The New York Times Magazine about potential Supreme Court nominees of Bush or Gore, and amazingly, it was about you and Judge Michael Luttig, my friend and NCC board member who now works closely with the NCC. And in that article, you stressed to me, you said, I pressed for more details, and you wanted to ensure that the blindness wouldn't become a focus of the article. And you said, someone once said that I viewed myself as a judge who happened to be blind rather than a blind judge. If you get too much into jogging and skiing, it

becomes an article about my blindness. I don't believe it's like the race issue, and you didn't want me to make it, as you put it. You said, I'm uncomfortable having it be a big deal.

[00:20:03.2] David Tatel: You know, when I went on the DC Circuit, I didn't want to be known as the blind judge. I mean, that's the way the press reported it. First blind judge, you know, okay. I was thrilled to get the job, but that is not what I wanted to be known as. And I'd say in my 30 years there, one of my major motivations was to write opinions that were so good and so convincing that people would finally just say, he's a judge. Oh, yeah, by the way, he happens to be blind, but I wanted people, and I think I've achieved that. And that's another reason why I'm so comfortable talking about it now. I actually think, I feel personally that I accomplished that in those 30 years and that people do look at my opinions as I would hope among the best in the judiciary, and that, gee, he happens to be blind. Wow. So in other words, I've achieved that point, at least in my own mind. And that makes me much more comfortable talking about the blindness, because it doesn't really have anything to do with the merits.

[00:21:16.8] Jeffery Rosen: So inspiring. And in fact, through the beauty and power of your writing, you've shown that you have much to teach the rest of us about how to write and what being a good judge involves. It's striking that the focus of the article that I wrote back in 2000 about the difference between you and Judge Luttig in a Bush and Gore victory would be your attitudes toward congressional power and the administrative state. And of course, that turned out to be a focus of your book, where you describe the central cases that you were involved with, involving the environment and voting rights and your more differential attitude to congressional power than the Supreme Court ultimately took. Tell us broadly about that, how central that question has been in your career.

[00:22:03.4] David Tatel: It's been critical to my career as a judge because I think respect for Congress and deference to its judgments, respect for the executive branch and deference to its judgment is really one of the most critical elements of judicial restraint, the principles that keep courts confined to judging and out of policymaking. And in the cases I talk about in the book, those are examples of situations where our current Supreme Court has failed to follow those principles faithfully. This isn't something new for me. Years ago, 20 years ago, in my Madison lecture at NYU, I wrote about the extent to which the Rehnquist Court in its school desegregation cases disregarded the plain language of the Constitution and the judgments of Congress. And this court is now doing the same thing even more extensively. And take for example, let's just take two. Let's take voting rights and the administrative state 'cause you and I have talked about both of those a lot over the years.

[00:23:28.0] David Tatel: So I wrote the Court of Appeals opinion in Shelby County, which sustained the constitutionality of the preclearance provisions of the Voting Rights Act, believed by many to be probably the most effective Civil Rights law ever passed. And a statute that was repeatedly sustained as constitutional by the Supreme Court on the basis of Section 2 of the 15th Amendment, which gave to Congress the power to enforce the non-discrimination provisions of the amendment through, "appropriate legislation." And over and over again, the Supreme Court said that language commits this responsibility to the Congress, not the courts. And the courts owe great deference to Congress's findings when it comes to race and voting. Well, that was the principle I applied when I wrote the opinion in Shelby County. And in fact, the last sentence of

my opinion says something like close calls go to the people's representatives, because I think that's what the 15th Amendment was designed to do.

[00:24:37.5] David Tatel: Well, in *Shelby County*, the Supreme Court invalidated the formula that underlies Section 2 or declared it unconstitutional. Section 2 is about as clear as it can get. This isn't a case where there's a debate like *Dobbs*, where there's a debate about a constitutional right. Section 2 is crystal clear. It gives Congress the power to enforce the provisions. And it's a dramatic limitation on state power. It's one of the major limitations on state power in the Constitution. And if you think about it, it makes a lot of sense because we had just fought a civil war over slavery. And the purpose of the 13th, 14th, and 15th Amendments was to limit state power. Now, if you read the *Shelby County* opinion, there's hardly anything in it about the 15th Amendment. It's all about state autonomy. It's as if the 15th Amendment didn't exist.

[00:25:37.7] David Tatel: And it also concludes, the court concludes on its own, that there's no need to continue Section 5 because, "the South has changed." Well, Congress, which had authority under the 15th Amendment to decide how to enforce it, had concluded just the opposite. So what you have here is a court that's disrespecting both congressional findings and the plain text of the Constitution, and in fact, its own clear precedent, because it had sustained this bill so many times. So it's really, I think, a good example. And by the way, my concern is not that they reversed my opinion. I actually think the court could have written an opinion requiring the revisions of Section 5 in a principled way. I wouldn't have agreed with it, but it would have been a legitimate act of judgment.

[00:26:30.7] Jeffery Rosen: You note that the young John Roberts in the White House in the Reagan administration had opposed the Voting Rights Act, and you said that's fine, but judges have to set aside their personal views. Would Chief Justice Roberts say that this opinion was justified in the name of the original understanding of the 14th and 15th Amendment? Or is there some other basis that the majority is invoking other than state sovereignty?

[00:26:53.0] David Tatel: Yeah, okay. So you've read the book, and you know I was very careful to talk about the court as an institution and not individual justices. And all I know about *Shelby County* is what I read in the opinion. And what I read in the opinion, I don't see any analysis in there about the 15th Amendment at all, except at the end when it tells us what the 15th Amendment doesn't allow. The principle that motivates the decision in *Shelby County* was something called equal state sovereignty. The court was concerned that the Voting Rights Act treated the southern states differently than other states, and it said that violated a principle of, a court made, I should say, principle of state sovereignty, one which its precedent, *South Carolina v. Katzenbach*, made quite clear applied only to the admission of states to the union. It had no applicability after that. But the *Shelby County* opinion acknowledges that but says equal state sovereignty still has relevance, relevance wasn't the word it used, but it was something like that. It still has relevance. And so it used this court-made doctrine, equal state sovereignty, which had no applicability to this situation and used it to trump the plain language of the 15th Amendment. That's all I know. That was the explanation the court gave, and I don't look behind that.

[00:28:27.6] Jeffery Rosen: Let's talk about the environmental cases. You were at the center of several leading precedents, some of which the Supreme Court upheld and others that they reversed.

[00:28:37.3] David Tatel: Right. I suppose the one we really want to talk about is Chevron. It's on everybody's lips these days. In my 30 years on the court, I probably dealt with the Chevron principle more than any other. I mean, the DC Circuit hears huge numbers of administrative cases, challenges to administrative actions. And so Chevron was a big part of our lives. I found over the years, Jeff, that the structure Congress had created, that is, with administrative agents, Congress passes general legislation like the Clean Air Act or the Food and Drug Act. It passes general legislation focused on the health and safety of the American people and creates administrative agencies to enforce them. And the agencies are subject, of course, to judicial review. I found that Chevron, which, of course, required courts to defer to agency reasonable interpretations of statutes, but yet to invalidate agency action when it violated the clear language of the statute.

[00:29:47.5] David Tatel: I thought that that principle, along with the other statutes we applied, the APA and the generic statutes, I thought the system did a good job of allowing federal agencies to do what they were charged with doing, namely use their expertise to pursue their mission, whether it was ensuring clean water or clean air or safe drugs or safe financial markets, whatever it was. They would use their expertise to issue and over the years revise regulations and standards to fulfill the statutory mission. I thought that Chevron did a good job over the years of allowing that flexibility to proceed, to move forward, free of judicial interference, but yet retained the authority of the court to rein in the agency when it exceeded the law. It worked for me. I thought it was pretty effective. And apparently, Congress did because, although Congress made a few adjustments over the years, it knew about Chevron and it passed more legislation knowing that the courts would apply to Chevron. It made a few adjustments, but it left that in place.

[00:31:12.2] David Tatel: And I know most of the judges that I worked with were more or less satisfied with it. And one of the interesting things about Chevron also is that it was responsible for producing a great deal of unanimous court decisions because it wasn't unusual for the three of us to go back to conference and which judge to, say, if we were reviewing say a decision of say OSHA, a regulation of OSHA, one judge would say, you know, if I were looking at this de novo, I would throw this out, but I can't say it's an unreasonable interpretation of the statute. And so we would have a unanimous decision. Well, now the court has decided, this same court that has applied Chevron repeatedly, has now decided that Chevron violates the Administrative Procedures Act. First of all, I find that argument unpersuasive. Yes, the APA says courts are to determine what the law is, but under Chevron 2, we're only approving an agency action under Chevron 2 if we think it represents a reasonable interpretation of the law. We're not approving agency decisions that we think are unlawful. We think they're a reasonable interpretation of the law, and in many of these cases, in fact, most of them, the statutory language is ambiguous and there are gaps and it has to be interpreted and there's a range of legally acceptable interpretations. And so I don't see any conflict between Chevron and the APA.

[00:32:58.8] David Tatel: Now, I think it's a good example of the court not respecting its precedent. It's the same thing as in *Shelby County*. Yes, precedents can be overruled, but the court has to have a powerful reason for doing it, and it has to have a rational explanation for doing so. And neither of those exist in the Supreme Court's decision overruling *Chevron*. The result of this, I think, is going to be chaos for quite a while. It's going to take a long time for the courts of appeals to figure out how *Chevron 2* only came into play when the canons of statutory interpretation didn't give you an answer. So now, what do we replace that with? I think what's probably going to happen, first of all, you're going to have a lot more divided panel decisions because there's no deference. So the courts of appeals are going to split along ideological lines in many, many more cases. And I think what we'll see, this is only instinct, I think what we'll see is a tightening up on the rules of statutory interpretation.

[00:34:13.5] David Tatel: I think we'll see more and more use of the so-called major questions doctrine, which says that if an agency action has a major effect on the nation's economy, or some other aspects of it, that the major questions doctrine was originally developed to say Congress would not have delegated that to the agency. I think you will now see it being used to say in cases that have a major impact on the economy, unless Congress speaks clearly, the agency can't do it at all. So we'll see that used a great deal in. And there are several justices who have expressed interest in the nondelegation doctrine. And I don't know whether that will be used in the next few years. I mentioned that fear in the book, that that could be where we're headed. But I think we're in for a huge amount of chaos and uncertainty as the courts and then ultimately the Supreme Court sort out what has just happened.

[00:35:13.4] Jeffery Rosen: Describe the change on the Supreme Court and its attitude towards *Chevron*. You note that you had the American trucking case where you dissented and argued for deference to the Environmental Protection Agency and the Supreme Court in an opinion by Justice Scalia, agreed with your dissent. Justice Scalia was a supporter of *Chevron* and deference to administrative agencies. But then four years later in another APA case, the court abandoned deference and reversed you. Taking Justice Scalia as an example, he had a more Hamiltonian attitude toward congressional power and believed in deference. And the current Jeffersonian justices who opposed *Chevron* take a different view. Tell us about that change.

[00:35:55.4] David Tatel: The American trucking was actually more about non-delegation at that point. My court, relying on a footnote in a brief, had decided that there was a serious non-delegation problem in the Clean Air Act. And I dissented. And you're right, I went to the Supreme Court and Justice Scalia wrote the opinion for the court and obviously, that's all about deference too. It's just the non-delegation doctrine is a much sharper principle than eliminating *Chevron*. But I think then, back then, you had a sense that the courts, including the Supreme Court, respected what Congress had done. That is, respected the system Congress had created. And although they weren't always happy with what administrative agencies did, I think the courts, and you see this in many decisions, the courts understood that this was the framework Congress had created and that agencies were doing the best they could. And they saw them not as the current court does, as "unelected bureaucrats." That's what they call them. But rather as presidentially appointed commissioners and administrators who like them are confirmed by the Senate. Those are the people whose decisions they're reviewing.

[00:37:19.2] David Tatel: And I think there was just much more respect for the whole structure then, Jeff. That's largely vanished, particularly at the highest levels of our judiciary, largely as a result of the, I don't know, two-decade effort to rein in administrative agencies. Just as the conservative legal movement wanted to overrule *Roe v. Wade*, their goal was to rein in administrative agencies, which they thought were over-regulating the economy and exceeding their jurisdiction. And some of my colleagues on the DC Circuit felt that also. We talked about it a lot.

[00:37:58.0] David Tatel: It was a subject of conversation. But that negative attitude towards administrative agencies, we all know that during the 2016 campaign, candidate Trump's people said he would be appointing judges who would rein in the administrative state, bringing it to heel. So this has been a goal for a long time. And this decision, the *Chevron* decision, plus the *SEC* decision, which limits the ability of agencies to enforce, collect sanctions through the administrative process. And the corner post opinion, which makes a dramatic change in statute of limitations. Those decisions accomplish a great deal of what they've wanted to accomplish.

[00:38:48.7] Jeffery Rosen: It was a central goal of the conservative legal movement when the Federalist Society was founded. As you say, it worked itself out on the DC Circuit as well as the Supreme Court. And you quote Justice Kagan as saying, by ruling that agencies are powerless to answer any questions the court deems major, she could not think of many things that are more frightening than having the court appoint itself instead of Congress, the expert agency on climate policy. You talk a lot in the book. I would like you to give a shout out to your dad and talk about how he both inspired you to be interested in everything, as you so movingly said and also gave you a real appreciation of science and an ability to think through these questions on your own. And yet you're concerned that judges rather than policymakers will be making scientific decisions. And you see this shift as radically empowering judges at the expense of policymakers. So just tell us more about that shift and why you're concerned about that.

[00:39:43.4] David Tatel: What's interesting about the point you just made, Jeff, is that the court justifies what it's doing on the basis of preserving the separation of powers. But what it's actually doing is upsetting the separation of powers, because in the *Shelby County* case and in this case, what it's doing is strengthening, enhancing its own power over the two elected branches of government. It's actually disruptive of the separation of powers and most important, the checks and balances that have kept the system working so long. But you mentioned my dad. My dad was a physicist, a true physicist, I mean, a pure physicist. And when I was a little kid, he used to take me to his lab and he took me on major scientific expeditions with him. And science was in our family.

[00:40:34.6] David Tatel: I've often said that growing up in the Tatel household was like growing up in a science fair. There were all kinds of experiments going on everywhere in the house, and science was in my DNA. And when I went off to college, I went to the University of Michigan and I was majoring in science and math. And that was gonna be my career. But I like to say I got hijacked by the '60s and left science behind. But I only left it behind as a profession. I've maintained my interest in science. I read deeply. I read science magazines. I love biographies of scientists. I've served for years on a wonderful committee at the National Academy of Sciences called the Committee on Science, Technology, and Law, which I love both because

there are fascinating people on it, but so much of what we do there, we focus on issues that fall at the intersection of law and science, relate directly to my work as a judge.

[00:41:40.5] David Tatel: And one of the treasures of being on the DC Circuit is many of our cases rest on highly scientific records, whether it's an FDA case where you're looking at a huge amount of medical evidence or an EPA case where you're looking at hundreds of studies about the atmosphere and how the atmosphere reacts to different pollutants and how the human lungs react to different kinds of pollutants. They're deeply scientific. And I think I'm pretty good at reading this stuff and understanding it. But I found Chevron 2 and our obligation, the other obligation, it's not just Chevron 2, but it's the APA obligation to defer to agency fact-finding when it's supported by the record. Those two things were extremely reassuring to me because while I felt comfortable in looking at a complicated agency record and saying, all right, it looks to me like the agency followed the scientific process here.

[00:42:43.2] David Tatel: That is, there's enough evidence to support their decision. And most important, they considered opposing evidence. They looked at the alternatives, at the evidence that goes the other way, and they explained it in a way that makes sense. In other words, I saw the scientific process at work in the agency. And to me, that was enough, particularly since as much as I think I understand this stuff, I would have felt uncomfortable making the decision myself. I just didn't see how I could do that. I didn't have the skill. Much of my science has been learned over the years. I haven't taken all the necessary courses. I would have felt very uncomfortable in the American trucking case, in deciding what level of emission standards that should be identified for PM, particulate matter, or Ozone, or any of the other complex chemicals that we looked at.

[00:43:43.6] David Tatel: I would have, in a food and drug case, how would I decide whether the agency, if I had to decide whether a drug was safe and effective, there's no way I could make that decision. I don't have the qualifications for it. But I do know, what I do know how to do is to look at what the agency did and see if the scientific process was at work. So I don't know what the courts are going to do. It's not up to me anymore. I retired. But I know my colleagues are going to be thinking, looking deeply at this. And I'm going to be watching carefully to see how they go about resolving these complex questions. And then exactly what the Supreme Court does when they get them. They don't have any more scientific knowledge than I do. And they certainly don't have as much as the agencies do. So I don't know what's gonna happen, except that I think the result will be less regulation. And that's the goal.

[00:44:37.7] Jeffery Rosen: You did have an experience running an agency. It was the Office of Civil Rights under President Carter for the Office of Health, Education and Welfare. And you were responsible for enforcing Title VI of the Civil Rights Act and for denying federal funds to school districts that failed to comply with Brown's desegregation mandates. You have several inspiring chapters about this. Tell us about your approach, the attitude it gave you about whether or not the government can work, and whether you think that you and your colleagues faithfully interpreted federal law in implementing desegregation.

[00:45:15.6] David Tatel: Well, Title VI, as you said, prohibits racial discrimination in federally funded programs, which is basically everything, every school, university, hospital. This was

1977. OCR was enforced in K-12 schools, kindergarten through 12 schools, throughout the South, and then a few years later in the North, enforcing the Supreme Court's school desegregation cases. So for example, when the court ruled that freedom of choice plans were unconstitutional, OCR worked out with all the Southern school districts desegregation plans that didn't use freedom of choice, but that met the Supreme Court standards. And then later when the Supreme Court said courts could order busing to desegregate schools, we enhanced the plans with busing when it would work. And what was happening at that time was that you had all three branches of government.

[00:46:25.3] David Tatel: This is after the Nixon administration. It was a pause because of that. But you basically had all three branches of government, the courts, the executive branch, and the legislative branch working together. The Supreme Court continuously strengthened the desegregation rules, Congress passing legislation to enforce it, and the executive branch, both through litigation and OCR, enforcing it. So you had all three branches working together. And the result was pretty dramatic because by the early '80s huge numbers of Black and White children in the South were going to school together for the first time. And I thought that was a really kind of textbook example of a government fulfilling its mission and of the branches of government.

[00:47:18.7] David Tatel: Yes, there were checks and balances and there were tensions between the three branches, but the result was quite dramatic in terms of bringing about a major change in education, a change that I thought and the research supports was very good for education at the time. Well, for a lot of reasons that I talk about in the book, politics, change in nation attitude, change in the courts, that movement slowly but gradually came to an end. And we ended up at a point. When, because of changes in the court and in the other branches of government, you had all three branches of government working against it. And so school desegregation efforts were brought to a halt. School desegregation efforts weren't finished, weren't completed. And now at the K-12 level of racial segregation, enhanced by the fact that many of the Blacks are not just in segregated schools, but they're in poor schools, is now close to what it was before the country started this mission. So it's an example of government at its best and government at its worst.

[00:48:37.8] Jeffery Rosen: What does it say about the role of judges? You note in the book that meaningful desegregation didn't actually occur right after Brown. It wasn't until the threat of the loss of federal funds under Title VI that schools desegregated. And yet presidents from Nixon to Reagan ran against the courts and claimed that By imposing busing, they were engaging in activism and exceeding their statutory authority. Do you see it as an example of judicial activism or not?

[00:49:07.9] David Tatel: Well, I thought, I talked about role models for me. One of my earliest role models when I was a college student were the Southern judges. These Southern men, they were all men. That's fortunately changed. But these Southern judges who grew up in segregated communities and belonged to segregated clubs. They took the oath of office and they took the constitution seriously. And I think the '50s and '60s in the South are a wonderful example of our federal judiciary operating at its very, very best. It was extraordinary. And those men, they were my role models. I mean, Frank Johnson, Orma Smith, William Cady, people like this. They

weren't northerners who went south and applied the law. They grew up in these communities and it had serious effects on their standing in their communities.

[00:50:21.2] David Tatel: I've read their stories, but they took their oath of office seriously and they enforced the 14th and 15th Amendments. That's a great example, but it all became politicized. The Nixon administration, Richard Nixon's Southern strategy was the beginning of the end. And he pretty much did when he got elected what Donald Trump did when he got elected, although Nixon wasn't as effective because while he appointed a lot of judges, a lot of those judges continue to enforce the law. Although, as I point out in my Madison lecture, that wasn't true with respect to the 14th Amendment at the Rehnquist Court. And oh, by the way, I think if you went back and looked at the confirmation hearings of those judges, Jeff, you would find them almost all fairly routine.

[00:51:17.3] David Tatel: First of all, many of them were appointed by a Republican President, Eisenhower, and their confirmation hearings were pretty standard and short. Now the judiciary has been totally politicized. The election where Donald Trump got elected, that election was about the court. That's what it was. It was about the Supreme Court and it was about what Trump wanted the Supreme Court to accomplish. And he listed the judges he would appoint. He won the election. He appointed them and they did it. So it's not surprising that the public looks at our courts today and thinks that they're just an unelected political institution, which is, by the way, one reason why I think it's declined so much in polls. I think the more it's perceived as political, the more it drops in the public esteem.

[00:52:09.9] Jeffery Rosen: It's really remarkable. It was Ronald Reagan in 1964 who ran against the courts. And in his speech for Barry Goldwater, he said the court should roll back the excesses of the Great Society. And also he criticized Brown and the school prayer decisions and said those were examples of judicial activism that were inconsistent with original understanding. So that was really those were the two pillars of the conservative judicial movement that is succeeding. Was Reagan and Nixon, were their criticisms of judges as violating original understanding correct or not? And they said that they were the defenders of judicial restraint.

[00:52:48.1] David Tatel: Yeah, well, I don't want to go. I mean, if you want to talk about originalism, I mean. An originalist, a true originalist would have come out the other way in Shelby County and in the recent immunity case. I don't know that originalism helps a discussion a whole lot. No question about it. Ronald Reagan ran again. And the DC Circuit was one of his focuses. But here's an interesting story, which I think is very revealing. In the first three or four years of his presidency, he switched the DC Circuit from predominantly Democratic appointees to predominantly Republican appointees. And after Webster got control, the Republican appointed judges. There was a panel of three Democrats issued three pretty controversial decisions, and the new Republican-controlled DC Circuit unbanked them all.

[00:53:39.6] David Tatel: And at the last minute, one of the Reagan judges changed his mind. It was Larry Silberman, our friend Larry. He decided that this politicized the courts, and he wasn't gonna let it happen. He switched his vote, and they didn't unbank those three cases. And I thought that was just a classic example of how the courts can resist, how even though judges are appointed in a much more politicized process, they can still act as judges. Too bad that more of

that doesn't happen these days. But I thought that that little story was very revealing about the relationship between the executive branch and the courts and how the checks and balances, that's checks and balances working perfectly. And they worked because one judge there decided to act like a judge.

[00:54:36.1] Jeffery Rosen: And you give several moving stories in the book of your collaboration with Judge Williams and Judge Santel and the DC Circuit really acting like courts and converging around outcomes that they may not have agreed with. You mentioned two judicial heroes in the book, Lewis Powell and Learned Hand. Tell us why and how, for you, they embody judicial restraint.

[00:54:56.1] David Tatel: Yeah, it's so interesting. You know, a lot of my friends who read the book scratch their heads and they say, well, how come you didn't talk about Bill Brannan? And how come you didn't talk about Thurgood Marshall, who are heroes of mine? But the fact is that the summer I was waiting for, I had been nominated in May and my hearing was in, it was early, and it was in late September. And so while I was getting ready for the hearings, I decided to read as many judicial biographies as I could. I thought, what better way to prepare to be a judge? And the two that really connected with me were Gerald Gunther's biography of Learned Hand and the fairly new biography of Lewis Powell. I picked up the Lewis Powell one and liked it originally because he, like me, went straight from private practice to a court.

[00:55:50.6] David Tatel: I had never been a district judge and he had never been an appeals court judge. And his descriptions of what his first couple of years were like and how difficult it was with the flow of paper and new ideas, it gave me some confidence that I could survive this too. But both of them believed deeply in these principles of judicial restraint that seemed so important to me in terms of preserving the separation of powers. And they both lived that life as judges. Now, I didn't agree with everything they wrote. There were Lewis Powell decisions I disagreed with, but both of them, their opinions were principled acts of judging. Sure, they may have interpreted a Supreme Court decision differently than I did, but they didn't ignore it or distort it. They just interpreted it differently, and it was a principled interpretation.

[00:56:44.6] David Tatel: Same thing with statutes. They might issue an opinion that interprets a statute differently than I did, but their interpretation of the language was reasonable. And even if I didn't agree, it didn't mean they were wrong. And so these were two judges who I thought were perfect examples of how the principles of judicial restraint work to confine the courts to the judging function and keep them from meddling in the other branches of government. And then, as I say in the book, it's one thing to read books. It's another thing to try to do it. And I like to think that the next 60 pages of the book are my effort to show my readers how I try to do what those two judges did in my judging.

[00:57:32.5] Jeffery Rosen: Well, that's exactly what you do. And you do it so vividly and in such beautiful language that I'm really urging We the People listeners, to have the pleasure of reading Vision. For themselves. It's time to end. And I want to say that one thing that emerges from the book is your faith in the possibility of living nobly through the law, and you had such an inspiring career in public service. And for you, the law really was an instrument for the

common good. Why don't we end with just your final thoughts for We the People listeners about why you believe that law can be a force for reason and for good.

[00:58:14.1] David Tatel: I saw it when I was a college student in the '60s, in the height of the Civil Rights movement, I was fascinated, Jeff, with the role of the Justice Department, the Civil Rights Division in the South, and the way those lawyers brought those cases before those great judges in the South. And then when President Kennedy created the Lawyers Committee, the hundreds of lawyers from Washington and New York and other cities who went South in 1963 and '64 and handled Civil Rights cases. I thought, to me, that was the way our legal system and legal profession is supposed to work. They were and that was my model for my entire career. I was baked in from that very moment, Jeff. And look, the world is very different now and totally different.

[00:59:09.0] Jeffery Rosen: But what I say to my law clerks is, yes, you can look back at that as an inspiring time for courts and lawyers. But there are inspiring times for courts and lawyers today. I tell my law clerks, you can do a whole lot to improve the world by being a good lawyer and handling pro bono and Civil Rights cases, working with, whether you're a liberal or conservative, this is not a political point. Lawyers can still have a major impact on people's lives. Now, it may be more challenging in the federal courts, but there's the state courts and the state and local government. And there's huge numbers of jobs around the country that I think young lawyers can thrive in and lead productive and satisfying lives in the same way that I did. And I really believe that.

[01:00:11.8] Jeffery Rosen: David Tatel, you begin the book. With the Merriam-Webster definition of vision, first the act or power of seeing, and second, a thought concept or object formed by the imagination. And in this beautiful book, you allow all of us to form a thought or imaginative concept of what the law can be and what principle judging can involve. For writing Vision and for your service to the United States, David Tatel, thank you so much.

[01:00:38.7] David Tatel: Thank you, Jeff. This has been a lovely conversation. I've enjoyed it as well. Thank you.

[01:00:47.5] Jeffery Rosen: Today's episode was produced by Lana Ulrich, Samson Mostashari and Bill Pollock. It was engineered by Bill Pollock. Research was provided by Samson Mostashari, Cooper Smith and Yara Daraiseh. Please recommend the show to friends, colleagues or anyone, anywhere who's eager for a weekly dose of constitutional illumination. Literally, coruscation and general elation. Sign up for the newsletter at constitutioncenter.org/connect. Remember always when you wake or sleep that we're a private nonprofit. We get basically no government funds. We rely on your generosity. And if you want to make a donation of any amount, \$5, \$10 or more to signify your commitment to We the People and the NCC, that would be so greatly appreciated. You can do that by becoming a member at constitutioncenter.org/membership or give a donation at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.