



Restoring the Guardrails of Democracy

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[00:00:00] Jeffrey: Hello, friends. I'm Jeffrey Rosen, president and CEO of the National Constitution Center. I'm so excited to share today's episode with you on both of our podcasts, We the People, and Live at the NCC. Only July 6, we hosted a panel to present the reports of the teams participating in our Restoring the Guardrails of Democracy Initiative.

[00:00:24] The project brings together three teams of leading experts, libertarian, conservative, and progressive, to identify legal and technology reforms that might address current threats to American democracy. Edward Foley is the leader of Team Progressive. He holds the Ebersold Chair in Constitutional Law at The Ohio State University.

[00:00:43] Sarah Isgur is leader of Team Conservative. She's a staff writer at The Dispatch, where she co-hosts the legal podcast, Advisory Opinion. And Clark Neily is leader of Team Libertarian. He's Senior vice president of the Legal Studies at the Cato Institute. It was a wonderful conversation, and I'm so happy to share it with you.

[00:01:02] On with the show.

[00:01:04] Welcome team leaders and friends. I'd like to start by asking each of you to summarize the highlights of your reports, and then we'll explore similarities and differences. What was most striking in reading the reports is that all three of you acknowledged a common problem, namely that safeguards are necessary to prevent the kind of... What the Progressive Report calls negation of election results attempted by Donald Trump in the aftermath of the 2020 presidential election.

[00:01:36] That's the language from the, um... Forgive me. From the Libertarian reports, but it could have come from the other reports as well, because all three reports acknowledged the false claims of the 2020 election as a problem that needed to be responded to.

[00:01:52] Team Conservative talked about it in these phrases. It said, president Donald Trump and his worst enablers tried to steal an election, and in the process, interjected a flood of poisonous paranoia about elections into our politics. And Team Progressive said the organized efforts would repudiate the result of the 2020 election, which culminated in the insurrection at the capital on January 6, revealed the republic's vulnerability to a partisan effort to retain power, regardless of the popular verdict.

[00:02:18] I begin by quoting the similar language from all three reports, 'cause it is significant that all three of you, in the state of Nature, or state of Zoom, or however you met, acknowledge this common problem of, uh, responding to attempts to negate, uh, the, the results of the presidential election, but you had very different [inaudible 00:02:37] reforms for addressing that problem.

[00:02:39] So, let me begin by asking you to sum up those proposed reforms. Clark, Team Libertarian, as I mentioned to you, has the best executive summary of the three reports, so I can read from that. But instead of doing that, I'll ask you to sum up the meeting recommendations of Team Libertarian.

[00:02:54] Clark: Thanks, Jeff. It's a pleasure to be with you tonight. I want to thank my co-authors, uh, Ilya Somin, and, uh, Wally Olson for the excellent work that they did. Um, clearly the most urgent short term reform, uh, to restore public confidence, um, in our electoral process, and to ensure, uh, as best we can, the peaceful transfer of power, uh, in the next election.

[00:03:14] Um, you know, our, our election procedure, uh, for federal office, in particular, president, is necessarily somewhat complex. The Constitution mandates that. Um, but the key is to ensure a certain amount of clarity, uh, and transparency so that it becomes more difficult for, uh, failed candidates to, uh, raise insubstantial challenges, or otherwise, uh, take advantage of various complexities in the electoral process in order to try to frustrate the outcome of a valid election.

[00:03:44] So, that's certainly at the very top of our list. And of course, as you mentioned, uh, all of the groups picked up on that in one way or the other. We can talk, uh, in a moment, uh, sort of about the guts of how we might, uh, do that. Probably the centerpiece is reforming, um, the more than century old Electoral Count Act, which was written in 1887, is imprecise, and somewhat open ended, and also, um, uh, seems a bit old fashioned because it was written for a era where, um, it, it didn't seem likely that, um, presidential candidates would challenge the outcome of elections in bad faith. And we now know that we're in the new era.

[00:04:19] A second problem that seems, uh, sort of... All of the groups picked up on in one way or another, is the increasing polarization, um, in American society. Our proposed solution to this polarization, or at least to try to ameliorate it is to enhance what, um, my co-author, Ilya Somin, calls foot voting, which is the idea that, um, there are more than one way to vote.

[00:04:40] You... It's not just, for example, ballot box voting, voting for different candidates, or different laws. There's foot voting, which is the ability actually either move to a jurisdiction that has a more appealing, uh, array of policies, or in your private life, uh, avail yourself of various options to involve yourself in significant activities, uh, whether it's where you live, or, or how you educate your children, um, that are better tailored to your personal, uh, preferences and values.

[00:05:05] And then, third, uh, we think there's a real problem with lack of thoughtful participation in the democratic process. Um, again, Ilya Somin has written significantly about, uh, rational ignorance, which is the idea that because somebody's ballot box vote really doesn't

have much chance of effecting anything, there's not much incentive for people, um, to really study the issues, and, uh, acquire the knowledge that they would need in order to, uh sort of wield the power of, of a franchise, um, in a way that, that reflects, uh, what is at stake. Because, again, in terms of their, their, their single vote, not much.

[00:05:40] Um, and then finally, uh, we, we touch on an underappreciated aspect of our, uh... Of democracy, and our opportunities for de- democratic participation. Um, probably the most important, uh, venue for direct democratic participation is service on a jury, in particular, a criminal jury. The, uh, criminal jury was really, the centerpiece of the Bill of Rights. There are many good reasons for that.

[00:06:02] Um, the most important one is that the founders made a deliberate decision to make citizen participation, um, the very heart of the administration of criminal justice, and we've effectively taken that heart and just ripped it right out of the Constitution. Um, criminal juries are practically extinct on American soil. 98.3% of all federal criminal convictions last year came from guilty pleas, as opposed to Constitutionally mandated jury trials.

[00:06:26] Uh, in the States, it's roughly the same. Um, and so, this opportunity for, for really meaningful civic participation service on a jury is essentially now, uh, gone, uh, and we need to restore that, and so that people have the ability to really have that direct participation in our democracy, where their vote on a jury, um, can determine the fate of another person. And that really, um, puts on a premium, uh, on conducting themselves as good, uh, and knowledgeable citizens, and we need to restore that, uh, feature of our... Of our democracy.

[00:06:56] So, those are the three, uh, areas that we've focused on. I look forward to hearing, uh, from the other team as well.

[00:07:01] Jeffrey: Thank you so much, Clark, for such a... For your presentation, and for so helpfully setting out those three separate categories of threats to the guardrails of democracy that you and the other teams addressed. First, election subversion, second, polarization, and third, the lack of thoughtful democratic participation in the political process.

[00:07:20] Sarah, Team Conservative, in it's great report, addresses those problems, but it has a different approach than Team Libertarian. So, tell us about the highlights of your report.

[00:07:32] Sarah: Sure. And again, thank you for being here. And it's just, it's awesome to be with Clark and Ned, two people who I talk to plenty off of this event too, uh, and we just have the best conversation. So, this is part of that ongoing conversation of wonderful people along the ideological spectrum, who I think all agree on the problems.

[00:07:51] And I think to some extent, we agree on some of the solutions. We may prioritize differently. We may even disagree on a few of them, but that's what I think makes this conversation neat, and important is I don't know how far off on a bunch of these things we are.

[00:08:05] That being said, um, we certainly try to approach this to find those areas where we would contribute ideas that maybe we thought the other two teams either, um, wouldn't think of,

or wouldn't agree with necessarily to try to tease out some of that creativity along sort of that ideological diversity that this project engenders, which I just love.

[00:08:26] So, we divided ours into Congress in Crisis, and Election in Crisis, and the reason that we put Congress first, I think, is worth some additional time because in, in our view, part of the reason that our elections are in crisis is because Congress has all but abdicated it's Constitutional role entirely.

[00:08:46] And in doing so, without a functioning legislative branch, uh, the executive branch has filled in a lot of that power void, sort of in an aconstitutional manner, and, uh, certainly, we can talk more about that. But as result, then, the Supreme Court has become such a focus, then, of people's wants and desires because if you can't legislate, uh, and the executive isn't really built to do some of these, then everything ends up litigation, and at the Supreme Court, which then, every presidential election becomes about Supreme Court picks.

[00:09:19] Every term of the Supreme Court becomes more important, and I think we're seeing a lot more of that. That is driving some of this factionalism. That's why people are contesting the 2020 election, because they think that everything revolves around the presidency, and it just didn't always used to be this way.

[00:09:36] It is more and more this way every year because Congress does less and less. So, we started with Congress in Crisis because we believe that a stronger legislative branch will fix a lot of these problems, sort of from an inherent structural sense. Uh, we talked about making the amendment process easier, uh, so that, you know, when the Supreme Court has an opinion that people don't agree with, instead of this feeling of hopelessness, people actually believe there's some chance that they could amend the Constitution to address it.

[00:10:06] You could think about this in the Second Amendment context, in the abortion context, in the religious liberty context. It, it spans the spectrum. Um, it's one of the things that a bunch of the justices throughout the last several decades have agreed upon. Justice Scalia said it is the number one change he would make to the US Constitution. Justice Breyer agreed, Justice Stevens agreed. It's included in their books as well.

[00:10:28] Uh, so the people who know the Constitution best, one might argue, thinks that it needs to be easier to amend. Uh, we talked about some changes that the Supreme Court could make to sort of push Congress to do their job more, and reset those incentives. Major questions doctrine, non delegation doctrine, uh, they're in the weeds a little, but the idea is forcing Congress to do it's job instead of punting to the executive branch by simply the court saying, "The executive branch can't do that. Congress can't say, in the Affordable Care Act, for instance, um. "Mr. president. You decide how to do contraception mandate because we don't really feel like negotiating anymore/it's too politically dicey for us, so we're just gonna let Health and Human Services decide that."

[00:11:15] That that would be something right for the courts to say, "No, no, no, no, no. You, Congress, have to do that. The executive cannot. That is a legislative function. The Constitution gives that to you. Filibuster reform, um, we think getting rid of the judicial filibuster has actually

caused any number of very bad things to happen within, uh, the judiciary, incentivizing who becomes a judge, how they act, in order to get that attention, to get the nomination in the first place.

[00:11:43] So, we are against getting rid of the filibuster, but we think there's a way to lower that bar, um, potentially based on a percentage, rather than the number of the overall Senators, rather a percentage from each party that would be necessary to, um... To pass legislation, uh, which would lower the number overall.

[00:12:04] Uh, transparency, again, to try to incentivize that negotiation. Maybe things should be less transparent, not more. Maybe CSPAN has been a net negative. Um, and then, we move to the Elections in Crisis. Which, you know, again, to some extent, we see that as the end of a process, an incentive trail, if that makes sense.

[00:12:24] Uh, but changing how we do education K through 12, making it less, "Memorize, you know, the Krebs cycle, and more about logic, and how to process information, and discern misinformation, and how to use... I mean, we have every bit of knowledge at our fingertips, and we're not really teaching kids how to access that, and, um... And, and get through it. Statistics, logic, things like that.

[00:12:49] Uh, getting rid of Bipartisan Campaign Reform Act from 2002. I was a huge of fan of it in 2001, 2002, but what we have seen again, in terms of those incentives, it has killed political parties, which, again, I was pretty for back in 2001. [laughs] But when we see the results of that, they haven't been very good. Without political... Without strong political parties, you end up with extremist candidates, and no real leadership, um, to set an agenda.

[00:13:17] Uh, the same thing has happened because of [inaudible 00:13:20] with large dollar donors basically becoming non-existent because of the relatively low dollar limit set in federal election cycles, creating the rise of small dollar donors. Which, again, in order to reach small dollar donors, you're trying to outrage them, anger them, hit them with emotion, and we see which candidates are successful doing that. It changes who runs in the first place, and certainly, who wins, and how they act once they're in office.

[00:13:43] And last thing, we think, "Bring back Election Day." Uh, too much early voting. It's actually causing more problems than it's solving, um, and it is okay for elections to be not as convenient as we can possibly make them, but instead, to try to create elections where the electorate is as informed as possible.

[00:14:05] Jeffrey: Thank you so much, Sarah, for so clearly setting out your solutions to two separate problems, which you've helpfully distinguished, Congress in Crisis, and Election in Crisis. The Congress in Crisis proposals are significant. I'm just gonna repeat them so we all have them in our head. Um, you laid them out really well.

[00:14:23] They include, um, making the amendment process easier, which, as you note, has been endorsed by Justices on all sides, and things like reigning in the administrative state through the major questions doctrine, and the non delegation doctrine. As you said, that's in the weeds. But friends who are listening, these are involved in, in the big PPA case that the Supreme Court

just decided last week, where it reinvigorated the major questions doctrine, and gave Team Conservative half of it's wish.

[00:14:50] And then, the non delegation doctrine is another thing that the court is debating, and now, appears that there may well be a Supreme Court majority, to reinvigorate that as well. So, it's striking that as we were discussing, Sarah, um, Team Conservative's proposals are among the few of all the teams that may actually be enacted because the Supreme Court has the power, and perhaps, the inclination as well, to restore the separation of powers, and also, to reign back [inaudible 00:15:16] in the way that Team Conservative suggests.

[00:15:19] And finally, you also talk about the importance of strengthening political parties, and also, K through 12 civic education, which is something that all three teams do as well. So, many thanks for that, and we're gonna dig deeper into all those areas in a moment.

[00:15:33] Ned Foley, in your powerful report, Team Progressive focuses on electoral reform that could prevent election subversion by reforming democracy to ensure that the winners of the majority elections actually win their seats. Tell us about the major electoral and technological proposals of Team Progressive.

[00:15:57] **Ned:** Well, thanks Jeff, and it's an honor to be part of this important project, so thank you for that. Um, and I'd like to acknowledge that in addition to Franita joining me on, uh, the report, we saw it and received informal advice from a few other folks, in particular, Rick Hasen, and Lisa Manheim, who gave us very valuable, uh, feedback, and, and input.

[00:16:18] And also, my colleagues, uh, at Election Law at Ohio State. You know, I shared, um, this project with them, and, and got, uh, their helpful input. Um, you know, our structure of our report really echoes something that Clark said. We sort of identified three specific, uh, problems that needed to be addressed.

[00:16:38] And, and as he said there, the idea of subversion, the negation of valid outcomes, the issue of polarization, and then we termed, uh, the third one as disinformation, the, the, uh... Just the, the inability of, of voters to deliberate because of, um, if you will, the pollution of the, uh, information space.

[00:16:58] Um, so given that, uh, three part structure, you know, there are solutions on the first part, on the issue of subversion also echo what Clark said. We think it's imperative that Congress, uh, revise this antiquated electoral count act. Uh, you know, we can go into more details of that, but we certainly want to emphasis and echo that point.

[00:17:19] We also took up the issue of potential subversion, not just of presidential elections, 'cause the Electoral Count Act only protects us from that kind of subversion in the context of a... Of a presidential election, and it's, you know... It would be possible for a US Senate election to, um... To have the same kind of problem.

[00:17:39] For that, you need to make sure that there are adequate, um, you know, ballot integrity rules in the state, in terms of, um, keeping chain of custody of ballots intact, because the

Constitution gives each, uh, branch of Congress the power to be the final arbiter of elections, and of the own... It's own chamber.

[00:17:58] So, the Senate can be it's own recount body, if necessary, uh, in a US Senate election. That's both a good, [laughs] and a potential fraught for danger, given partisanship and the polarization issue that we get to. And so, um, you know, ideally, in advance of the November, it, it... This is, again, hard to imagine, unfortunately, but we just wanted to, to plant the warning, um, note that, uh, you know, if a... If one of these pivotal US Senate races from Georgia, Arizona, elsewhere, ended up going to the Senate itself to figure out who won, it would be essential, uh, for both political parties to have a shared methodology to resolve that dispute, and, and that's a challenge in our current environment, and we could explore, uh, ways that that could be improved upon.

[00:18:48] And then, um, you know, interestingly enough from our perspective, we... I think that people should not lose sight of the fact that a equal protection principal that comes out of Bush versus Gore, but a bunch of other cases besides that, is an essential presup for protecting against the subversion of results in races like gubernatorial elections at the state level.

[00:19:12] 'Cause Congress can only write the rules for federal elections, but there could be significant dismantling of democracy with respect to important state elections. But the 14th Amendment governs all elections, and we should not lose sight that there are significant 14th Amendment principals, both in the due process clause, and in the equal protection clause that protect us from that kind of election subversion.

[00:19:36] Turning to polarization, Jeff, as you mentioned, we identified the need for structural reform to protect the capacity of a majority of voters to prevail in an election. Um, obviously, our Constitution has Bill of Rights, and, and structural provisions to kind of prevent against the tyranny of the majority, but when you put matters to a vote in the electoral context, you want the majority will to prevail, as opposed to, uh, the opposite of the majority, you know, that more should prevail over fewer, um, but that doesn't always happen.

[00:20:13] And one, um, theme of our report is that, um, you know, our Constitution, and the whole Madisonian system comes out of enlightenment thought at the end of the 18th Century, but there was a parallel development across the Atlantic at the same time in France. Um, a leading thinker of which was, uh, someone called Condorcet, who really drilled down into the mathematics of elections, and the voting process in a way that, you know, our enlightenment figures, like Madison, would have appreciated that it was parallel development.

[00:20:48] Um, and we need to reconnect those two strands of the enlightenment thinking by reincorporating some of Condorcet's ideas into how we run elections because he had a very sophisticated concept of how you identify a majority preference when you have more than two candidates. If you have only two candidates, it's easy to know who the majority is. When you have three or more, that can fragment it in ways that our system doesn't adequately, uh, handle, and we could go into details on that. So, we just wanted to highlight that, that point.

[00:21:23] Um, we have to deal with the problem of gerrymandering, which is a cancer on our system. There are different ways to think about that, and, and one innovative idea that we just wanted to put out there is a concept that we're calling self districting. Rather than having politicians draw district lines, rather than even attempting to give it to an independent redistricting commission, as Ohio tried to do but didn't really succeed, if you've been following any of the, um... The kind of calamitous [laughs] events associated with Ohio's redistricting process this year.

[00:21:57] You could create a system in which the first thing that voters do is self select into communities of interest, or into constituencies, um, and that's the first phase of an electoral process. Then the second phase would actually be to hold the election within those self defined, um, constituencies.

[00:22:18] Uh, this approach actually is quite similar structurally to some versions of proportion, and representation that exist in Europe, and around the country. The proportional representation is not something that has had any salience as a matter of electoral reform in the United States, and we think, um, that at least that floating this idea of self districting would be a more palatable way for Americans to get behind some of the advantages of that approach.

[00:22:48] You know, we like... You know, Americans like the power to choose, and to... And self determination, and, uh, again, for reasons we can go into, there would be a way to implement that, and that would avoid all of the pathologies of, of gerrymandering, and, and help with some of the difficulties of interpreting the Voting Rights Act, which is at the forefront of some cases that the Supreme Court's gonna have next, next year.

[00:23:12] And then finally, on the issue of, uh, disinformation, we want to put out there two ideas. Um, and again, necessarily, I think these ones have to be thought of a little bit more cautiously because of First Amendment considerations. Um, but, you know, the big lie is such a danger to self government, and, you know, it hasn't disappeared. It's, it's become, you know, more entrenched, unfortunately.

[00:23:39] We have to think about, how can we pro- protect truth from that kind of blatant, intentional falsehood? And we think that the Supreme Court's decisions in some cases, in particular, the so called, "Stolen Valor" case [inaudible 00:23:56] Alvarez has been misinterpreted as, "Think that the First Amendment automatically protects intentional falsehoods."

[00:24:03] We don't think that's accurate, and we think a narrowly tailored, carefully targeted law, um, against campaign falsehoods designed to change the outcome of elections, contrary to the will of voters, you know, could be, uh, a permissible statute within First Amendment terms. You'd still want to have sensitive prosecutorial discretion, in terms of how you would utilize that tool. But even just putting it on the books as a kind of symbolic statement that, you know, deliberate untruths about elections results is not protected by the First Amendment, we think's an important principal.

[00:24:40] And then lastly, we think, um, in the social media space, uh, you know, a, a social media outlet like Twitter, or Facebook, they have the right to engage in an editorial control if they want to be, uh, First Amendment entities, like newspapers, or bookstores, or, you know, uh, TV studios and stations, but you... They don't get to have the... That editorial control, and at the same time, be completely immune from the responsibility as an editorial judgment.

[00:25:14] Historically, we've distinguished in First Amendment jurisprudence between content providers that have First Amendment protection, but, you know, at the extreme, are subject to liability for intentional defamation, for example, under the *New York Times v. Sullivan* standard.

[00:25:31] And on the other hand, there are common carriers, like the post office, or the telephone company, that do not engage in editorial judgment. We've kind of backed into a situation where the social media companies are trying to claim, or have the legal advantage at the moment of both the benefits of editorial control without the responsibility, and we think that needs to be revisited.

[00:25:55] So, in addition to the civics education point that we've talked about, that we think is also essential, those are our basic recommendations.

[00:26:02] Jeffrey: Thank you so much, Ned for such creative proposals, and summarizing them so well. I'm gonna broadly sum up again, just to make sure that we all... That I have them in my mind, and, and we all do, you have those three categories.

[00:26:06] First, for election subversion, you talked about reforms for presidential and Congressional elections. And in particular, you endorse reform of the Electoral Count Act, that's an area where you and Team Libertarian agree, and I'm gonna ask you more about that agreement in a moment.

[00:26:07] You also talked about supervision by the federal courts, and to ensure that election results are not subverted, and you called on federal courts to reject the independent state legislature doctrine. Friends, the Supreme Court, just last week, agreed to take a North Carolina case that will raise that question next term, and Team Progressive says that it's important to reject that doctrine.

[00:26:07] For polarization, you talked about structural reforms to protect the ability of majorities to prevail, including what you called Condorcet voting, which ensures that majorities can actually elect the candidates they prefer, and also allowing voters to self select into community of interest, which sounds like proportional representation, but, um, you think is more in the American tradition, and that has echoes of Team Libertarian's emphasis on voter's voting with their feet.

[00:27:17] And the third category, which Team Libertarian called thoughtful political participation, and, and you, Team Progressive, called disinformation, you had two ideas. First, the possibility that deliberate untruths about election results might not be protected by the First Amendment.

[00:27:31] And second, the idea that social media companies, like Twitter, can be either common carriers or exercise editorial discretion, and be subject to liability for carrying falsehoods.

[00:27:41] Okay. Friends who are watching, and listening, and learning, I know these are complicated, and in some cases, unfamiliar reforms, but it's so important to ha... To introduce you to them, which all three teams have considered crucial for protecting the guardrails of democracy, and for disaggregating areas of agreement and disagreement, asking ourselves, "Which reforms might be implemented by the courts?"

[00:28:05] We've identified some of them. Others by Congress, if it had the votes, which it doesn't. Others by Constitutional Amendments, and figure out what is practical, and what may be advisable, but is unlikely to pass.

[00:28:18] Okay. For this round, let us focus on what all of you have called the first category of election subversion. Clark Neily, as we've identified already, you and Team Progressive both endorse reform of the Electoral Count Act. Tell our friends who are watching what the Electoral Count Act is, and, and what kind of reforms you propose.

[00:28:41] And in addition, for election subversion, you propose ways to incentivize electoral losers to concede defeat, as you put it, rather than engages in bogus allegations of fraud, and voter suppression, and to gradually restore trust in the electoral process. Tell us about what those proposed reforms are.

[00:28:58] **Clark:** So, the Electoral Count Act, as I mentioned, is an 1887 federal law that only partially successfully tried to, um, provide for a procedure by which, uh, uh, Congress would receive, uh, certifications of state electors, um, for president, um, and come to a decision about which candidate had been properly elected.

[00:29:18] Um, as we saw, um, in the wake of the 2020 presidential election, and particularly, uh, with the unfortunate events at the capital on January 6, um, there are just a lot of holes in the Electoral Count Act. There are a lot of things that it either doesn't address, or doesn't address with sufficient clarity, and we need to have a better idea of what are grounds, what are sufficient, or appropriate grounds, for objecting to a state's certification, uh, of it's electors from, from that state for president.

[00:29:42] That's the number one, uh, issue that Electoral Count reform, uh, has to address. Um, we also make to clear that the vice president does not have discretion, um... Sort of unbridled discretion, uh, to reject, um, a state's certification of it's electors because of course, as we saw on January 6, that can be a very serious pressure point, um, where the, the potentially interested vice president, um, because they're, uh, you know, maybe of the same party as the president that's exerting pressure, um, to reject, um, a particular state certification of it's electors in a way that could, uh, change the outcome of an election.

[00:30:18] Um, we want the vice president to have... Or, or we want the, the sort of the bounds, the... On the Vi- vice president's discretion, uh, to be both clear, and very narrow, um, so that

there can't be any kind of, you know, sort of political chicanery of the kind that almost occurred on... Or, would have occurred on January 6, if Mike Pence had not sort of held the line.

[00:30:35] So, those are really, the two most important, uh, aspects of Electoral Count Act reform, um, from our perspective, but again, uh, you know, Team Progressive was very similar, in terms of their concerns, and some of their proposed solutions, but there wasn't a perfect overlap, so, um, I'll sort of yield the floor to, to [inaudible 00:30:52]. Uh, I'm sure that he'd like to sort of add his perspectives, his team's perspectives about what else needs to be fixed.

[00:30:57] **Jeffrey:** Before turn to that, I, I do want to ask Sarah, Team Conservative didn't endorse Electoral Count Act reform. Do you oppose it, or did you just not consider it, and I guess I'll ask you what, what you think of Electoral Count Act reform, recognizing you can't speak for your teammates, and it's not in your report.

[00:31:13] And then, tell us about-

[00:31:13] **Sarah:** Um-

[00:31:14] **Jeffrey:** Other, um, ways that you propose for preventing election subversion.

[00:31:19] **Sarah:** Yeah. So, we absolutely endorse fixing the Electoral Count Act. It's ridiculous. Uh, David French, who's one of my co-authors, and I have talked about it extensively on our podcast. I went through and actually counted the number of words, and commas, in one of the sentences, and I think it was roughly, like, in a 300 word sentence, it had 19 commas, 2 semicolons.

[00:31:40] I mean, it's indecipherable. Um, and certainly during the 2020 election, and it's aftermath, when we were trying to explain what the law was in this, it was a lot of, "Well, this is what should be, **but really, the statute leaves two possibilities of how to interpret it that are both reasonable.**"

[00:31:57] So, uh, yes. We just thought that went without saying, uh, [laughs] is the truth. So, it's not that we didn't think it was important, it's, um, almost that we thought it was so important, like, "Duh." Um, [laughs] which is, uh, maybe is a failure on our part, um, certainly not on the other teams.

[00:32:16] So, in terms of, uh, how to reform it, the number one thing is just clarity. Honestly, more than anything else, having rules that everyone understands, and agrees to in advance, with any game, is actually the most important rule of all. Uh, and then, beyond the clarity, you know, I am concerned that you always are fixing the last problem. You're always addressing the last election, and so there will be too much attention paid to a threat from the president, and not enough paid to a governor, or, uh, you know, a majority of state legislatures, or something.

[00:32:51] But at some point, I also believe making the Electoral Count Act simply clear, short, concise, don't try to fix all the problems will actually be the best solution because... And I, I s-... I hear myself when I'm saying this, believe me. If you elect bad people to office, the American experiment doesn't work. We cannot make rules to prevent all of the bad things that would

happen if you elect a tyrant, uh, to... Whether it's presidency, or governorship, or any, uh, hypothetical in the future.

[00:33:25] Julius Caesar didn't conquer Rome. He was welcomed. There was a parade, and I just think that's important to remember. At some point, at the end of the day, the American experiment probably doesn't end, um... [laughs]

[00:33:39] It doesn't end 'cause we failed to reform the Electoral Count Act. I'll just [laughs] put it that way. Uh, so in terms of the other things we endorsed, look. I think that having people believe in the outcome of elections, and that there are known rules, that they're fair, and that we all agreed to them, that they don't favor one side or another will go a long way.

[00:33:59] In 2005, we had a commission with James Baker and Jimmy Carter, Republican former Secretary of State, and Democratic president, obviously, in the wake of Bush v. Gore, where people's confidence in American elections was very much challenged. They came up with 87 recommendations. They're great. I'd sign on to every single one of them. They span our ideological spectrum debates at this point, um, so, you know, there's...

[00:34:30] If you want to pick partisan winners and losers in it, you can. I think it's about even. Um, you know, there's more ballot harvesting, there's some voter ID. There's making elections... You know, mailed ballots, for instance, easier, things like that. And I saw in a lot of the comments, people concerned about my Election Day point, so I just want to do a little asterisk here, which is, um, in order to make Election Day great again, [laughs] uh, you would have to, A, make it a national holiday. B, uh, endorse a lot of the Carter/Baker issues of there shouldn't be any wait time when you go to vote.

[00:35:07] These should be palaces that are staffed by a zillion people. It should be like going to the Apple store. Um, so it's not that by saying you should just vote on Election Day... I mean, please wait nine hours, and it'll last 'til 11:00 pm because that's how long it takes 'til you get to the front of the line. Uh, no, no. Not at all.

[00:35:26] Election Day should be harolded, it should be a thing we all do, and it's... It is highly efficient.

[00:35:32] Jeffrey: Thank you very much for that. And thank you for giving us our headline for this panel, in terms of agreement, which is that all three teams, Team Libertarian, Progressive, and Conservative agree on the need for Electoral Count Act reform. That is an earth shattering revelation, which will no doubt [laughs] transform our political system, but in fact, as we know, a bipartisan group of Senators, just a few weeks ago, agreed in principle on a framework for reforming the Electoral Count Act.

[00:35:59] So, Ned, why don't we just get down to brass tax on this point. Tell us the status of that Electoral Count Act reform. What does the proposed bipartisan bill do, and is there any chance in practice that it will actually pass?

[00:36:14] Ned: Well, we still don't have text from the, uh... That, um, bipartisan group of Senators. Th- there, there are some text of bills floating around, but, but the, the group led by Senators Collins and Manchin, I don't believe has issued text yet.

[00:36:29] I, I don't... I don't think I've seen that. But, um... But you're right. They, they announced that they... That there is a kind of consensus around that group, and I think that's a reason to be very optimistic that they will be able to get the votes to clear the filibuster threshold, you know, the, the 60 votes necessary in, in the Senate.

[00:36:47] Uh, and then eventually, in the House. There is a parallel effort in the House that I think will... The two efforts will come together. You know, in my mind, um, and picking up on, on what Clark said, I think, you know, there's one principle that I hope is part of the bipartisan agreement.

[00:37:05] Um, other than clarity, Sarah's 100% right, the most important thing is that the rules be, be clear, and the current statute, given the convoluted language, and the semicolons, and the commas that she's talking about, is it hides the principles that I actually think it contains.

[00:37:21] So, I think if you just put in 21st Century clear language, what I think it was designed to do in, in the... In the first place, so this would not be innovation. Basically, there's a clause that says Congress promises to accept as conclusive, that's the word in the relevant provision. Um, what gets resolved in the states pursuant to judicial procedures, and administrative recount procedures that take place after the ballots are cast for the popular vote, and before the electors themselves meet to cast their electoral votes.

[00:37:55] And so, if there... A- as, as long as the rules are s-... Are, um, put in place in advance of the ballots being cast, 'cause you don't want new rules after people have voted. That's not fair to the process. Congress says, "Look. If you guys figure out what the law requires, we'll honor that resolution of the dispute."

[00:38:17] And unfortunately, in Congress since 2000, members of both political parties have, have disobeyed their own command in th- that regard, the most egregious disobeying was, you know, January 6, 2021, with all the violence that occurred.

[00:38:36] But, but if you go back to 2005, and 2017, you can see the same kind of mistake being made. So, if Congress can just recommit itself to honor what the courts themselves do by way of handling any litigation that arise, that's the key principle. And by the way, it relates to the point, Jeff, that you mentioned, about the so called independent state legislature doctrine.

[00:39:03] You know, and there is this new case from North Carolina. I don't know that we want to go into that right now, but, you know, that doctrine can have a kind of innocent version, or a pernicious version, and I think the most important point is that, um, rejecting the pernicious version goes hand in glove with reforming the Electoral Count Act because we've heard people worry about it.

[00:39:29] And Sarah's saying we have to worry about what happens next time. Well, what if a state legislature gets this idea that it wants to repudiate the result, and just send in an alternative submission. Will this doctrine allow the state legislature to do that?

[00:39:44] The answer is no, as long as Congress cleans up the statute properly because the Constitution gives Congress the power to choose the time of appointing electors. The legislature can choose the method for appointing electors, and thankfully, legi-... State legislatures want a popular vote because we the people like to vote for president.

[00:40:06] So, I think we can count on the fact that the legislatures will still let us, as citizens, vote in that popular vote in November. But once the state legislatures choose that method, they can't repudiate their own method, and no Constitutionally sound version of this so called independent state legislature doctrine would permit that.

[00:40:26] Why? Because Congress picks the date by which when electors are appointed. So, legislatures can pick the method, but they're stuck with their own method. They can't choose a new method for that election. They could choose a new method for the next election, but not for the one already held, and I think that's a key point to recognize, both to understand what this doctrine is and isn't, and also to...

[00:40:51] 'Cause there's one part of the Electoral Count Act which is particularly fraught with peril on this point. And again, we don't need to get into all the details, but it's essential that cleaning up this point is part of what Electoral Count Act reform's all about.

[00:41:06] Jeffrey: Thank you very much that. Thanks for giving us a sense of the status of the Electoral Count Act reform, and thanks for reminding us that for Team Progressive, as well as for Judge Michael Luttig, who made a very thoughtful presentation, uh, of the soft launch of these reports at a National Constitution Center event in Miami a few weeks ago.

[00:41:27] Electoral Count Act reform should go hand in hand with rejection of the independent state legislature doctrine. And friends, that reminds us of the complicated nature of the task we're talking about. Electoral Count Act reform could be implemented by Congress, and, and Ned Foley suggests it's possible that it might be one of the few areas of bipartisan agreement.

[00:41:48] But the independent state legislature doctrine ultimately, will be in the hands of the courts, and that suggests that these guardrails may be implemented in different places, and, and some have a more realistic chance of being implemented than others.

[00:42:02] For this round, and we'll see if we have, uh, time for closing thoughts after it, but I, I do want for this next round to focus on your various solutions to what Team Progressive calls disinformation, and what Team Libertarian calls the challenge of resurrecting thoughtful participation in the political process.

[00:42:21] Uh, I think this is the area where Team Progressive disagrees most with Team Libertarian and Conservative, so Clark, I want to ask you first what you think, and I, I think you reject them, of Team Progressive's suggestions of regulating intentionally false disinformation,

as well as making Twitter a common carrier, and what your preferred alternatives are to the problem of what you call [inaudible 00:42:49] participation.

[00:42:50] Clark: Yeah, so to... I want to begin by emphasizing a point of agreement, which is certainly, there is a real problem with misinformation, um, you know, in the stream information that's available to voters. Um, where we disagree is whether it's a good idea to put the government in charge, or to give the government a significant role in identifying, and trying to police that kind of misinformation.

[00:43:08] Um, from our perspective as libertarians, we think that's not a good idea. We think the government has a consistently poor track record, and I'm being very, very generous in saying that it has a consistently poor track record. Um, you know, in, in, in smaller company, I would use much stronger language.

[00:43:22] Um, but just look at the government's, um, uh, track record, for example, on COVID, and, and, um, all the ways in which the government, um, uh, you know, sort of fell all over itself, and failed in that... In that one small area, um, tried to suppress certain information, that we later determined to be true, um, and vice versa.

[00:43:38] So, from our standpoint, not a good idea, um, although the problem of misinformation is certainly, uh, real and nontrivial. Um, our basic outlook here is that, uh, what we want to do is to incentivize, uh, individual voters, um, to do a better job of acquiring the information that they need, um, in order to make policy decisions.

[00:43:57] And not just acquiring the information, but assessing it, which is, of course, where the question of misinformation comes in. As I alluded to earlier, um, when you're talking about pure ballot box voting, and... Voters don't have a really strong incentive, either to acquire, or to, uh, intelligently assess the information before them.

[00:44:13] Why? Because it really doesn't matter. Um, they're the odds that, uh, your vote, um, in any given election will influence the outcome are infinitesimally small. And so, again, as Ilya Somin has written about, um, we have this i- idea of rational ignorance, that it's perfectly rational for people to remain ignorant about decisions that will have virtually no, uh, prosp-... That, that they have virtually no real prospect of influencing.

[00:44:35] So, we turn to, uh, what, uh, Ilya calls foot voting, this idea, um, that you can move to another jurisdiction with a better mix of policies that you prefer, or you can, um... You can engage in private foot voting. Go live in a planned community, or even an HOA, where you can enroll your children in a school of your choice.

[00:44:52] All of those decisions will have a much greater impact on your life, and you have a much, much stronger incentive to acquire the information that enables you to make an intelligent decision, and to be on guard about not being misled, uh, by the misinformation that I think we all agree is in the system.

[00:45:08] So, again, it's a question of incentives, it's, it's, it's ensuring that people, uh, have the meaningful ability to make decisions that, um, uh, produce different outcomes in their life. This

will then give them the incentive that they needed to acquire, and to assess the information that's out there, um, and to reject misinformation, and make better decisions.

[00:45:24] So, again, significant agreement about the problem with misinformation, but disagreement about the best way to address that.

[00:45:31] Jeffrey: Sarah, Team Conservative uses the word disinformation just once in the context of rejecting voter ID requirement, and I think also, although not explicitly, doesn't support the [inaudible 00:45:44] the progressive suggestion that speech should be regulated by making Twitter a common carrier of, like, criminalizing lies.

[00:45:50] I take it from the report that your preferred alternative really is civic education, and in particular, you suggest studying primary texts, and I'm so excited the National Constitution Center is about to launch our founder's library, which will have precisely the primary texts that you suggest.

[00:46:06] But, but tell us broadly about why I think you're not a fan of the progressive suggestions for fighting disinformation, and what your alternatives are.

[00:46:15] Sarah: Sure. And, again, it's not that I don't think disinformation's a problem, or that I think everything is just hunky dory right now on Twitter. Uh, neither of those are true. It's that disinformation isn't new in our American system. It's...

[00:46:26] In fact, goes all the way back to the founding, and so we know that it is not in and of itself, uh, the threat to the American experiment. Um, we've lasted this whole time with lots of disinformation. Uh, certainly the 19th Century, not just in the United States, is full of disinformation, um, some of which led to catastrophic outcomes, by the way.

[00:46:46] So, I also don't want to downplay, uh, the importance of misinformation. The problem is who gets to define misinformation? And, for instance, uh, this is an example that maybe gets overused, but I think for a reason, uh, because it's one we can all sort of remember.

[00:47:03] Um, at the beginning of the pandemic, it was misinformation to suggest that the virus was created in a Chinese lab. It was taken down from social media platforms. It was designated unacceptable thin-... You know, thinking, uh, in this very Orwellian way. A year later, it turns out we don't know.

[00:47:25] And that's not, by the way... I want to be very clear. I'm not saying that COVID was created in a Chinese lab. What I'm saying is when you designate something misinformation because the expert said so, or because a social media company said so, it will turn out that that kind of group think doesn't lead to truth.

[00:47:40] And it certainly isn't a good way to determine misinformation because, as the sort of after actions on how that COVID, uh, mishap happened, um, many of the experts who believe that it was possible that COVID-19 was created in a... Uh, a Chinese lab, and then, potentially accidentally escaped from that lab, said that they felt, um, that they were not able to speak up because they would have faced professional penalties.

[00:48:08] Uh, at that point, sort of the train had left the station. Reporters said it's misinformation because, you know, the right, or politically, uh, unliked people said it, therefore we will no longer allow it. Just imagine who you want setting what is misinformation. Do you want the government to decide that? And then, uh, do you want the government during the Trump administration to decide that? Do you want the government during the Biden administration to decide that? Do you want Twitter deciding that?

[00:48:36] Um, no. I don't want any of those. And so, then when it comes to social media platforms, if you freeze in time, and say Twitter will always be what Twitter is now, I'm far more open to Ned's suggestion, but there is no evidence that that's the case, just ask Myspace. Um, we have sort of this churn of media in this country, and the powerful today aren't the powerful tomorrow.

[00:49:00] Look at the generational changes happening on Facebook. Young people aren't on Facebook. If you have teenagers, ask them how their Facebook page is. They will look at you like you're an old person, um, because you are, presumably, if you are tuning into this. Uh, so, uh, common carriers have a specific role. I don't think Twitter, Twitter, or Facebook, or Tik Tok, or Snapchat, or Instagram.

[00:49:21] I mean, think of all the companies I can name right now, and how they've changed, in terms of their market share, even in the last two years over time. And so, I would just say that we're not there. If in 10 years, we have this conversation, and Twitter is still Twitter, Ned, then let's, let's dig into it more. But right now, I- I'm not there.

[00:49:43] Jeffrey: Thank you for that, Sarah. Okay, Ned, I'm gonna give you a tough homework assignment. We have four minutes left, and we always end on time at the NCC. So, apologies for asking you to sum up in three minutes, but the benefit is that you have the last word.

[00:49:57] Tell us, y- you don't have to make the full case for why you propose the speech reforms you do, 'cause they're in the report. But tell us, predicatively, do you think the Supreme Court would actually uphold them? Y- you say it's a close question, and you have to revisit some doctrine. Do you believe that if your reforms were to pass, they'd be upheld by the Supreme Court, and why do you think the court should uphold your reforms?

[00:50:18] Ned: Yes. So, um, thanks. First, to be clear, it's not a requirement that Twitter become a common carrier, it's that they can't have their cake and eat it too. It's there's a fork in the road, uh, that they... That they need to take. So, i- if Twitter wants the editorial judgment, uh, of prioritizing, you know, which Tweets you see through the algorithm, that's fine, but with editorial judgment comes editorial responsibility.

[00:50:45] Um, if they don't... If they want the kind of immuni- immunity that they currently have, that's where there should be a divergence between editorial judgment and the complete i- immunity.

[00:50:56] 'Cause right now, they have the kind of im- immunity that the post office gets, or the telephone company gets, and it's the combination of the two that's the problem. So, fine, they,

they do not have to be a common carrier, but then they need to put their money with their mouth is, so to speak, just the way The Washington Post does, The New York Times, any other publication, uh, needs to, in terms of defamation laws.

[00:51:17] So, I think that it's important to be really clear about what the nature of proposal is. It's not to automatically require them to be common carriers. Um, and I do think properly understood that way, they're, they're really... There is a good chance that the court will see it that way, and should see it that way, because the law, up to this point, has made this clear division between two different types of entities, whether you're a... You're an editorial, uh, speaker, like The Washington Post, or instead, you're a platform like the post office.

[00:51:47] Um, we don't treat the same... Uh, the two in the same way, and never have. On the issue of, of the deliberate falsity, you know, if you commit intentional security fraud, you're at risk of criminal liability. If you co- commit intentional medical fraud, you're at risk of liability.

[00:52:07] Obviously, political speech is different from commercial speech, but we have to think about what happens when people know that what they say is completely untrue and baseless. It's not just an accidental mistake about, you know, the source of COVID, or whatever, it's a deliberate lie designed to affect electoral outcomes.

[00:52:31] And here on your disagree list, Sarah, that is something we have not seen before in American history, based on my judgment of all the disputed elections that, you know... That I've tried to study, going back to 1800, 1876, and, and so forth.

[00:52:48] Um, the kind of disinformation that one political team spread in the aftermath of 2020 is nothing like any of the fights that we've had in the past, and I believe that that was created. And again, some people may lose their... And have lost their, um, license to practice law.

[00:53:11] Again, we're talking about the right tools. Not a sledgehammer, but appropriate scalpels, to excise this kind of cancer. Um, and, you know, you can disbar an attorney for that kind of deliberate falsehood. The question is whether or not our set of tools are adequate to the kind of deliberate subversion that we're seeing perpetrated.

[00:53:34] Jeffrey: Thank you so much for that, and thank you so much, Clark Neily, Sarah Isgur, and Ned Foley for a superbly illuminating set of reports about the most fundamental problems of our democracy.

[00:53:46] Friends in the chat, there... You have such rich questions. Several of you have asked about the electoral college, and I'm thrilled to share with you that the National Constitution Center has a separate project called the Constitution Drafting Project, where three teams once again, conservative, progressive, and libertarian propose reforms and amendments to the Constitution, and Team Conservative and Progressive agree on the need for electoral college reform, and were reconvening them in person at the National Constitution Center in September, around Constitution Day, to see if they can agree on draft language.

[00:54:19] This model of bringing together conservative, libertarian, and progressive teams of thought leaders for civil conversation, for meaningful agreement and disagreement is so

illuminating, and is urgently important to model the way democracy is supposed to work. And if we've done nothing else in this meaningful project, it's providing you with an example of civil dialogue, and how people can agree without being disagreeable.

[00:54:44] And there's a wonderful comment in the chat from John Adcock, who says, "No one should be muted in this conversation. This is the essence of what has us polarized. I lean progressive and need to come and listen, and understand other perspectives." The only thing I'm certain of is I'm ignorant of why people hold perspectives that are different from mine, and opening John's mind, and those of all of us to different perspectives is what the National Constitution Center does.

[00:55:10] So, thanks so much, Ned, Clark, and Sarah. Thanks again to Mike and Jackie Bezos for launching this wonderful initiative. We hope to keep it going, and hope to reconvene soon. Thank you, friends, for listening, and have a wonderful evening.

[00:55:26] Today's show was produced by Tanaya Tauber, John Guera, Lana Ulrich, and Melody Roul. It was engineered by Kevin Kilburn. Research was provided by Lana Ulrich, Samuel Turner, DeShaun Chowdery, and Colin Tebeau. Please rate, review, and subscribe to both We the People and Live at the NCC.

[00:55:43] If you are not a Live at the NCC listener, subscribe because it's the feeds of great programs like this, that are not always running on We the People. And check out the show notes to read the team proposals, as well as the resources that inform them. We'll be back next week with more Constitutional debate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.