

**Reforming Congress Project
Sunwater Institute
Interview with Peter Shane**

CHERVENAK: Professor Shane, thank you so much for joining us.

SHANE: Oh, it's a privilege to have this opportunity to talk with you.

CHERVENAK: Why don't we start with your background? Where'd you start off, you know, the arc of your career so far, and what you're doing now?

SHANE: Sure, so I am a Long Islander by birth, a creature of higher education in the northeast, Harvard College and Yale Law School. My first, I had always thought when I was in college and law school that I wanted to eventually be a professor, but I also suspected I would be better at it if I did something first, so my first post-law school job was clerking for a wonderful judge on the Fifth Circuit US Court of Appeals, but then I went to work for the Justice Department for about three years, and up until that time I'd imagine as a lawyer and as a teacher, I would be primarily interested or primarily involved in litigation. That's, if you looked at my law school transcript you would say, this is a, this is somebody who thinks he's going to be a trial lawyer.

And yet in this, when I was looking for a position at the Justice Department, an office that was hiring is what's called the Office of Legal Counsel, and the Office of Legal Counsel has had more publicity, I guess, in the last couple of decades than back then, but it's a very important office. It's an office, it's a relatively small office, a couple dozen lawyers who work both as a kind of general counsel's office for the Justice Department, but also as outside counsel to the rest of the executive branch and to the White House, particularly on complicated issues of constitutional and statutory law.

Sometimes they're asked to opine just because any issue is new or delicate, sometimes it's because there are two executive agencies that disagree on what the law means and somebody has to decide it for them, and that's the Attorney General, and the Attorney General relies on the Office of Legal Counsel to do that.

The opportunity to work there was certainly too good to pass up when I realized what they did, but to be honest I hadn't focused on this subject matter in law school. When I was in law school, well, I started law school in the summer of 1974, the summer of Richard Nixon's resignation, and up until that point, separation of powers, law I could call it that, had been something of a sleepy backwater in the constitutional law area. Everything was about individual rights in terms of what people were talking about and writing about, but for better or worse the administration acclimated people to the idea that the president could be sued, and those issues were very important, and that really shifted the focus of my personal and professional attention, and ultimately my scholarly attention, to issues of administrative and constitutional

law that concentrate on really the relationships between and among the three branches of government.

My main focus has been on law and presidency, but of course you can't think about that except in a framework that includes Congress and the judiciary. So in 1981, I went into teaching full-time, and I've been doing that for forty years. I retired from full-time teaching at Ohio state just last summer, in large part for a very unprofessional reason, which is my wife and I have an adult daughter who lives in Brooklyn, and we wanted to go live in Brooklyn, so that's where I've been.

CHERVENAK: Excellent. Why don't we start off with, you know, some of your work as it relates to the presidency and Congress. You know, obviously this program's focused on Congress, but a lot of, there's a general consensus that over time Congress has ceded a lot of its powers to the executive over time, and, you know, not only that, there's the regulatory environment that is really dominated by the executive branch even though in theory Congress should be making all the laws, so can you talk through your perspective on where, the relation between Congress and the president over time and where we are now and where you think we should be?

SHANE: Big, big, and important questions. So let me try to disentangle those threads a little bit because what Congress, when Congress hires the executive branch to do a job, when it sets up an agency to protect us against pollution or securities fraud or whatever statutory mission it assigns to an agency, that's, that is not, at least in theory, Congress giving anything up, Congress could decide subsequently, oh we've given away too much, we're going to change the law, or we don't really like the way agency x is operated, so we're going to trim that back.

In the 1960s, as a, when Ralph Nader was sort of the embodiment of the consumer movement, Congress created the National Highway Traffic Safety Administration, Department of Transportation, and they empowered the department to make a lot of rules with regard to automobile safety. One of the things that the department did was they created these, they allowed manufacturers to use as one safety device these things called ignition interlocks, where basically you couldn't start your car, or you would hear an infernal, an eternal buzzer, until you fastened your seatbelt. And people hated that. But manufacturers, that was cheaper than airbags. People were afraid of airbags at the time, so the Department of Transportation said to the automotive industry, you can, you can go this route, and people hated that. Congress just amended the law. They said, we want you to do this, but no ignition interlocks.

So Congress has not really given away its law-making authority in that way. What they've given away is power. And what I mean by that is that in the original design, the founding generation was very pragmatic. They didn't have a really, I would say, highly formalistic or kind of almost procrustean idea of, you know, this power must be done by this person and this powers. But they wanted each branch to operate in a way that, as the familiar phrase goes, checks and balances the other branches.

Congress has evolved to a point where, if the power, the party in charge of Congress is not the party in charge of the executive branch, they, you know, there's virtually no cooperation. If

they're the same, there's virtually no oversight. So, as a result, presidents understand that in order to get Congress's cooperation may be difficult, but for Congress to push back in a kind of regular order, legislative way, may also become too difficult for Congress because it's too riven by bipartisan divides.

When I was at the Justice Department, it was during the Carter administration. President Carter, of course, was a Democrat. Democrats controlled both houses of Congress. There was no apparent relaxation of congressional vigilance over the performance of administrative agencies under the Carter administration. The late congressional representative John Dingell, who was chair of the House Commerce Committee, was known for being very aggressive in demanding oversight-related information from the executive branch. His demands were commonly referred to as Dingellgrams. These were the, you know, please give me everything you have in your files about some huge subject, and he was pretty intense about demanding accountability, even from a president of his own party.

Right now, you know, if you look at very frequently what the hearings are about, the hearings are often about, you know, the talking points that are floating around, you know, in sympathetic media venues, but not necessarily on the everyday bread and butter issues that really affect how agencies operate. So it is really, in that way, I think that Congress has ceded a lot of its primacy to the executive branch. And I want to just, but I suppose I should draw a line around one area where Congress really has set back on the question of authority, and that is with regard to military policy. So of course, after Vietnam, the enactment of the War Powers Resolution in 1973 over Nixon's veto, Congress seemed to be in a at a moment of relative aggressiveness in terms of taking back its many years of acquiescence and whatever the president wanted to do, but Congress has again with, I guess the complicity of the executive branch, has seemed to be happy with the President having all but unilateral decision making with regard to the deployment of military force abroad so long as we're not engaged again in a prolonged major land war without congressional authority.

If you look at what the Justice Department under both Republican and Democratic presidents says is the president's power to send US military forces into hostilities abroad, it recognizes very little practical limit on what presidents can do. And Congress, you know, we're still operating in a counterterrorism context. We're still operating under the 2001 resolution enacted after 9/11. You know, a lot of the people who are on the other side weren't born on 9/11. So Congress's inability to wrap their hands around this is a sign of institutional weakness.

CHERVENAK: So beyond war, though, and you know, this idea of single or same party lack of oversight, you feel like that the Congress was right to delegate a lot of its rule-making authority, or I'd say rule-making operations to the executive branch, however many years ago it was when they did that? That that original bifurcation, you think, was a was the right one?

SHANE: Well, it's not as if—I think you have to look at this context by context. Congress, particularly in rapidly-evolving areas, you think about, you know, areas, Matt, that I know you know you look at: data mining, data gathering, you know, the operation of the digital universe.

If Congress were to enact a statute now that said, this is the way we want the world to operate, it's going to be obsolete, you know, by the time it's signed. Rulemaking is slow, but it's not as slow, and it can be changed and amended more nimbly. Congress sometimes will recognize that a problem exists before it knows what to do about it, and for Congress, you know, the most precious commodity, it's not just money, it's time.

And so for anything to be a sustained focus of congressional attention becomes a real burden. So if climate change is an issue, if anti-competitive behavior and industry is an issue, if consumer fraud is an issue, there's a lot to be said for setting up some organization that can have that as its main focus, issue rules that are accountable both in terms of potential congressional oversight, reviewable in court, there's public, there are opportunities for public input, that is actually a more logical way of getting policy made in a lot of these complicated areas.

Occasionally, Congress may get too enthusiastic about this. They may say, you know, you have people in very different, they think there's a problem, they have very different points of view about what to do about it. But they all want to go home and say to their constituents, we did something. And so one way to do it is, you know, to create an agency that supposedly will take care of the problem and that everybody feels that they've done something. But, you know, whether they've really done something is uncertain at that point. I guess my own feeling is that that happens relatively rarely, that most of the occasions in which Congress has created administrative operations in order to address public problems, there were serious problems and Congress attacked them seriously.

CHERVENAK: So I'm curious, you know, that's sort of from a structural point of view. What about the notion that Congress's capacity or expertise compared with the executive branch has declined? You know, there's a lot of individuals who say, you know, the committees don't have enough expertise to oversee the agencies that they, you know, the executive has all this expertise and all these resources that the Congress itself doesn't, you know, basically deprive itself of over the last fifty years or thirty to fifty years. What are your thoughts on that score?

SHANE: Well, it's kind of a, I would say a congressionally self-inflicted wound. Yes, so we have an Environmental Protection Agency. An Environmental Protection Agency is going to make sensible rulemaking decisions with regard to air pollution, water pollution, toxins. You're going to need access to all kinds of scientists, epidemiologists, statisticians, economists. You would expect the agency either to have staffed up in those areas or to have consulting relationships with you know appropriate experts. What Congress has done, though, is it hasn't necessarily, well it's cut back on its staff in in these areas, and often it has shifted its personnel resources out of Washington towards the home office, and I suppose from a point of re-election that may make some sense.

But as a consequence, you're often going to be in a situation where the members of a congressional committee and their staffs simply don't understand very well the problem that they're supposedly overseeing. That's why when you see somebody, you know, I'll single out

you know a law professor turned congressional representative who's, Katie Porter out of Southern California. I mean, professor, now representative. Porter is a real expert in finance and bankruptcy law, and when you watch her have a congressional hearing and she is questioning witnesses, there's just a level of expertise that you often do not see, and very often the questions that are being asked, well, I'm sure, you know, members of the executive branch understand they have to answer respectfully and try to be helpful, but they're just not being questioned by very skillful questions.

CHERVENAK: Right. So what about in terms of the balance between the Congress and then the judiciary? I know most of your work is the presidency, but you must have thought about this other balance of power, you know, and a lot of, there's also a lot of discussion about the judiciary taking a larger role at the expense of Congress. What are your thoughts on that side?

SHANE: If you ask any judge what their responsibility is with regard to interpreting the law, a law that Congress has enacted, they will say, we're just here to carry out the will of Congress. No judge will say, Congress has written a text and we're just going to make of it what we feel like. The question is, what tools and what approach do they take to figuring out congressional intent?

We're living in a time when a now majority of the Supreme Court and many lower court judges insist that they are just what you know they would call, and what many law professors call, textualists. You know, when Congress passes a statute, then, you know, all we as judges can look at are the words being used, and they will, you know, talk about what the dictionary says this word means or that word means.

CHERVENAK: The current definition versus the previous the definition at time of writing ?

SHANE: Well, that could be, that could be. But all of this is done supposedly in the name of judicial constraint. You know, if I don't stick to the dictionary, then I might just make something up. Okay, so let's hold that thought. If you actually look at the way judges decide cases, cases that are decided by judges who are appointed by Republican presidents traditionally are, wind up being more pro-business than those appointed by Democratic presidents, and vice versa. What that suggests is that judicial values are coming into play, and judicial values and, I don't want to say in a necessarily, in a in a kind of blunderbuss or utterly unprofessional way. It's not that a Republican judge sees business A versus consumer B and says, ah I'm going to do whatever I can to make sure the business wins or the other way around.

I think judges do seriously try to consider what is the best reading of the statute that they're implementing, but the idea that they're really being confined by the text, even when they say so, I think is, just doesn't hold up to scrutiny. And the response is, well if we don't do that, you know, if we don't just stick with the text, what else do we look at? And the traditional answer is what lawyers call legislative history. You look at the debates that led to the drafting of the law, you look at the hearings that were held about the law, you will look at the committee reports that are written about the law, you look at the problems that were being reported maybe in the

newspapers at the time that led to the enactment of the law. That will give you a sense of what its purpose was. And that method, although it sounds more open-ended, turns out to be certainly no less constraining than the other, and in some cases more constraining because you actually know, you know, what it is that Congress was driving at.

There's no getting away from the role of individual judgment in judging. Judges will always bring something of their own predilections to the judging process, but I do think that the judiciary in, which has recently been kind of hostile to the use of legislative history, has in a way undermined the capacity of Congress to control what its enactments mean, because often it is through the committee reports, through the debates, through the floor discussion, that you really see members of Congress trying to communicate effectively what they're trying to accomplish. And if all of that's going to be ignored, that makes Congress's job much harder.

CHERVENAK: Well it's interesting that, when you think about the information coming out of Congress, there's the information of the of the law, right, and then there's this kind of meta information around what led to that law. That meta information is by definition going to be incomplete, right, so it's going to be a sampling of what was really thought of at the time, you know. How many unwritten, how many unwritten debates were happening around each line of that text? So you would think that that's a pretty challenging job, is to try to understand legislative intent, not to mention the fact that Congress isn't a single individual. With a single individual, you might be able to get it intent, but when you have lots of people, each with different intents, it's hard to make that notion of intent, you know, a real thing that can be ascribed to an author when you when in fact you have so many different perspectives that are synthesized to one thing.

SHANE: For sure, and I think because of what you've said, and I think what you've said is accurate, you'll see judges using kind of different starting points in their thinking about a statute. So one way of thinking about a statute is to look at its purposes. Often many a statute will say, you know, Congress has a list of findings, you know, these are the things that we think are a problem, these are the things in general, you know, this is the way we wish the world would actually operate, and then you get to something complicated in the wording of the text. The text is ambiguous or vague, so one way a judge might try to understand that statute, one way of the agency might understand that statute is what is the most reasonable way of reading that section, if we take seriously that Congress wants to accomplish the purpose that's stated up front? Okay.

Another way might be, okay I'm Judge X. In general, I believe in liberty, and so if the statute is vague, I'm just going to take as a baseline assumption that the less restrictive, the less regulatory meaning is the right one. That's another way to go. And you, I mean, judges are not always entirely frank about what their starting points are. But my own view is that if the judiciary takes seriously that it is intent on carrying out the will of Congress, it is best off trying to ask what the statute most reasonably means, given Congress's apparent purposes and trying not to sort of, you know, of course there will always be other factors in play, but I think the

primary question the court should be, any court should be asking itself is, what is Congress trying to do here, and what reading will come closest to advancing that purpose?

CHERVENAK: And by Congress, when you say, what is Congress's will, you mean the text of the document, or do you mean...?

SHANE: I mean the enacting Congress. So, these issues, so, I just want to go back to something you said because it's very important, where you talked about how information comes out about what Congress has done, and it may be broadcast in different ways to different audiences that may or may not be attentive or understanding of all aspects of it. And I think, unfortunately, this is a problem because we all, you know, we've been to high school, we heard there were three branches of government. They do, they make the laws, they execute the laws, they, you know, they interpret the laws.

But policy making winds up being so much more complicated to process, and it's very hard for non-specialists to follow all the steps of that process, and that has gotten worse because there's less and less reporting that is focused on what I would call kind of the workings of the day-to-day administrative state. If you're Chevron or if you're the National Natural Resources Defense Council, some, you know, big organization, either on the for-profit sector the non-profit sector, you can afford to subscribe to a news service that will give you a pretty good insight into the inner workings of whatever agency is most impactful on your particular activity. But for ordinary citizens, they have no idea. And as, you know, we have I think a third less newspapers now than we did twenty years ago and a lot less reporting. People often say, well, we still have plenty of journalism, and we do. We're awash in journalism. What we're not awash in is educated reporting. And so, you know, in terms of understanding what Congress intended, often, you know, I think it's easy for judges and, you know, ordinary voters to be under-informed.

CHERVENAK: And by intended, I just want to make sure I understand where you're coming from because there's the intention of the document as passed by the whole body, and then there's the random intentions of the people, individuals, in hearings or you know whatever, before that process. When you say intention of the Congress, do you mean the text that ultimately resulted, was passed, or do you also mean the individual utterances of individual members before that?

SHANE: Well, I think you're looking at the intent or the purpose that underlies the text, the text that was actually enacted, but it may be that what individuals say will shed light on that, may shed more light on that than, you know, Webster's Dictionary.

CHERVENAK: Right, that's a big challenge because obviously, since there's so many different people, they may all have a different view of that bill, and so you're trying to create a synthetic from something that the best they could do is come out of a text, you know, they couldn't come up with an underlying novel to explain their world views and put them in synchrony. But it's interesting, you know, we talk about this concept of information flowing out of Congress, and I

know you've done, and this leads to my next question, which is really about your work as it comes to, you know, communication or political information, you know, within Congress itself moving to the constituents and also with the media. Can you talk a little bit about what work you've done in this political communication information area? You know, what questions were you asking when you embarked on that research, and what did you find?

SHANE: Relatively early in the 1990s, as, with the advent of what we now think of as just the world wide web, I guess we now just think of it as the internet, it's just so built into our daily lives, but once you started, you didn't have to know a lot to be able to go online, communicate with other people, get information. You started to see governments using these new media to share information or to distribute information to the public and also to invite members of the public into policy discussion. The United States was not really in the forefront of this.

You saw it more, actually, you know, a lot of the sort of earliest and most interesting stuff was happening in the European Union, in part because there was so much anxiety about, you know, policy-making authority drifting from individual nations into Brussels, that the European commission realized, early on, that if they had an online presence communicating in, you know, almost two dozen languages, where people could get information, share information, that might reduce this sort of anxiety about a democracy deficit.

Now at around the same time, you had kind of two waves of writing about this, and much of it I'm sure you saw also. There was a wave of what I would call technological utopianism. Hand out enough laptops and all cured, and all ills of democracy will be cured. And this was replaced in due course with kind of apocalyptic technology dystopianism, where, you know, once we're all online we're all, you know, manipulable, we're all subject to disinformation, our worst possible behavior is enabled, and you know we'll have the breakdown of civilization as we know it.

My own view then, as now, I mean not, and I have to say, you know, there's some evidence actually on both sides, but, you know, we're getting a lot of publicity about the negative side, at the same time I always ask myself, is there another information age you would rather have lived in, you know, would we have rather lived in the 1900s and relied on, you know, the sources of information available to us then in terms of how the world works? I'm not really nostalgic for that. But I think what technological realism calls for is a real understanding or real focus on the role of human agency in making communications technologies either work for or against democratic possibility.

And part of the problem that democracy faces, and this is, I'm hardly the first person to say this, inertia favors authoritarianism because if people don't remain vigilant about how power is exercised in their name, then the people in power will exercise it for their own ends. If Congress is not conducting meaningful oversight over the executive branch, the executive branch will pull more power unto itself. If the public doesn't react when Congress misbehaves, Congress will misbehave more and what that means, unfortunately, is that it requires a lot of time and

attention from people, not every person, every day twenty-four, seven, three hundred and sixty five days a year, to focus on politics and the news, but it does mean that the world is better off if more people are engaged than if there were fewer. And how that is done, you know, how that can be best designed to achieve more, sounder, more legitimate democratic collective outcomes is a, it's just an ongoing problem.

CHERVENAK: And so your specific work in that area was what? It was to figure out or to describe that information flow? To project it into the future? To see the problems and come up with solutions? What was your kind of big question, and what did you find?

SHANE: So I guess there were two things in which I was involved at different times, sort of, again, around the turn of the millennium. I was working with a couple of other researchers at Carnegie Mellon University, basically to ask the question whether it was possible to design online deliberative environments that people might find as satisfactory for their own kind of collective decision making or, you know, you think about public hearings, for example, as doing it face face-to-face. And the data that the experiments yielded, and I'm, you know, certainly not the primary social scientist behind this, but I believe I'm accurate in saying, excuse me, that our data showed that under certain conditions people were as satisfied with the opportunity to converse and deliberate and understand issues and understand and communicate with one another online in real time as they would be attending face-to-face hearings.

So that's, that was sort of good news. Having said that, it's still, you know, I think governments could go much further than they had in terms of creating these kinds of opportunities for citizens to deliberate with one another and have and feel like they're having a meaningful impact on the democratic process. The second sort of stage of my involvement in these issues was working with something called the Knight Commission on the Information Needs of Communities in a Democracy. So this was a project that was funded by the Knight Foundation, and I think we started around 2008, 2009. It was actually organized by the Aspen Institute, which was being funded in this effort by the Knight Foundation, and Alberto Ibarguen, who is the wonderfully visionary director, president of the Knight Foundation, said, I just had three simple questions.

And he said this without smiling, so I learned to understand that he wasn't, in his mind he didn't really think he was joking when he called them simple questions, but his questions were, what are the democratic information needs of communities in a democratic nation? Are they being met today? And if not, what should we do about them?

And it turns out from my point of view that those are very complicated questions. I do think that one thing that we agreed upon, that the commission agreed upon, I was basically his research director, was just the tremendous importance of universal broadband adoption, not just in terms of, you know, I can get some kind of signal everywhere, but really being able to have a kind of rich online experience in rural America, urban America, among minority communities, majority communities, everyone. And one of the things that is really, I suppose that has puzzled me, or frustrated me, is that if you look at what President Obama said he

wanted to achieve in terms of universal broadband adoption, what George W. Bush said he wanted to achieve in terms of universal broadband adoption, I think it may have even been the same under the Trump administration. For some reason that agenda has never been effectively enacted, and so there are just still parts of the country where people can't, you know, cannot easily have the kind of experience you and I are now having because either the broadband is not available, or it's just too expensive for households in that area.

Again, having that technology is not itself going to solve the problem, but I do think without that kind of platform, you're going to, you are going to continue to have a very great chasm in the quality of experience that some people have with information as opposed to others.

CHERVENAK: Well let's talk about this concept of information flowing out of Congress, right, towards constituents. There's an information flow, right, part of that information flow are, is legislation that's either passed or in process, there's committee hearings, you know, there are pronouncements by the Speaker or by, you know, a senator. There's all kinds of information being generated by Congress, and your average constituent can consume that information in a variety of ways. They can go to the Congress website, they can get it through national media, they get, maybe in the past they've got it maybe through local media, you know, what are your thoughts about what's the appropriate stream coming out of Congress that Congress should create, right, and then how should that information be communicated or transmitted to constituents?

SHANE: I do think, again, this is where the loss of local reporting has really hurt. We have, again, just many, many fewer reporters covering local politics, and although we, you know, we talked about the national legislature, the national Congress, each representative is accountable to his or her district. I mean, that's, those are the voters who can hold that person to account or not, and without some kind of independent voice that is sharing information about what that member of Congress is doing, I mean, you know members of Congress quite understandably want to be reelected.

They're going to present themselves and what they're trying to accomplish in a particular way that is not necessarily balanced, and in our highly gerrymandered political environment they may think they don't have to. You know that, what gets me reelected is my party label, depending on, you know, whether I'm in a Republican or Democratic district, and so the incentive to really have engaged, informed voters may not be very great.

Where I would like to see, and this is, you know, we're talking idealistically, so I'll be a sort of semi-utopian here, there's a political scientist I very much respect and like out of Stanford named Jim Fishkin, who created a process that he called deliberative polling. He was reacting many years ago, he just hated the idea of these polls where, you know, somebody calls you on the phone and asks you your opinion on something that you've never heard of before and you give an opinion, and then they say sixty-four percent of the American people support x, y, or z. And I think there was even an experiment done where, you know, I think maybe Time Magazine back in the day, had a public opinion poll on whether the people were opposed or supported

the Improvement in Government Act of 1975 or something, and of course there was no such act, and, but people had an opinion, and if you told people, you know, President Ford supports the Government Improvement Act of 1975. Do you? That produced a certain result. Government, General Ford is against it. Again, it's just easily manipulable.

So he created a kind of set of protocols for deliberate for randomly selected deliberative groups, groups that are not predetermined by party or age or race or anything else, to get together and be able to talk about even highly contentious issues, not to reach consensus, but to at least reach a kind of common understanding of what the hard questions are, what the range of possibilities is. Now, he's deployed this in a variety of ways. It's labor intensive. But what would be great would be if members of Congress, or if Congress institutionally, created more opportunities like this, where instead of just saying, you know, whoever shows up with the loudest voice, you know, we're going to listen to that, instead allows themselves to be an audience for a randomly-selected group of their own constituents representing different points of view, who've been adequately prepared to think with a little depth about an issue for some period of time, instead of getting a kind of knee-jerk opinion, you might find that people's opinions converge around much more practical responses than would otherwise be the case.

I would love to see a mechanism like that developed, but we're talking money and time, and again, everybody in power right now, and I want to say this. I'm not, you know, I am not, I don't think of myself as anti-government in any sense, but I do think as a realist, one has to understand that the people who enjoy power now, they got elected president, vice president, they got elected to the Senate, they got there by playing by the rules that now exist. That greatly reduces the incentive to change the rules. So unless we as citizens get involved in some constructive way behind programs of change, we can't be surprised when inertia takes over.

CHERVENAK: So you mentioned the media companies, the local journalists, you know, obviously if Congress pumped out all its information in a feed to everybody's household, right, the individual could then select among that information for what they thought was important, right, but in reality they're getting it through intermediaries, which is typically highly selective about what they think is important, and there's going to be a world view associated with that, and a lot of that world view, or at least those intermediaries have been captured by various interests, right, so there's not, there's very few, it seems, media that are dedicated to the thing you mentioned earlier, which is some kind of objective measure of what's happening in Congress, you know. It's captured by a particular ideology or a party or whatever. There's an already preconceived notion of what's important and what's not embedded into that media that intermediary, right. So what do you, what are your thoughts on how that's evolved over time with the media? You know, is it, you know, is it hopeless that there's this kind of like self-reinforcing structure there? Or, you know, what's your perspective on the history of it and where it is now where it should go?

SHANE: Well, the period of time during which objectivity was a professional goal of the press was a relatively short, it was not most of our history. We were talking about a certain portion mainly of the 20th century, you know that what the Jeffersonians and the John Adams

supporters were saying about each other in 1796 and 1800 would still look pretty shocking today. So you had newspapers that were party organs. Again, there wasn't necessarily this idea of objectivity.

But two things, I think, have happened, well more than two, but one thing that's happened is our problems have become, I think, much more complex and interconnected. You know, if we were, if I'm sitting in a room like this you know in 1800, everything in the room was probably manufactured relatively close by, and, you know, I may know the people involved. I can watch, you know, what the market was in cotton or whatever. Now, you know, we're surrounded, you know, I assume nothing in this room was manufactured locally. And keeping track of that complicated world in terms of international trade, effects on climate, labor policy, you know, income equity, you know, all of those things just becomes much, much more complex.

And the second thing is that the technology we have which makes us more connected than ever does allow for this kind of self-selection of information sources that can work against us. What I find if there is encouragement to be found, I think it's largely in the fact that I don't really see in personal interactions the kind of polarization that seems to exist you know in, on a Twitter thread or in Facebook. I mean I have, you know, I am, in my particular place on, you know, the philosophical spectrum, I have, you know, friends going back decades who are at a very different place, we don't talk at each other the way, you know, members of Congress who represent fairly extreme points of view talk to one another. But when you have, but when you have a media environment that kind of feeds toxic, kind of toxic mix of information, to people who are too busy or just otherwise inclined to believe it, you know, this really weakens political accountability.

I really do believe in the capacity of human beings, when they sit down and really talk to one another, to achieve some kind of understanding that enables people to move forward, not I get everything I want, not that you get everything you want, but at least I understand where you're coming from, you understand where I'm coming from.

You know, right now just you know we have controversies going around about things that I'm quite sure the people who are often most adamant about them do not understand. You know, the first question I would like to ask anyone who tells me that they're frightened of critical race theory is, what is critical race theory? Because I firmly believe that a great many of the legislators who are agitated about this really don't know, and that's a problem. I mean, and it's a problem that can be—well right now, if you have a Congress that has was targeted for a violent attack on January 6, you know, of 2021, and they can't even achieve consensus on the propriety of investigating an attack on themselves, you know, that really shows that misinformation, without human, without real human exchange among the citizenry, can just have a terrible outcome.

CHERVENAK: But it sounds like for you, the answer to that problem is a kind of a structured dialogue, right? Because there's one, you know, there's a, I like to call it a constructive dialogue, but one that, you know, has an outcome that is greater than the sum of its parts, right. But in

terms of the way that the, you know, if you look at the various social media platforms, they have a particular way of having dialogue, right, you know, you have a blog post, right, you have these different methods of dialogue that are relatively back and forth, you know, but there's a, there's the kind of the notion that you can create a dialogue that has these more, that requires a little bit different interaction among the participants, you know, when, what's kind of the requirements of that kind of dialogue in your mind, you know, that you've talked about or you've seen since those early studies?

SHANE: Well I think one requirement is trained moderation, that is, you know, somebody who is, you know, helping to keep the room going, keep people talking, who is not committed to one side or another the issue that's being discussed, but is again just committed to making sure everybody gets a chance to speak, that people are hearing one another fairly. I think that is essential.

I know, Matt, that one of your interests is the role of anonymous information sharing, and this is a conundrum because of course in an age of, where surveillance can seem quite threatening, and online harassment it can be a very real thing, there are lots of things that people know that ought to be shared, but they're quite understandably reluctant to share it because they don't want to, I don't know when the nation, when we be— when the nation adopted the habit of issuing death threats to everyone they disagree with, but you know I'm sure this is very frightening to a lot of people who don't think of themselves as public figures.

So if you don't have opportunities for anonymous information sharing, that itself is a democratic problem. On the other hand, people behave differently if there's a face behind the statement, and if they can, if they are at least in that sense held accountable for what they say, and again I don't think I'm saying something, you know, that others haven't said, but accountability is a precious quality of democratic life that we're not seeing except often in a kind of overblown way. You know you have, you know, companies failing their consumers, their employees, and their CEOs walk away with huge packages. You have, you know, politicians who are acting in ways that could legitimately be viewed as corrupt, and yet you know there doesn't seem to be any adverse consequence.

At the same time you have ordinary citizens who say something online that they may be sorry that they put it that way, and suddenly, you know, the world kind of comes down on them. And I do think we need some way of kind of recalibrating our norms of interaction, both online and offline, to be, on one hand, sort of more demanding of people in power and, but more understanding of each other as human beings who are not going to be infallible, and just give each other, you know, space to be part of an ongoing democratic conversation.

CHERVENAK: You know, I wonder about this notion of anonymous communication, right, because if I'm a representative and I want to know about what my district thinks about something, but I'm getting a bombardment of information, I never really know if that's coming from my district or not, right. It's hard to know, even for the mail, right, or the Twitter feeds, or the, you know, whichever channel you choose, a lot of that information may be coming, may be

highly distortive about what my district really thinks or really where they stand on particular issues, you know, so I wonder about this notion of anonymity being a hindrance to the representative understanding what's really happening in their district.

SHANE: It's hard, and maybe, you know, as a data analyst you'll be able to come up with a more precise sense of, you know, which factor is represent—is affecting what percentage of the variance out there. I'm sure that, you know, you're right, but to me that, I just have to feel that a lot of what's leading to a distortion, if that's what's going on, and how representatives are representing their constituents, is where they think the money for their campaign is coming from. And often that is, you know, they're perfectly happy for that money to come from outside the district, and a lot of campaigns are being financed, you know, on a national basis, not on a local basis, and so it's not that the representative may not know what his or her constituents think, but he or she may understand that, you know, very few voters are going to measure each issue in a sort of highly calibrated way, and if they can get their re-elect me message out more often, that's not always going to be, you know, you can't buy every election, but you can have a real impact.

And I think more than anything it's become the role of anonymous money in our system that is more of a problem than anonymous information. I will say, by the way, just to pick up on, you know, the sort of proliferation of, you know, you get all these phone calls you don't know where they're from or something. In the executive branch when agencies make the issue rules and regulations, they're subject to something called the Administrative Procedure Act, and for, when they issue a rule, for most significant rules, most rules that bind the public with new obligations or responsibilities, they're required to create opportunities for public comment. And these opportunities can be quite meaningful in the sense that in an agency, if you know if the FCC decides, you know, the internet needs a new regulation, or the Department of Agriculture decides farmers need a new regulation and they open it up for public comment, if issues are raised in that public comment period that they don't address in the final rule, they may not agree with the comment, but at least they have to say, you know, we went along with this, we didn't go along with this for a reason, a court might set this aside.

So these can be potentially very meaningful opportunities for public participation. But at the same time, you look at something like, you know, the fight in the FCC about net neutrality, or you look at the question before the Department of the Interior whether polar bears should be an endangered species, you're getting not just hundreds of thousands, millions of online comments, a lot of them are just copies and paste of this comment that's been provided to whoever is sending it in by an organization. So for the agency involved, this has become its own kind of technological problem where, you know, they're not supposed to be counting votes. You know, the fact that they have a million postcards that say one thing and a million and half postcards that say another is not supposed to decide the issue. But they have an obligation to review what's coming in, they have to separate out decide, you know, how many comments are just duplicates of other comments and figure out what are the real issues, and you know, anonymous or not, it's the massive influx of really non-deliberated information that I think for many agencies is the big problem.

CHERVENAK: Yeah, and I think that's a challenge for obviously for Congress it's the same issue, even in a committee, and then how much of each side of an issue do you pay attention to, right? And of course the majority gets X and the minority gets Y in terms of witnesses or in terms of the ability to create information pro or con any individual piece of legislation, and so that's the way they try to structure it, but again, what are they getting is also from a special interest point of view rather than probably a broader audience.

SHANE: Sure, so one example of where I think, you know, from my point of view you see oversight gone astray is with regard to the Internal Revenue Service. Congress has enacted tax laws, presumably with the idea of raising money. I don't, you know, enjoy paying taxes any more than the next person, but I understand that, you know, public finance is a prerequisite to good infrastructure, to having the kinds of government services on which I and others rely, and if you compare, you know, driving on the German Autobahn with driving on you know [] State Turnpike, you'll realize there's something to be said for paying enough in taxes to support a really good infrastructure. So you would exp[ect], so, you know, there have been studies to indicate that tax law is being way under-enforced particularly with regard to high income taxpayers, and, you know, there may be a substantial degree to which we could relieve, you know, the deficit each year if the tax laws were more fully and fairly enforced.

What you would expect oversight to focus on is what's being done to effectively collect taxes. Instead, I haven't, I don't even know what the, what the latest hearings on this had been, but during the Trump administration with Republicans in charge of Congress, the big oversight was whether, you know, conservative nonprofit groups are being unfairly targeted, and you know, that's not a non-issue. I mean, political groups, you know, should not be discriminated against. At the same time both liberal groups and conservative groups may have tax obligations they ought to be, you know, they ought to be held accountable to, but to focus entirely on that is what I mean by focusing on what the talking points were, you know, for your party as opposed to whether the agency is behaving effectively.

If you don't want the agency to behave effectively, that's one thing, then change the law, you know. Don't pretend that the agency is doing that job, but if that's the agency's job, if the executive branch is charged with faithfully executing the law, then you, Congress, should make, see whether the agency is really carrying out its mission, and you should be upset when it doesn't. You shouldn't be upset when it's being lax in a way that, you know, you feel you can live with.

CHERVENAK: Yeah, it's a challenge, you know, again it goes back to what you said about time. You know, there's a certain limited amount of time Congress can spend. How is that time allocated, and is that time allocated according to the importance of the issue, the importance of the problems before it, or what's actionable within a Congress, or some other measure? Tax code in particular is a tough one because the complex, it's so complex. It's back to your comment about the complexity, you know, if the tax code was simple and short, then the attention issue might be less pronounced, but when you have such a complex system, that time

element becomes even more critical because you can't look at all these individual pieces, you have to, well that's all you can do is you can look at individual pieces, you can't, you have to pick and choose among the complexity rather than treat the whole thing, so it's a challenge.

SHANE: And we were talking before about the comparative expertise of, you know, executive branch administrators and congressional staff, but there's another expert group that's out there, which are the lobbyists, and, you know, the people who approach members of Congress with ideas for legislation that will help their industry, their consumer group, whatever it is, they know what they're talking about. They have a detailed understanding of what they're asking for and what its impact will be, and often, again, you know, members of Congress are not staffing up at a level that kind of, you know, meets that level of expertise.

And I will say and again, I, it's, I hate, I hope I'm not just sounding glib about these things because so much of this is being, you know, argued by others as well, but the commitment, it seems on both sides, but you know, and you know I'm going to feel it's more on the other side, they're going to say it's as much on my side, to sort of following the party instead of analyzing the issue. It's really been, I think, just devastating to the policy-making process. I was part of it in an initiative. I don't want to, you know, give away any identifying detail here, but it was part of an initiative whose objective it was to make a university's faculty research resources more easily accessible to policy makers, and we were reaching out to various policy makers in different arenas to just say, you know, we have people working on A, B, C, D, E, F, G problems and, you know, if we can be helpful to you, you know, we don't want to persuade you of one thing or another, but, you know, you're just trying to figure out what the trend is on this or that, what the best thing is, you know, we would love to be of help.

That's, you know, I've worked for public university. Most of my life has been in public universities, it's part of a public university mission, and so you know, one of the people who said, oh they would love to talk about this was a staffer for a member of Congress, and we got this person on the phone, and my colleagues and I were basically saying, so tell me your member's agenda, you know, what are the things that your member would like to accomplish, and we can sort of line up people who might, you know, have expertise. And basically, I mean this is, I'm paraphrasing but only slightly, my member doesn't have an agenda, that is, you know, the caucus has an agenda and my member supports it, you know, and I, it's great for you to reach out, you know, we love hearing from you professors, but basically I'm, we're just, we're just waiting for our marching orders. That's not very encouraging.

CHERVENAK: Yeah, that's the, it's the European system, right, so we've migrated to that without the parliamentary structure to support it.

SHANE: And you know, in the European system you also have, think about, you know, either France or Great Britain or Germany. You have a professional civil service that runs much deeper than in the United States. The United States agencies typically have a very thick layer of political leadership before you get to the civil service, and the civil service in those countries is highly

trained, highly respected, often expected to serve with equal zeal whatever party is in government. That, that's, yeah, we don't have that.

CHERVENAK: So I guess I have one more question before we move on to our next phase of the discussion, which is, you know, your work on this concept of oversight, but as it particularly relates to the executive branch carrying out the law. So, you know, when I think about oversight, there's lots of different frameworks. One of them is this kind of investigative oversight, right, which a lot of people focus on, but then there's this notion of, is the law written being executed well, and if it's not being executed what's the reason? There could be multiple reasons why it's not being executed. You know you could have, the law could be unexecutable, it could be willful, you know, non-enforcement by the executive branch, or I think as you mentioned at one point, it could be a lack of resources to execute the law. So can you talk about what you've done in that space and what have you, what questions were you asking there, and what did you find in that area?

SHANE: Congress enacts administrative programs in a criminal code that is vast, ambitious, highly complicated. Congress understands that a hundred percent of the law is not going to be enforced a hundred percent of the time. Sometimes there are laws that, as you say, there are different reasons. There may be laws that are now obsolete, or there are laws that, you know, are recognized as being of low priority, but generally every agency realizes it can only work within that year's budget. And in a healthy situation, there would be an ongoing dialogue between the agency and the congressional committees overseeing that agency so that members of Congress understand what the agency thinks are its priorities, the agency understands what its oversight committee thinks are the priorities and presumably tries to get them in line, and sees, you know, where the resources are adequate and where they are not, and we have a system.

So here's the textbook version of this system. Every agency of government responds to an oversight committee, a substantive committee, the justice department response to the judiciary committee, agricultural response to the agriculture committee, armed services, overseas defense, and so forth. Every two years, the, that committee is supposed to write a new version of the law that sort of sets out what are the amounts of money that are allowed to be appropriated for the agency and for what purposes. These are authorization bills. They don't actually hand out the money, but they say, you know, this is, you know, this is where we think money could permissively be appropriated. And often they will adjust in these two-year laws what the precise authorities are of a particular agency.

And then each year by September 30th of the year, Congress will have enacted I think it's thirteen different appropriations bills that attack whatever these missions are within the terms of the authorization laws that have been enacted. I believe that since 1980, Congress has enacted all of its appropriations on time once. I think it was in 1988 when the Democrats that year thought this was actually a salient election issue, so they wanted to be able to say we got it all done on time. Never otherwise done on time, and I, my guess is that there's many, many a committee that is a laggard when it comes to its authorizing process. So the kind of, as, if I'm

right about that, then what this means is that the agencies are not getting the kind of rigorous testing of their priorities by members of Congress who are responsible in those areas, that would help the agency again faithfully execute the laws according to what Congress wants to happen.

And again, as long as, this is, I want to say there's just not much that's sexy or exciting about that kind of oversight. I mean, you know, congressional committee finds that the same process could have been done more efficiently with a hundred fewer trucks, and that's not the kind of headline that's going to get the kind of attention back home that many members of Congress want, but it's that routine oversight that's really the bread and butter of a healthy process. My sense, and again I'm not a specialist in Congress as much as I focused on the executive branch, my sense is that the process is not working that way.

CHERVENAK: And the unenforced law that you're mentioning, you know, it just kind of sits there and they selectively enforce it? You know, what's the, tell me about this kind of unenforced law.

SHANE: Well, it depends, you know, I suppose if it goes unenforced long enough, I mean, there's something called the Logan Act, which prohibits individual citizens from conducting foreign policy for, on behalf of the United States as if they're part of the government when they aren't. That goes back to a Dr. Logan and his famous, infamous activity in the 1790s. Nobody's ever been successfully prosecuted, or maybe prosecuted at all, for the last two hundred years.

I think if there were a prosecution brought under it, a court would now say it violates due process to pretend that that's still the law, but other laws, you know, they kind of rear up or go down depending on who's in power. So we've seen this with regard to immigration priority setting. We've seen this with regard to drug policy. The Obama administration basically said, you know, we're not going to prioritize marijuana enforcement in states where the state legislature has made marijuana position legal. That doesn't mean we will never do it, but, you know, we're just going to treat it differently in those states as opposed to other states that still want to treat marijuana as being unlawful.

But, you know, when that administration leaves office, what was unlawful last year becomes unlawful again. Well the questions you're asking are very important questions, Matt, and I'm just, it's a privilege to be part of the conversation with you. Thank you for having me.

CHERVENAK: Professor Shane, thank you so much and best of luck with your coming work.

SHANE: Thank you.