



Elections, Speech, and Political Disinformation

Thursday, March 10, 2022, 7 - 8 p.m.

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[00:00:00] Jeffrey Rosen: Hello, friends, and welcome to the National Constitution Center. I am Jeffrey Rosen, the President and CEO of this wonderful institution. Friends, as you know, we're a nonprofit and we rely on your support to put on wonderful programs like this. And I'm thrilled to share that we are launching an exciting crowdsourcing campaign. Thanks to our friends at the John Templeton Foundation, every dollar that you give to support the We the People and Live at the NCC podcasts will be matched, uh, one-to-one up to a total of \$234,000 to celebrate the 234th anniversary of the ratification of the Constitution. You can go to constitutioncenter.org/wethepeople. And it would be wonder if you could give any amount, \$5, \$10, or more to signal your membership in this meaningful community of lifelong learners and your support for the programming that makes it possible.

[00:00:57] Tanaya Tauber: Welcome to Live at the National Constitution Center, the podcast sharing live constitutional conversations and debates hosted by the center in-person and online. I'm Tanaya Tauber, Senior Director of Town Hall Programs. What happens to constitutions when legal and political norms are violated? How can we defend rule of law and ensure that our civic institutions remain strong? These are questions that governments around the world are grappling with amidst modern challenges. Today, we're bringing you a conversation about protecting the rule of law and constitutional systems, featuring a panel with a unique set of perspectives, including foreign dissidents who have risked their lives to fight for freedom in their own countries.

[00:01:35] Jeffrey Rosen, President and CEO of the National Constitution Center, moderates. Joining Jeff is Garry Kasparov, renowned chess player and Chairman of the Renew Democracy Initiative; Judge Claudia Escobar, former magistrate of the Court of Appeals of Guatemala and Distinguished Visiting Professor of the Schar School of Policy and Government at George Mason University; Robert George, McCormick Professor of Jurisprudence and Director of the James Madison Program in American Ideals and Institutions at Princeton University; Kim Lane Scheppele, Laurance S. Rockefeller Professor of Sociology and International Affairs at Princeton University; and Uriel Epstein, Executive Director of the Renew Democracy Initiative.

[00:02:16] This conversation was streamed live on February 9th, 2022 and was presented in partnership with the Renew Democracy Initiative and the SNF Paideia Program at the University of Pennsylvania. Here's Jeff to get the conversation started.

[00:02:30] Jeffrey Rosen: Hello, friends. Welcome to the National Constitution Center and to today's convening of America's Town Hall. Before we start, I will turn things over to Uriel Epstein.

[00:02:40] Uriel Epstein: Well, thank you so much, Jeff. And thank you, everyone, for joining us. I think today is gonna be an incredibly exciting and interesting and unique program. Um, and so I also wanna, uh, thank the National Constitution Center and UPenn's Paideia Program for, uh, helping co-sponsor, uh, this event. So I wanna very quickly introduce the Renew Democracy Initiative. We were founded in 2017 in response to the rising tide of illiberalism around the world.

[00:03:06] Now, our leadership comes from all across the political spectrum. But we're united with the goal of pulling American democracy back from the brink, and restoring its place as a beacon for global freedom. And we believe that at the crux of our democratic crisis is a failure of imagination. On the one hand, people simply can't imagine how fragile our democracy can be. And on the other, they can't imagine that the alternative to American democracy is most likely not some utopian society, but rather a far more authoritarian or kleptocratic one, because freedom isn't the norm. It is rather the aberration. Even today, according to Freedom House, just 20% of the world lives in an entirely free country.

[00:03:53] And so, ultimately, our mission is an educational one. We wanna counter this failure of imagination both by demonstrating how precious rule of law is, while simultaneously conveying the urgency of the threats that it faces. And we do this through events and partnerships like this one, as well as projects like our Frontlines of Freedom Project, where we partnered with CNN to bring together 52 dissidents from 28 oppressive countries to offer a positive message about how inspirational American democracy truly is. This project is now being developed into a course for universities around the country.

[00:04:29] And that's why I'm especially excited to do this program today, uh, because we've pulled together a truly unique group of panelists from American legal experts to actual dissidents, and people who have fought on the frontlines to defend rule of law. And so if you're interested in learning more about RDI, our mission, uh, or you'd like to get involved, you can email us at info@rdi.org or you could visit our website at rdi.org to learn more. So again, Thanks, Jeff. And back to you.

[00:04:59] Jeffrey Rosen: Thank you so much for that Uriel. This is indeed a incredible convening of, uh, some of the world's greatest thinkers about liberalism, freedom, and the rule of law. And I'm excited to partner with you and RDI to make it happen.

[00:05:15] Thank you so much for joining us, Garry Kasparov, Judge Escobar, Robbie George, and Kim Lane Scheppele. Garry Kasparov, I will start with you. You are an acclaimed dissident. You were beaten by the Putin regime before you fled, uh, because of your political views. You have called the regime kind of fascist dictatorship and have said you're not sure whether things are worse, uh, now than they, uh, were, uh, under communism. We're here to discuss the rule of law and, um, authoritarian regimes. Tell us in what ways the Putin regime is a fascist dictatorship and in what ways it violates the rule of law.

[00:05:58] Garry Kasparov: Thank you very much for having me, Jeff. And I'm delighted to, uh, be here and to share my views for this occasion because, again, rule of law is what separates Free World and Unfree World. So, definitely, we'll see from other distinguished speakers today that rule of law is not guarantee for, um, uh, freedom and for success of the country and, uh, and, and, uh, respect of human rights. But what, what is guaranteed, that lack of rule of law or, uh, denial of the rule of law or abuse of rule of law by, by the rulers, they could be named presidents, dictators, rulers, dear leaders, general secretaries of communist parties, whatever the ti- title they use, but the, the disrespect that they show, uh, to the rule of law is a guarantee that people who live under their rule will suffer.

[00:06:53] Now, um, Uriel Epstein just mentioned, you know, that one of the reasons for this failure and actually for the current threat, uh, to, to the rule of law in, in the Free, uh, World is the lack of imagination. And I can go back to 1991, the end of the Cold War, collapse of the Soviet Union, that was a moment of triumph. And we all thought that the future will be bright. And it's not surprising that the bestselling book in 1992 was Francis Fukuyama. It's a great book, uh, uh, The End of History. And I have to, um, admit that I was also guilty of sharing this joy and not recognizing that evil doesn't die. Evil doesn't disappear. It could be buried for a while under the rubbles of Berlin Wall. But the moment we lose our vigilance, the moment we turned complacent, it sprouts out.

[00:07:44] And, um, and, uh, in 1991, 1992, nobody could imagine that, uh, eight years later, the KGB lieutenant colonel would become President of Russia and would use skillfully, let's give him credit, the weakness of Russian democracy. Very fragile institutions that have been barely built, uh, uh, during the, the, the last decades of the 20th century, and, um, uh, would, would kill this, that he would succeed to bring country back, not the Soviet Union, but something much worse because it's much more, um, agile. It's, it's much more poisonous.

[00:08:21] We can argue about the terms of fascist dictatorship of mafia state. I don't think we have time to actually identify exactly what Putin regime is. I'm sure the historians will, will, will be arguing about it. But what we know, this is the country that has one, one ruler, uh, is unchallenged, he's not going anywhere. Uh, the, uh, opposition Russia has been totally destroyed. People who marched with me peacefully in the streets of Russia is in, is in exile like me, or jailed, Alexei Navalny, or killed like Boris Nemtsov. Uh, the, um, murdering political opposition, both in Russia and outside of Russia, that's still, that's the signature of the, of this KGB dictatorship.

[00:09:01] And, of course, you know, as every fascist dictatorship, it employed foreign aggression. Not only in neighboring countries, attacking Republic of Georgia in 2008, and, of course, Uk-, annexing Crimea and, and, and, uh, fomenting war in Eastern Ukraine, but also you can see Putin's, um, hand everywhere. From Venezuela to North Korea, from Belarus to, to, to Syria, and now to many African countries, where you have all these long coup d'états that have been directly or indirectly sponsored by Russian paramilitary groups and, and, and oligarchs.

[00:09:33] But the real danger actually from Putin is not just for us in Russia. We live in exile in Russia. Russian understand that the rule of law is no longer there. It's, it's, it's a law that has been

abused and, and used to punish people for any sign of dissent. For a tweet, you can go in jail for two years. It happens all the time. Uh, it's not just neighboring countries. But Putin is challenging the very system of international law because he believes, and I think that's, that's one of, one of the only beliefs that he, uh, um, he has, is that the rulers, they have all the rights to control their territories, whether, you know, there's this, it's the, the, the, the communist or fascist.

[00:10:14] But he has total, um ... It's a distaste. It's, it's rejection of democracy and, and the rule of law because it limits those in power. And he, he is looking for, uh, for allies everywhere. That's why he was so keen to see Donald Trump rising in America. That's why you can always see him supporting all illiberal groups, no matter whether a communist far left or far right. And that's what may seem more dangerous than the communist regime in the Soviet Union, because the Soviet Communist had to, had to stick with the far left groups.

[00:10:47] Uh, Putin goes anywhere. He's, uh, more like a merchant of doubt. He doesn't sell ideology. He's, he's spreading chaos. And he, again, give him credit, he's good at that and he controls more financial resources than any other individual in human history. And he's not shy of using these resources, unlimited resources. We're talking about hundreds of billions of dollars to buy favors and to build the most sophisticated lobbying and, and, um, influential network of agents, uh, around the world. That includes even many former heads of states, not talking about prominent business people or other luminaries.

[00:11:24] So it's, it's very clear that, you know, as long as Putin stays in power, there will be no peace in Ukraine. There'll be no ... He's in any corner of the world where Putin wants to foment violence and conflict. And it's very important that the Free World will recognize that this is the virus, this is a pandemic. It's so serious. It doesn't present itself as openly as communism but, you know, it hits, uh, with more accuracy. And we could see the, the impact of Putin's rule felt in every corner of the world.

[00:11:56] Many, many years ago, people like myself or like Boris Nemtsov, we were desperately trying to communicate this message to, to the Free World, that Vladimir Putin 15, 20 years ago was our problem. But eventually, he would be everybody's problem. And unfortunately, only now, uh, it seems that the Free World is, is getting to realize that, uh, it's you can have temporary compromises, but you cannot have lasting peace was Vladimir Putin because, as every dictator, he's not asking why, he's always asking why not. And he would not be stopped until he stopped. Thank you.

[00:12:30] Jeffrey Rosen: Thank you so much for that eloquent intervention, uh, for your personal courage in opposing the regime, and for that powerful definition of the rule of law. You talked about Putin's murdering political opponents at home and spreading chaos abroad, punishing dissidents for a tweet, and challenging the system of international law, and asking not why, but why not.

[00:12:54] Professor George, I'm gonna ask you to do something very hard, and there's no one better to do it. And that is to define the rule of law. You have a wonderful article called Reason, Freedom, and The Rule of Law, which quotes Lon Fuller's eight elements of the rule of law. And

then share what they are and try to distill them and talk about the whole dispute about how hard it is to define the rule of law. What is it?

[00:13:17] Robert George: Well, uh, Jeff, first, uh, thank you for inviting me to be a part of this program this evening. It's a very important one. And once again, it's the National Constitution Center taking the lead in addressing tough, but profoundly important issues. And what a pleasure it is, as always, to be with you. And thank you for the honor of allowing me to be with your distinguished, uh, guests with my co-panelists, uh, each of whom has been a champion of the rule of law, of both in the scholarly reflection on the rule of law and also in the practical, uh, world of politics.

[00:13:51] So what is the rule of law? Well, we have the rule of law when the rulers are bound by the law. We lack the rule of law when the rulers can act arbitrarily. That is, they are not bound by the rules, by the laws. Where the rule of law is enforced, where it obtains, rulers exercise power according to legal empowerment. In other words, the laws themselves empower the rulers to rule. Moreover, where the rule of law is in place, the rulers rule in conformity with the law, respecting the law's limitations of their own powers.

[00:14:36] So for example, we here in the United States have a separation of powers system. We have an independent judiciary. We have an independent legislative branch. We have an independent, uh, executive. Where those holding offices in those three branches of government stay within the, uh, limits of the authority granted to them by the Constitution, they are observing the rule of law. Where they exercise power beyond what has been granted to them in the Constitution, where they trench on the authority, say, of another branch of government, now they are violating, uh, the rule of law. Where the rule of law is lacking, we do have arbitrary government action. The knock on the door at night and someone is held away, not because the person has broken any law, any preexisting rule, but simply by the arbitrary edict of whoever happens to hold power.

[00:15:36] Now, reflection on the rule of law and its importance goes all the way back to the Greek philosophers of antiquity. Plato was both a defender of the rule of law and a critic of the rule of law. He saw, as Garry Kasparov has pointed out, that the rule of law is important if we are to have justice. But he also recognized that the rule of law itself could be abused. So Plato gives us both sides of the story, uh, there. Aristotle wrote on the rule of law with great illuminations. The medieval thinkers write on the rule of law. So this is not a new thing, nor is it tied necessarily to democracy or any, any modern notions of democracy or republican, uh, government.

[00:16:18] Having democracy doesn't guarantee that you'll have the, the, the rule of law. You can have the rule of law in non-democratic systems. Uh, but you have the rule of law when the rulers rule according to law and when they are themselves bound by the laws. Now, you mentioned Lon Fuller. He was a Harvard, uh, law professor, someone interested in my own field, philosophy, uh, of law. He published a very important book in the early 1960s called *The Morality of Law*, which was all about the content of the rule of law. And he noted that the rule of

law is a procedural guarantee or set of procedural guarantees, but one with substantive moral consequences.

[00:17:04] What he meant by that is this. The rule of law does not guarantee that the substance of the laws will be just. But if we lack the rule of law, you can be guaranteed that we will have injustice. This is another point that Garry, uh, Kasparov, uh, made. So what are the elements of the rule of law? What has to be in place procedurally if we're to have the rule of law? Well, he identified these eight elements or desiderata of the rule of law.

[00:17:33] Uh, for law to exist, for the rule of law to be in place, the laws must be promulgated. If the laws aren't promulgated, you can't govern your behavior by law. They need to be general. They can't be specific to specific individuals. You don't have law in that situation, you have arbitrary rule. The laws have to be reasonably clear. If the laws aren't clear, people can't follow the laws. They have to be prospective, not retrospective. How do you obey a law that makes it a crime to have done something yesterday when it wasn't a crime yesterday?

[00:18:12] The laws have to be consistent. If the body of laws is inconsistent, there's no way for the citizen to conform his behavior to the law. He'll have to break the law in one respect or another, and then the ruler can seize on that failure to live up to one area of the law in order to punish arbitrarily, uh, selectively, uh, the person he wants to punish. It has to be possible to comply with the laws. If legal rules require people to do things that are impossible, obviously, they can't conform their behavior to the laws.

[00:18:44] The laws have to be reasonably constant over time. Fuller pointed out that if the law is constantly changing, constantly in the state of flux, we can't keep up with that. We will never be able to, to be confident that we're actually staying within the law. This doesn't mean that the laws can never change. We change the laws, we update the laws. Sometimes for good, sometimes we make a mistake and change the laws we shouldn't change. But if the laws are in a state of flux, it's impossible to live by law.

[00:19:13] And then, finally, and in a certain way, most importantly, Fuller notes that there has to be a congruence between the actions of officials and stated rules. If citizens are facing a situation where officials are going to act against them, irrespective of what the rules say, then they are living under arbitrary rule, not under the rule of law. So, uh, the rule of law, to conclude, is not a guarantee of justice, of substantive justice. But without it, you have injustice.

[00:19:48] You need more than the rule of law, but you certainly need the rule of law. Liberty, justice, human rights cannot survive under arbitrary rule. You need the rule of law. The law should be just. The rule of law begins the process. It doesn't guarantee substantive justice or total substantive justice. But it's a condition. And human beings, if, indeed, we are what we think we are, bearers of profound, inherent, and equal dignity, should be treated by officials as creatures deserving rule by law, creatures whose rights are violated by arbitrary rule.

[00:20:33] Jeffrey Rosen: Thank you so much for that. That was magnificent. And I would love to distribute your remarks as a beautiful definition of the rule of law. You said that it's a set of procedural guarantees, that it doesn't guarantee that the substance is justice, but is a condition of

justice. You gave us these eight conditions. You distinguished it from the arbitrary knock on the door at night.

[00:20:55] And now, I understand, um, we asked Justice Gorsuch, uh, to define the rule of law, and he gave the example from Blackstone's Commentaries of how the Emperor Caligula would post laws high above the city wall so, so people couldn't see them and they couldn't obey them. And now you've helped us understand all of those eight factors are not met when the laws are not promulgated, clear, prospective, possible to comply with [inaudible 00:21:18]. Thank you so much, Professor George.

[00:21:20] Professor Scheppele, in your extraordinarily illuminating article, Autocratic Legalism, you distinguished between the rule of law and constitutionalism as a system of government. And you give examples of countries like Hungary, for example, which may formally follow the rule of law, you call Orbán the ultimate legalist, while not at all respecting constitutional norms or liberal values. Tell us more about that dilemma. And how do you distinguish, uh, the rule of law from other values that are necessary to protect freedom?

[00:21:54] Kim Lane Scheppele: Well, thank you so much. And I'm really honored to be here. And it's wonderful to, to be, uh, listening to my colleagues here because, actually, I just taught one [inaudible 00:22:02] my Princeton class. So thank you [laughing] [inaudible 00:22:05]. And I've had you as a guest speaker, Robbie. I wanna pick up where Robbie George left off to say that, you know, one of the crucial elements about the rule of law is the reduction of arbitrariness. And we ge- generally tend to think of arbitrariness as being, you know, the, the knock on the door for lawless activity, something that state officials do without needing to care whether they're following the law.

[00:22:28] And one of the things that's appearing now on the scene is a new form of autocracy, uh, a new form of the reduction of freedom for individuals and a reduction in checks on the state. And it happens through law. So Hungary strikes me as being one of the main places where this happens. Actually, Russia, uh, as well has gone through some of this. It's not an accident that what we're seeing are lawyers coming into power, and lawyers using the law as punishment for their enemies.

[00:23:01] And so I'm reminded of that, that quotation from Peru's General Óscar Benavides, who said, "For my friends, everything. For my enemies, the law." Right? So there's this thing that happens to law when, uh, aspiring autocrats come to power. And that is, what they aspire to do is to get control over lawmaking so that the law always legitimates what they wanna do the minute before they do it. So in Hungary, for example, um, when Viktor Orbán came to power in 2010, uh, he won 52% of the vote, which was a lot. But he got 68% of the seats in the parliament in a system where the Constitution he amended by a single two-thirds vote of unicameral parliament, which is to say, he got a majority to change the Constitution, and he did.

[00:23:55] So the first thing he did was there was a clause in the Constitution that said, "If there's gonna be a new constitutional process, it takes four-fifths of the parliament." So he's two-thirds majority, took the four-fifths plus out. [laughing] And then it was off to the races. So he started a new constitution. He amends it every day. The new constitution came into effect at the beginning

of 2012. We're already on the Ninth Amendment. One of those amendments was a third as long as the entire text. Many of the articles have been changed.

[00:24:25] Essentially, what we're in is a system in which everything is done by law, but everything is done by law created by the person who doesn't claim to be bound by it, you know. So it's a bit a system in which there is this appearance of law, but it's not actually used to constrain the government. And this is, I think, the crucial lesson. Law can be just as arbitrary as the knock on the door because you pass a law that says that door must be knocked upon, or all doors that have this number living on that block, if you wanna make it more general. And then it happens.

[00:24:58] So this is a different kind of arbitrariness. And it comes disguised in the court of law. So this is where I entirely agree with my colleague, Robbie George, to say that the rule of law, law is not sufficient. Just having law is not sufficient. You have to ask questions about how the law is produced, you know. Is the law produced in an inclusive and fair and public deliberative process? And does the law actually seriously constrain those who have to live by it, you know? Because if you can make up your own laws in the morning and follow them, you know, until night, and then do it again the next day with different laws, you, too, will be a totally law-abiding citizen. But it doesn't mean that you had to conform your laws to any norms that you didn't wanna follow, you know.

[00:25:46] So I think we have to stand back. And that's where the distinction that you asked me about between sort of the rule of law and constitutionalism comes in. So how do we fill in the gap between a purely rule-governed system and a system in which you really have constrained power? And I might say, also, the public ability to change their leaders when they want to. And this is where you need something bigger than rule of law. This is where you need a concept that I've been calling constitutionalism, because that's the thing that says even the leaders need to live under the law. That's the thing that says the leaders can't just go off in a corner, write a law in secret, shove it through a parliament in a totally secret process when no one's paying attention.

[00:26:32] You know, all of this has to be done through a public and deliberative process in which the leaders are constrained by what people have put them there to do. So constitutionalism and democracy are joined at the hip. They can't operate also without the rule of law. But I agree fully with Robbie George that the rule of law is not sufficient to create a place in which you would really wanna live.

[00:26:58] Jeffrey Rosen: Superb. Thank you so much for that. That's so clarifying. Uh, the rule of law is not sufficient. Um, it's arbitrariness that is the threat to freedom. And to avoid that, you said law has to be reduced to an inclusive, fair, and deliberative process that constrains those who are bound by it. And you define that as constitutionalism. Um, and you say that, uh, constitutionalism, which guarantees the right to change rulers when people want and, uh, fills the gap between a purely rule-bound system is often associated with democracy, but need not be.

[00:27:29] Judge Escobar, it's so meaningful to ask you about your own experiences with corruption in the judiciary. You experienced corrupt clerks in your own judiciary in Guatemala. Unethical lawyers were using the system for personal gain. Political officers asked to receive

electoral positions. And you, when you expose the corrupt process, you say, "That is when I realized that my actions have then placed my family and me in a high-risk situation," and you left Guatemala in 2015, uh, with your husband to promote judicial independence and to fight corruption. So powerful. Tell us about the ways in which you experienced corruption as threatening the rule of law. And did it also threaten arbitrariness and constitutionalism?

[00:28:12] Claudia Escobar: Thank you very much. And, first, thank you for inviting me. I feel honored to be here with my fellow panelists. And, and I'll be glad to, to share with you these, these concepts, uh, which are more than that, you know. For me, the independence of the judiciary is key, is key for the rule of law. But it's, it's also a right that will allow other rights to be effective in, in a country. I come from Guatemala. I, when I turned 18, we had a new constitution. It was the end of the Civil War. In my country and in other countries of the region, we went through a long period of, um, uh, a violent conflict. That was, you know, a civil war for almost four years.

[00:28:53] So a new constitution was being draft. And there was, um, a moment of hope when we thought that the institutions were going to be strengthened, that people were going to be able to have their rights respected. And when I became a judge, I really was not prepared to see the level of corruption that I saw in the judiciaries. I had to face, um, clerks that were facilitating corruption inside the courts. I had to confront lawyers that were stealing properties, stealing, um, businesses to, to their citizens. And also, I had to confront politicians that wanted to condition my position in the judiciary.

[00:29:34] So if we wanna check, have checks and balances, we need independence of the judges because the Constitution can be beautiful written, but somebody has to make it real. And those are the judges. And what we are seeing right now in small countries in Central America is that they're becoming kleptocracies. They're not democracies anymore. They can have, you know, elections every five years, but the people that get in power are there just to make sure that organized crime gets what they want.

[00:30:07] We are talking about a region that has more than 95% of impunity, which means this is paralyzed for criminal activities, for criminal organizations from everywhere. And it's a region that is in a geographical position that is, you know, key for commerce and also is very close to the United States. It's in the middle of America. So I think that we need to pay attention what, to what is happening in the region and, and to the threats, uh, of the rule of law that we are seeing there. Right now, many of the people that have had key positions in fighting corruption had to, to go to exile. So I will say, say, you know, that the, the justice is in exile right now.

[00:30:53] Jeffrey Rosen: Fascinating and powerful. Thank you very much for, uh, sharing that and also for introducing that central notion of kleptocracy. The countries without the rule of law can be kleptocratic and corrupt. And one way to avoid that is through an independent judiciary that ensures that oligarchs and, uh, and mobsters cannot use the government for their personal gain.

[00:31:18] Okay. Uh, Garry Kasparov, you've heard this really rich round of interventions by your colleagues. And you, too, have called Putin's rule kleptocratic. And you've said that every

company that doesn't follow written norms is kleptocratic. Tell us more about that, how you define a kleptocracy, how Putin's regime is kleptocratic. And then tell us about the crucial role of free dissent in preventing kleptocracy. I'm standing now behind the fake backdrop of the very real First Amendment tablet, which has been installed at the National Constitution Center just last week, the majestic words of the American First Amendment, "Guarantee freedom of dissent and opinion." Why is freedom of dissent and expression so crucially important to check kleptocracy and to protect the rule of law?

[00:32:05] Garry Kasparov: I believe that every dictatorship is kleptocratic, um, even the ideological dictatorship of the 20th century. Yeah. We can, uh, um, recall the reaches of Nazi, Nazi leaders that have been revealed after, after, um, the, the Third Reich had been defeated. So, uh, Vladimir Putin is no exception, but it's probably a new level of corruption. I say that every country has its own mafia. In Russia, mafia has its own state, though it's in absolute control. And, and it's a mixture of oligarchy, uh, mafia rule, dictatorship. It's a strange synergy of, uh, of fascist ideology, imperialism, uh, and, you know, simple, you know, idea of getting rich.

[00:32:50] And, and in Russia, your access to power is the only guarantee to protect your wealth. Vladimir Putin is by far the richest man in the world today and ever been, and probably will ever be. So directly or indirectly, he controls the amount exceeding \$1 trillion. \$1 trillion. If you look at the total amount of money in Russian treasury, the Russian annual budget, the oligarchs fortunes, and he almost single-handedly can move insane amounts anywhere you want, right, left, or the center.

[00:33:23] But this wealth can evaporate in a second if he loses control. It's not like money on the control of Jeff Bezos, or Elon Musk, or Warren Buffett, or Bill Gates. Putin's wealth and the wealth of the oligarchs related to him, and the Russian ruling elite depends exclusively on their total control of power. So, uh, that's, that's something new. That's 21st century. And this one important element of the, of these dictators of the 21st century, it's not only for Russia. It's, it's, in the past, we saw this Iron Curtain, the separation, where the Free World and Unfree World with all very little, uh, communication between them.

[00:34:04] Today, it's all intertwined. And, and dictators, all these terrorists and thugs, uh, they found a very effective way to use technology that has been developed, produced in the Free World to undermine the very foundation of the Free World. It's again, it's something, something new. They also learned how to use the language, uh, the language of freedom, of attack on freedom of speech.

[00:34:33] There's recent example. In Germany, the government eventually decided to stop the poisonous propaganda of Russia today that had been supporting antivax movement among many other things that they did. Immediately, Russian, uh, Foreign Ministry cried about the, uh, attacks on freedom of speech in Germany. And it's at a time where, you know, freedom of speech in Russia has been just, you know, totally destroyed. It's just, it's on the ground. It, and, again, they don't care. They don't have any problems with public opinion or with a dissent in the parliament. So the kleptocracy, it's, it's, um, unmistakable sign of modern dictatorship.

[00:35:11] Again, you can look at any part of the world, whether it's Taliban, whether it's Chinese Communist, uh, Putin's, uh, uh, KGB dictatorship, you name it. Syrian butcher Bashar Al-Assad, Maduro, um, among many other dictators in that region. Uh, so they all tie their power to money because they know that with money, they can buy impunity, not only in their own countries, but in the West. They can buy. That's unfortunate. So they actually revealed how vulnerable the Free World to these unseen corruption.

[00:35:43] So, and also, I wanna make a couple of points, you know, just related to what, what, what I heard from my distinguished co-panelists. The word arbitrary was used often. And I think the arbitrary rule, rule of law is oxymoron. It's, this is, the moment it's arbitrary is no longer rule of law. It's something else. And also, I think what, what we are probably not emphasizing enough here is a tradition. Russia never had, you know, real history of democracy. Even Hungary. It was, it's further west of Russia, but it's also as part of Austro-Hungarian Empire. Yes, there was a rule of law there. There's more respect. But, you know, let's not forget the years of Soviet occupation. And even in between world war, world wars, Hungary was not a model of democracy.

[00:36:29] So the Anglo-Saxon democracy has, you know, stable, um, foundation because of centuries of, of traditions of building it. It didn't happen overnight. So it's, but it was steady. So that's what something, some people and actually many people do not recognize is that it's, it's the model, that democracy cannot be perfect. There's no perfection in this universe. But you should look at ability of a country and a system to, um, meet the challenges and to overcome them. And that's, that's what Anglo-Saxon democracy proved over centuries. Gradually improving. It's a bumpy road. It's not, you know, it's not easy. It's not paved. But it's, it's, it's one-way street, and it keeps better and better. And that's what separates America, United Kingdom from, even from the Eu-, many European countries that are still, you know, struggling with many concepts of freedom.

[00:37:22] And the last, not the least, I saw one of the questions about Russia, you know, Russian people being not fit for democracy. Yeah. It's a long debate, but I can simply tell you that genetics has nothing to do with, with, um, ability or inability of people to live under democracy. You don't believe me, it's not what I'm saying. I'll simply point out, um, two examples. North Korea and South Korea. Very same people. Not even cousins, brothers and sisters. They have been separated in 1953.

[00:37:54] And on one side, in the North, you have gulag. It's one of the most, if not the most, oppressive state in the world. In the South, you have one of the most vibrant democracies and flourishing market economy. By the way, for those who doubt, they actually already managed to impeach their president and to, to put, put behind bars the head of the largest country corporation, so for a, uh, for, um, embezzlement of funds.

[00:38:20] And another one is China and Taiwan. Same people. A tiny, rocky island built one of the most effective democracies and market economies in the world. So that's why those who are, uh, trying to celebrate the accomplishment of Communist China, they should not ignore the fact

that free Chinese people could do much better than, than the same Chinese people under the oppressive communist regime. Thank you.

[00:38:44] Jeffrey Rosen: Thank you very much for that. Thank you for that powerful, uh, definition of kleptocracy, for noting that, uh, arbitrariness is inconsistent with the rule of law, and for arguing that the United States and the United Kingdom, by emphasizing norms and traditions, have done a relatively better job at protecting freedom than the alternatives.

[00:39:08] Professor George, you have argued that the purpose of freedom is to allow human beings to exercise their powers of reason to discover the truth. And that first principle recognized by the American founders as rooted in natural law is what constitutionalism and the rule of law are designed to protect. What happens in a world when the rule of reason itself is under assault from the kind of technologies that Garry Kasparov mentioned, including misinformation and disinformation? And if it's not too much to throw this into the mix, is one form of government better than another at protecting the freedom to pursue our powers of reason or, um, are other, uh, checks necessary to ensure that liberty?

[00:39:56] Robert George: Well, to answer the first of the questions you, uh, put to me, uh, Jeff, what, what happens when the rule of law disappears? Basically, that's what the question is. Uh, Garry Kasparov has described it, thuggery. Thuggery. It's what you have in, uh, Russia. It's what you have in Communist China. It's what you have in, uh, South Korea, so many other places, uh, around the world. Arbitrary rule, rule by edict, the knock on the door, double standards, citizens unable to, uh, protect themselves against the lawlessness of their leaders, leaders who themselves refuse to be bound by, uh, rules.

[00:40:39] Garry Kasparov has made such an important point about tradition that I want to reinforce it, Jeff. For the rule of law to be sustained, there needs to be an ethos in the society. I think that's really what Garry had in mind. You can correct me, Mr. Kasparov, [laughing] if I've got you wrong here. But by tradition, he means an ethos, where people understand the value of the rule of law, both the rulers and the ruled, whether we're in a democracy or an aristocratic model of, of governance, or a monarchy, where the people and whoever's in power have an understanding of the importance of the rule of law. You need an ethos.

[00:41:16] But that's never enough. In addition to the ethos and, indeed, to sustain the ethos over time, there need to be constitutional structural constraints on power. This is fundamentally what the Constitution of the United States is all about. And I think it's the great gift of our own Founding Fathers to humanity, to stress the importance of constitutional structural constraints, as what the founders called auxiliary precautions, in addition to Goodwill, in addition to tradition, in addition to the ethos to keep the rulers operating within the law.

[00:41:51] And I wanna emphasize, Jeff, that it's critically important for us to understand that the rule of law must be respected by all political actors, anyone exercising power, all officials, whether we categorize that particular official in his as executive, or legislative, or judicial. On this question of the judiciary, the independence of judiciary, its proper functioning without corruption is critically important to the maintenance of the rule of law anywhere. Uh, Judge Escobar is absolutely right about that.

[00:42:21] But we also have to remember, the rule of law does not mean the rule of lawyers. We're not necessarily enhancing the rule of law simply by transferring more and more and more power to judges any more than we're enhancing the rule of law by transferring more and more power from the legislative branch to say the executive branch, something that's happened massively in our own country here in the United States, uh, over the course really of, of the last, uh, century. Under the rule of law, every official stays within the scope and limits of his power, respects the scope and limits, stays within the, uh, lane. And when that doesn't happen, whether it's the judges overstepping, or executive officers, presidents, governors, sheriffs, or legislators, you lose the rule of law.

[00:43:05] Final question you asked me, Jeffrey, was, is there one form of government or another that is better at sustaining the rule of law? I don't know the answer to that question. But I, I, I think I can tell you something that's probably more worth knowing than the answer [laughing] to that question. Every form of government can violate the rule of law. Who murdered Socrates? Athenian democracy. It was a lawless act, but it was performed in the name of the demos, the, the people. Democracy does not guarantee, uh, the rule of law. And you can have the rule of law where the conditions are in place, even where you don't have a democracy.

[00:43:52] Now, I think we have very good reasons to try to sustain democracies or what I would follow, uh, our own Founding Fathers, uh, in preferring to call republican forms of government that have important democratic elements but, uh, but, but aren't pure democracy. Uh, our Founding Fathers, as you know, Jeff, they, they made themselves clear in the Federalist Papers, they did not want our country to be, uh, a pure democracy. They wanted it to be what political scientists call a mixed regime. We might call it a democratic republic. So republic with important democratic elements, but with also checks on the demos, checks on unrestrained, uh, uh, democracy. And, and, uh, I think the key thing is that whoever is ruling has to understand the profound inherent and equal dignity of each and every member of the human family.

[00:44:40] Now, ideally, democracy itself sort of embodies that. By allowing for mass participation, we pay a certain, uh, tribute to the idea of inherent equality, however, however different we may be, uh, in other ways, strength, beauty, intelligence, skill, power, wealth. However different and however legitimate it may be to make some, uh, decisions based on those inequalities. Uh, hi- hiring taller basketball players for the, for the NBA. Um, uh, admitting students with higher SAT scores or stronger academic performances to universities and things like that. However legitimate it is sometimes, uh, to act on the basis of those inequalities.

[00:45:25] Uh, a regime that honors what we try to honor with the rule of law will recognize that in the most fundamental respect of all. In terms of worth and dignity, basic value, all of us are equal, inherently equal. That's what our Founding Fathers were concerned about when they invoked the idea which you've, uh, yourself recalled here tonight, Jeff, of, of natural law and natural rights.

[00:45:54] In the Declaration of Independence, the, the founders say, "We hold these truths to be self-evident, that all men are created equal, endowed by their Creator with certain unalienable rights. And among these are life, liberty, and the pursuit of happiness." Those aren't the rights for

some, but not for others. Equality means equality. Now, did we honor it in practice? No. From the very beginning, we failed to, with slavery. Uh, have we ever perfectly honored it? No. To this day, we're not living up to it. Different Americans, I think, would point to different problems of inequality. They would reflect political, philosophical, uh, uh, uh, differences, but nobody believes we live up to perfectly. But we should aspire to do it. And a condition of doing it for any form of government is having in place securely the rule of law.

[00:46:36] Jeffrey Rosen: Beautiful. What a powerful answer, where you reminded us that we need not only an ethos of protecting our rule of law, but constitutionalism to constrain power, not a rule of lawyers. Um, and that's, uh, there's no particular government that can guarantee it. Athenian democracy murdered Socrates, but a mixed regime, a democratic republic can aspire to honoring the rule of law.

[00:47:01] Kim Scheppele, in your writings, you have talked about the ways that the United States doesn't have enough law. There are gaps, uh, that are covered by customer norms. And as a result, lawmaking takes place through executive order through secret Department of Justice memos, which poses challenges to the rule of law that are distinct. And you've suggested reforms from amending the Constitution to help with the question of free and fair elections to surfacing the secret laws of the executive branch. There's a lot of interest, of course, in the chat box and, and around the world. In the United States, what are your thoughts about the ways that the US is falling short of enforcing the rule of law and reforms that could help us do a better job?

[00:47:47] Kim Lane Scheppele: So I, you know, I wanna agree with my colleagues here. But the rule of law is a culture also, that it requires a certain depth of commitment to living under law, to living with each other in a form of democratic participation, that the US has a great virtue and a great vice of having a very old constitution. So a virtue in the sense that we've been at this a long time, there's a sense of, of, of history that looks like it stabilizes our system, that this is, you know, a longstanding practice that we can refer to and pick up.

[00:48:21] The disadvantage of our old constitution is that it's very spare. And it says very little. Um, and, in fact, the government that we have, if you just hold up the text to the government that we have, there's a great mismatch. And it's, it's not because of abuse of power. It's because every government in the world, modern governments are more complicated than 18th century governments were. And it would be hard to live with the Constitution if we hadn't elaborated this.

[00:48:46] So the question is, what are the principles of that elaboration? You know, and this is where it seems to me that the executive branch in the United States is really unusual. And when I teach US Constitutional Law abroad, this is the thing that shocks everybody. And that is, Article II of the Constitution says very little about what the President is supposed do. So that is the law that binds the President. It's also very hard to sue the President, as we saw, uh, because it's been, uh, tried, and it doesn't always, um ... It's just very hard to reach the, reach the President in a lawsuit.

[00:49:20] So what is the President accountable to? So we've developed a system in which the President is governed by legal memos written by the Office of White House Counsel and the

Justice Department, which because they're given as legal advice to the President about what his responsibilities and roles and duties and forbidden activities are, are secret. Um, we're the only advanced democracy that I know of where the vast majority of law governing executive is not publicly available, not even to lawyers.

[00:49:51] And so what that means is that you're on the honor system. So you get a President, and the President is presumed to be following the advice of legal advisers. There's certain amount of publicity in the actions of the President so that you can ask about this. But what if you have a President who just decides not to follow any of that advice because it's not "really law"? What we had just learned is that there are very few constraints that can reign such a president in. Um, I, you know, it's a, it's, it's been a shocking development for many of us to see how possible it is for the President to just ignore laws that apply to him.

[00:50:33] The most recent thing today, just to take a, a small example is that The National Archives, who's not exactly a political activist body, has now asked the Justice Department to look into compliance of the last president with the Presidential Records Act, which just requires keeping track of decision-making in the executive branch because, of course, 15 boxes of records were found in his private house. [laughing] So just that, you know. But there's, there's so many **more things of that kind.**

[00:51:01] So what we have is a constitution. Our old constitution gives us a constitutional culture, which does give us something we share in common as the people, and it's an incredible resource. If you've lived in countries with newer constitutions, you know it's an incredible resource to have an old constitution. But we have an 18th century constitution that has so many gaps in it, that we've, we've had improvisations filling in those gaps. And it's actually quite hard to say how you get the rule of law to apply in a context where nobody outside the executive branch knows what those rules are. So I think we need to really rethink, how do we regulate the executive branch? How do we bring it under the rule of law? And publicity of some of those norms, I think, would be a place to start.

[00:51:47] Jeffrey Rosen: Thank you so much for that. Well, Judge Escobar, I, the last word in this marvelous discussion is to you. As you advise democracies and countries around the world about how to avoid kleptocracy and corruption, and to protect the independence of the judiciary and the rule of law, what are among the most important recommendations that you would share?

[00:52:10] Claudia Escobar: Well, I can say one very key issue is the way of the, how the judges are appointed, how they are elected. You know, how do we protect them? How do we make for them to be secure and not to be afraid? Because that's key, you know, to protect the independence of the judiciary. But also, you know, on, on the other side, it's also important that, um, the people understand that this is important, and that they can also, um, look after what is happening in the judiciary, that they understand, um, that the judges also have to, to be able to explain, you know, their decisions. This is not a power, uh, without control. Judges also have to be responsible for their decisions. And also, there's other institutions that can come from kleptocracy, and they are important as well.

[00:53:04] Aside from that, I was seeing one of the questions where they ask, you know, how can we really build, uh, democracy in countries with the rule of law without going to insurrection? And I think that the European Union is a, is a very good example of what happened in the last 50, 60 years, you know, how they were really able to transform a region that went through a lot of problems into a region where the rule of law is respected. And I think that maybe will be good to reflect on that.

[00:53:33] Jeffrey Rosen: Thank you so much, Garry Kasparov, Robert George, Kim Lane Scheppele, and Judge Claudia Escobar for a, a, a marvelous discussion of a crucially and urgently important topic at the core of what the Renew Democracy Initiative and the National Constitution Center, uh, and our partner, the SNF Paideia Program at the University of Pennsylvania, exist to promote, which is awareness and understanding of constitutionalism and the rule of law. I'm so grateful to all of you for sharing your light. Thanks to all of you who've spent time learning and growing together tonight and look forward to convening again, um, as soon as we are able to. Thanks to all. Have a good night.

[00:54:17] Tanaya Tauber: This episode was produced by Melody Rowell, Lana Ulrich, John Guerra, and me, Tanaya Tauber. It was engineered by Dave Stotz. Visit constitutioncenter.org/debate to see a list of resources mentioned throughout this episode, find the full lineup of our upcoming shows, and register to join us virtually. You can join us via Zoom, watch our live YouTube stream, or watch the recorded videos after the fact in our Media Library at constitutioncenter.org/constitution. As always, we'll share those programs on the podcast, too. So be sure to subscribe so you never miss an episode. If you like the show, you can help us out by rating and reviewing us on Apple Podcasts or by following us on Spotify. Find us back here next week. On behalf of the National Constitution Center, I'm Tanaya Tauber.