

## Meet the Facebook Supreme Court

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**[00:00:03.3] Jeffrey Rosen:** Hello, friends. I'm Jeffrey Rosen, President and CEO of the National Constitution Center, and welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people. In 2019, Facebook surpassed 2 billion users, and the company created an independent oversight board known as the Supreme Court of Facebook to review appeals of its content decisions. In this episode, members of the Supreme Court of Facebook, which is now known as the Meta Oversight Board, join me to discuss the board's structure, its key decisions, and its efforts to ensure free and fair elections in advance of 2024.

**[00:00:47.6] Jeffrey Rosen:** It was an honor to convene Michael McConnell of Stanford Law School and Kenji Yoshino of New York University School of Law. Enjoy the conversation. It is a great pleasure and an honor for the NCC to convene two great scholars to discuss the role of Meta's Oversight Board and questions involving election integrity. Michael McConnell is Richard and Frances Mallery Professor and Director of the Constitutional Law Center at Stanford Law School and a senior fellow at the Hoover Institution. Kenji Yoshino is Chief Justice Earl Warren Professor of Constitutional Law at NYU and Director of the Meltzer Center for Diversity, Inclusion, and Belonging. Again, Professors McConnell and Yoshino are two of America's leading constitutional scholars. They come from diverse perspectives, but they're united in a commitment to the First Amendment and in their service on the Meta Oversight Board, which is a unique body with a great responsibility for enforcing free speech values in times of elections.

**[00:02:00.3] Jeffrey Rosen:** I was so honored when they agreed to come to tell us about what the Meta Oversight Board does and to discuss some of its important recent cases involving election integrity. And I know we all have a lot to learn from them. Welcome, Kenji and Michael. Kenji, why don't you start by telling us what the Meta Oversight Board does and what sort of issues involving elections it deals with.

**[00:02:54.0] Kenji Yoshino:** Yeah, so first of all, Jeff, it's an enormous pleasure to be with you here today, it's privilege and honor is mine. So the Meta Oversight Board is a body of 22 individuals globally, who help Meta deal with the thorniest content moderation issues that the platform faces. We're an independent body that stands apart from the corporation itself. And we make decisions in seven priority areas, elections and civil space, crisis and conflict situations, gender, hate speech, government use of Meta's platforms, automation, and treating users fairly. So I think we're coming together today to talk about the elections priority. And under that bucket, we have a weather eye out for a number of issues, but predominant among those are things like misinformation during elections, the suppression of dissident political voices would be another big one. And then finally, violence and incitement. The worry that these elections, which should be safe and secure around the world, are going to be subjected to threats of violence or actual violence itself.

**[00:04:05.0] Kenji Yoshino:** I'd be remiss if I didn't conclude by saying that, as we all know, this is an ultimate election year where 49% of the global population is going to the polls to vote. I do not think that we have ever seen an election year like this before. And so in that context, the work becomes all the more important.

**[00:04:28.7] Jeffrey Rosen:** It does indeed, and we're very glad to have the chance to discuss it. Michael, the Oversight Board was a unique structure when it was created. You were present from the creation. Tell us what the goals were in creating the Oversight Board was and how it's worked.

**[00:04:43.2] Michael McConnell:** Well, Jeff, the idea here is that the social media companies are enormously important and powerful gatekeepers for speech, and some people think, Well, why don't they just let everything go, but nobody actually wants that we all want spam out, we all want the law to be enforced. We don't want terrorists to be able to organize over the network. We don't want people to be bullied and harassed. There are lots of limitations on speech that I think most users agree about. But having a private company with its profit motives and its interest in pressure from advertisers being in complete control. Strikes many people in a democratic system as being troublesome. And yet the government as an alternative could easily be worse. The experience of government regulation of speech around the world is not a happy one. And so this is an idea, an experiment to ask a certain number of people on a part-time basis, people who all have been engaged in civic action and various roles to be an independent board. We don't work for Meta. None of us has ever worked for Meta. Many people actually have been critics of Meta in the past and to review specific cases and make recommendations for how Meta can deal with some of its really hard problems.

**[00:06:26.6] Jeffrey Rosen:** Well, let's discuss some of the recent decisions relating to free speech and election integrity. Our friends in the audience can find the decisions on the website of

oversightboard.com. We'll chat some of them. And among most important initial ones, involved the decision to uphold Meta's decision temporarily to remove President Trump for his comments surrounding January 6th, but to reverse the decision to suspend him indefinitely and to insist on the adoption of standards for deplatforming politicians. Kenji, tell us about this decision, a kind of Marbury versus Madison for the Meta Oversight Board. What did it hold and what is its significance?

**[00:07:18.7] Kenji Yoshino:** Yes, absolutely. So this is a violence and incitement case where President Trump was deemed by Meta to have incited violence with his comments around the January 6th incident at the Capitol. And as you said, they suspended his account indefinitely, without any kind of guideline around that. So I think oftentimes the headline of what the Oversight Board did in that decision is not really the most important thing that we did. So the headline was that we upheld Meta's decision to suspend. I actually think that the most important thing that we did in that case was to say it is not okay for Meta to create an indefinite suspension. There have to be some guidelines so that people are aware of what they have done and what the penalties are and when they can expect the penalties to be lifted. So as Michael was saying, what we worry about as the Oversight Board is that the speech platform that has billions of users on it is being regulated too much by economics and profit motives rather than through international human rights standards.

**[00:08:35.6] Kenji Yoshino:** So in our decision-making, we sort of adhere to certain international human rights standards, particularly those promulgated under the International Covenant of Civil and Political Rights, Article 19, which thinks about things like legality, legitimate aim, and necessity and proportionality. And here, the idea of legality is an issue that will be very, very familiar to you and many of our listeners today through the US Due Process Clause, which is that you have kind of noticed an opportunity to be heard, right? And you have a right to understand the kind of penalties that have been leveled against you. Also ideas like no kind of ex post facto laws of saying we have a right to notice, right? We have a right to not have vague standards be applied to us. And so it was really those kinds of impulses that refracted not through our US constitutional framework, 'cause it's the global standard, but rather through the ICCPR Article 19 standard of legality that pushed us to say, this has to be a limited suspension to two years, and then you have to be clear going forward, both about this particular individual, but with regard to all users as to why penalties are being leveled against them and when they can be expected to be lifted.

**[00:09:49.0] Jeffrey Rosen:** Very interesting and important. Michael, say more about the speech that the board held could be temporarily restricted, in particular, President Trump's comments, we love you, you're very special in his first post. And great patriots remember this day forever in the second post violated Facebook's rules prohibiting praise or support of people engaged in violence, but it wasn't permissible to impose an indefinite suspension. There was a minority of

the board that emphasized that Facebook should take steps to prevent the repetition of adverse human rights impacts and ensure that users who seek reinstatement after suspension recognize their wrongdoing and commit to observing the rules in the future. The fact that there was kind of a dissenting or concurring opinion makes me ask, how do the deliberations work? Do you meet by Zoom or in person? Do you talk by email? And tell us more about the significance of the Trump decision.

**[00:10:48.0] Michael McConnell:** Well, first, how do we work? We're all over the world. 22 members. Every continent except for Australia. I'm sorry, except for Antarctica, we do have someone from Australia. Time zones are a real problem. It's not infrequent for one person to be on the west coast of the United States at 6 a.m. And somebody else is often at the eastern edge of Eurasia, very late at night approaching midnight. It's difficult.

**[00:11:20.3] Michael McConnell:** We do meet together. About twice a year. That's usually more organizational and sort of to work things out rather than to deliberate over particular matters. We have a practice of appointing a five-person panel. There will be one member. It's mostly random, but with a guarantee of at least one member from the region most affected by the decision. And then their decision is circulated to the entire 22-member group, and there are comments and sometimes disagreements there. I actually think that the practice of dissenting is very important because it helps people understand that we are actually thinking these things through. And these are not easy questions, and there are no ready answers to them. And I think by telling the world what those more serious disagreements are, that we actually advance the cause. Now you asked for some more detail on the specifics. You quoted some of the specific Meta, you know, Meta meaning Facebook and Instagram, and now Threads. So there are three platforms covered by that term. That the community standards, the specific ones that were most in play with President Trump, on January 6th had to do with his words of praise as the riot was taking place at the Capitol and members of Congress were having to take cover and the office of the Speaker of the House was invaded and people in weird costumes were making threatening statements.

**[00:13:26.3] Michael McConnell:** As that's going on, the president was actually praising them and talking about them as patriots and so forth. And so the community standard on that came directly to bear. That standard is also quite important in connection with dangerous organizations across the spectrum. So this is not an anti-Trump or specifically Trump thing, the same issues come into play if someone is praising Hamas for what took place recently in Israel or praising the crushing of dissent in Russia. It's because one of the important ways in which support is raised for violence and suppression of speech is precisely through lauding the actions of people engaged in it. So that was the specific community standard most important in the Trump decision.

**[00:14:34.5] Jeffrey Rosen:** Thank you for that and that calling attention to that community standard and its relevance around the world is crucial. That leads to a recent decision overturning the speech of a Brazilian general. And there, well, Kenji, why don't I let you tee that one up and describe what the board held.

**[00:15:00.9] Kenji Yoshino:** Yeah, so there's a hotly contested election in Brazil. And I believe we handed down this decision about a year ago. And in the wake of that election where Bolsonaro lost, there was a Brazilian general who, in uniform, made a speech exhorting individuals to essentially storm the Capitol.

**[00:15:25.2] Kenji Yoshino:** So one of the interesting things about being on this board is that you see geopolitically how much particular situations would rhyme with each other. So there we again took down the post and said that you are not allowed to urge individuals to engage in this kind of activity in a highly sensitive time and a highly sensitive area. And so one of the things that we were flagging there was the high sensitivity of election issues. And we found that Meta had done an insufficient job of protecting individuals during election period, and we urged them to engage in greater sensitivity. So in some sense, what's passed is prologue that we were hopefully prescient, right, and saying we're going to confront this over and over again. And so Meta needs to have teams or attention played to particular areas, particular time periods surrounding elections so that these hot spots that we know will occur with regard to speech, with regard to incitement are more within the control of the platform.

**[00:16:35.4] Michael McConnell:** Can I just add to that that Meta has what are called crisis, a policy protocols in place when they expect that there are going to be this kind of violence and commotion. And elections are treated under that heading. But the Brazilian case wasn't actually about elections, it was about the post-election period. And one of the things we stressed is that in these days, the post-election period is just as much prone to this kind of action as anything else, and that they need to be aware of that.

**[00:17:20.2] Jeffrey Rosen:** That distinction between post-election and the election itself is crucial. And in response to questions from the board in the Brazilian decision Meta said that it doesn't have any particular metrics for measuring the success of its election integrity efforts, but it pledged to provide the company with relevant data and to come up with policies for determining actions and elections moving forward. What are the kind of policies that the board thinks that the company should adopt? And Kenji, what kind of issues moving forward in elections does the Brazilian decision flag?

**[00:18:02.7] Kenji Yoshino:** Yeah, I think part of it is, you know, holistically looking at the timeframe. So it's not just, you know, as Michael was just saying, the election itself, but the kind of aftermath of the election and making sure that the team doesn't just dissolve and Meta doesn't

take its eye off the ball. So making sure that crises and concerns are tailored to the extent of the crisis. But also, skipping ahead a little bit, one of the conversations that we've had more recently was with regard to manipulated media in the Biden case, where Biden was portrayed through manipulated media as inappropriately touching his adult granddaughter's breast. And so this was making the rounds and was challenged under Meta's manipulated media policy.

**[00:18:53.0] Kenji Yoshino:** And interestingly, the board kept it up because we said, as we apply the Manipulated Media standard, it doesn't actually cover this instance. So the Manipulated Media standard said you cannot make people say things that they didn't actually say. So Nancy Pelosi, that famous video of her slurring her words, for example might have been covered under that. But somebody doing something that they didn't do here, touching your granddaughter's breast inappropriately was not covered under the strict kind of four corners of the policy. Similarly, the manipulated media policy as written at the time, said look, we're not gonna actually deal with manipulated media acceptance so far as it concerns AI. And this did not. It was kind of just a very pedestrian usage and manipulation of media and did not involve AI.

**[00:19:46.2] Kenji Yoshino:** So it just fell outside of the policy. So this is one of the instances where we say, you actually reached the right decision, but the fact that this is the right decision means that the policy itself is wrong. So the community standard was something that we urged Meta to review. So that was actually the more dramatic instance where we said to Meta, please clean this up and please clean this up before the upcoming elections in the span, our election year. And the response on Meta's part was very swift.

**[00:20:21.6] Jeffrey Rosen:** Michael, tell us about what that response was and what the Biden video case tells you about whether the Meta standards themselves track the First Amendment closely enough or not. The distinction between saying things you didn't say and not doing things you didn't do isn't intuitive. How did the board, how did Meta respond and what do you think Meta should adopt as a policy for manipulated media?

**[00:20:53.1] Michael McConnell:** So as Kenji said, the Manipulated Media standard, which was adopted, I believe in 2020 or 20 or several years ago, which is eons ago in terms of the actual development of the technology had to do with what they were seeing at the time. And these, it was easier at the time to fake voices and statements, and that was basically the problem. But things change. And Meta, I think to their credit, immediately adopted, we identified three different distinctions within the policy that we thought no longer if they ever made sense, they don't make any sense anymore. And they immediately moved toward correcting those. And in addition to that, there was one other point, which is that under the prior policy Meta, either if it came within the policy, they would take the post down, or they, and if it didn't, they would leave it up.

**[00:22:02.5] Michael McConnell:** So it was a binary leave up, take down a sort of thing. And it is our judgment that, particularly in the area of manipulated media, that the real problem has to do with the fact that readers, users, viewers are frequently unable to tell whether something has been manipulated or not. And that's the deception. It isn't so much the content. I mean, in politics, people say falsehoods all the time, right. And especially about candidates and our United States Supreme Court has been very strong in protecting even falsehoods in the connection with political speech. But what we concluded was that it was most important for Meta to inform readers, users, viewers when the manipulation has taken place so that they, we would not be deceived and into thinking this is real 'cause some, especially as AI gets better and better, the deceptions are harder and harder for us to detect.

**[00:23:15.8] Jeffrey Rosen:** This is so interesting and nuanced. The content policy that you recommended in the, Biden decision as you just said, Michael, includes three recommendations to address the harms posed by manipulative media. Meta should reconsider the scope of the policy to cover first audio and audio visual content. Two, content showing people doing things they didn't do as well as saying things they didn't say in three content, regardless of the method. You also ensured asked for a clearly defining in a single unified policy, the harms that Meta sought to prevent beyond preventing users from being misled. And third, you asked for proportionality and said, Meta should stop removing manipulated media when no other policy violation is present. It took me a while to read all those recommendations, but Kenji reflect on the dynamic of the board, really in a thoughtful way, weighing First Amendment values, recommending that the company incorporate them in policy or do you feel that free speech values are being well respected and how is this dynamic working?

**[00:24:29.5] Kenji Yoshino:** Yeah. Well, I mean, it's not really free speech values alone, right? Because as Meta says, and as we deeply believe, voice is not the only concern that we need to protect. So there are really five values that Meta articulates as being salient to its platforms. And from time to time, it's says, freedom of expression is paramount, right? So we might lead with a voice as you have. But there are four other voices too. There's values as well. There's privacy, there's authenticity, there's dignity and there's safety. So what I find to be incredibly fascinating about my time on the board is that the balances among these different values can be extremely tricky, and that in many ways we are kind of not as tilted over one wing vis-a-vis speech.

**[00:25:22.0] Kenji Yoshino:** I'm curious as to whether Michael agrees or not as US First Amendment jurisprudence would indicate. So I've written a little piece on this, and it's pushed me back into the history of the creation of the oversight board. And in fact, early on with regard to content moderations, long before the oversight board even existed content moderation was done by first Amendment standards that the people who were in charge of these issues were trained in a US First Amendment tradition of, yes, the Nazis get to march in Skokie. Yes, you get to burn a cross on your yard. Because the very boast of our First Amendment jurisprudence as

the Supreme Court recently reminded us the *Mattel versus Tom* case is that we protect even the speech that we abhor. And so the speech we hate doctrine is part of a very expansionist and rigid vision that is intensely speech protective.

**[00:26:15.6] Kenji Yoshino:** And the story goes with Meta is that as Meta became more global, it realized what an outlier the United States was and could not simply default back to US First Amendment jurisprudence. Because, if you go to Europe and you look at sort of hate speech laws there, the cast is very, very different and much more tilted towards equality or dignity than it might be towards speech. And so, as a global platform that insisted on having community standards that were not geofenced that applied across the globe the balance, I think, had to be struck differently. And that's why our baseline here is not the US Constitution and free speech, but rather international human rights norms. So one of the things that I've greatly appreciated on being on the board is that because we're not state actors, and because we are global we can strike these balances differently from what I was taught and what I teach, are the First Amendment norms with regard to free speech.

**[00:27:14.6] Kenji Yoshino:** So, as long as they acknowledge that in our decisions. So I'm venturing a little bit further afield, but I still hope this is useful. We issued a decision on blackface where we said, if you actually portray yourself in blackface, even if it comes from an innocent tradition like the Dutch, black Pete tradition, we are going to prohibit it. And we know that if we were a state actor, if Meta were a state actor, we would not be able to do that, right? International human rights law would probably not allow that absent some exception, like violence or true threats or something like that. But given that we are not regulating a state actor, given that this is a private kind of super compliance B situation, we can strike that balance differently and on balance, equality norms Trump or dignity norms, Trump speech norms in this particular hate speech context. So that's a hate speech case, but all of these issues go to what the board is trying to do in elections as well, which is to try and balance out these different values. And what's been really striking to me is that if the baseline is international human rights norms, oftentimes that calculus comes out differently than it would if the baseline were US first Amendment norms.

**[00:28:24.3] Jeffrey Rosen:** Fascinating. Michael, you are a prominent defender of US first Amendment norms. Do you feel that the board is respecting them sufficiently in using international human rights as a baseline, or would you strike the balance in a different place?

**[00:28:44.4] Michael McConnell:** So I come to a similar place to Kenji, but I think the important difference is not so much the difference between international and especially European norms versus US norms. In fact, if I thought the project of the board were to bring, European understandings of the balance between expression and other things to the US I would be an unhappy person. I think the more important point is the one that Kenji was making toward the



end, which is the difference between a private company and a government. So even within the United States private companies are free to not convey speech that they disagree with over their platforms. Newspapers can do this. And there are actually, I think three cases before the Supreme Court this year talking about that balance.

**[00:29:48.9] Michael McConnell:** And I think when you reflect upon this that that's what any almost anyone would recognize. So take for example, in nudity and pornography our constitutional law does not allow the state to criminalize a lot of erotica falling short of obscenity, which is fairly strictly defined. Meta made a choice very early on, maybe at the very beginning of the platform, that it was going to be a family friendly platform and was not going to allow it to be taken over as some platforms have been by a whole bunch of sexual garbage. Now, the state couldn't do that, but Meta is free to do that. And spam is another thing, the government couldn't make spam illegal, but certainly the platforms have a right to keep spam off.

**[00:30:55.4] Michael McConnell:** Meta also made a decision in favor of authenticity, that is, people speak in their own voice, well, out in the constitutional world of the First Amendment, people very frequently have a right to speak anonymously or pseudonymously. After all, the Federalist papers were published under the name of Publius, not under the actual authors, names. So all of these are actual differences between private companies and the government that I, that we constantly are taking into consideration and frankly, having to figure out because although, we refer to international human rights decisions, most of those are also about governments. And it's our task to try to figure out to what extent that properly applies. Here now we've started out talking about the manipulated Media standard, and here I think we have landed much more closely where the US Supreme Court has on freedom of speech, that is to say falsehoods can only be banned as such when there's an identifiable harm from them. And that's the reason why we say don't take it down just because it's manipulated media, give the viewers the information they need to make to be able to tell, whether they've been, they're being manipulated or not. But don't take it down unless it violates some other independent standard, which is to say it, it produces some other harm. And that is, frankly, just exactly the holding of the United States in a case called United States versus Alvarez.

**[00:32:44.4] Jeffrey Rosen:** Wow. Kenji tell us more about whether you think the board is striking this balance between speech and other norms like dignity and privacy in a thoughtful way. Among the cases that the board relied on in the Manipulated Media case was one involving in sexual harassment in India where the board upheld Meta's decision to restore a post to Instagram containing a video of a woman being sexually assaulted by a group of men. The board found that Meta's newsworthiness and allowance is inadequate in resolving cases like this, and the company should introduce an exception to the adult sexual exploitation policy. It's just another example of how in what a nuanced way that the board is striking these balances. As you step back and look at the board, how do you think it's doing?

**[00:33:33.4] Kenji Yoshino:** Yeah, I am a true believer here. So I think the board is doing a excellent job, and if anything, I think that this model could be exported to other contexts, right? So just to clarify, where I was going with the European standard, that's really a story as I understand it, of how the standard evolved within Meta itself. So it's a origin story rather than a normative story about what the, what Meta's strongest defense is with regard to how it would balance norms differently than First Amendment jurisprudence would. I think the norm is story is very much this private public, distinction that Michael has also fastened on. But if you think about that for a minute, if it can pan out, that applies to other contexts as well. So if you look back to the kind of ill-fated congressional hearings on anti-Semitism, on the Hill the University of Pennsylvania president kept saying, I adhere to the Constitution.

**[00:34:34.9] Kenji Yoshino:** We adhere to the Constitution's First Amendment kind of protections in response to whether calls for genocide would incur some punishment, right? On UPenn campuses. And she got accused of being overly legalistic right in her answers and being kind of bloodless or overly analytical in the way that she responded. I actually had a different concern. I was worried that she was not being legalistic enough because the Constitution does not bind the University of Pennsylvania. So to act as if UPenn was bound by the Constitution in any way, or free speech norms in any way, I think was wrong, right? Or it just is wrong, right? And she was, she's very, very smart. She's a constitutional scholar herself. Like she herself was very clearly aware that she wasn't bound, but she was kind of wrapping herself in the Constitution in a way that I thought was ill-advised because she could make the choice and UPenn could make the choice to be bound by the constitution's norms.

**[00:35:33.2] Kenji Yoshino:** But to elide the fact that it is a choice, I think is a mistake because I think increasingly private actors, whether they be universities, whether they be companies, are all gonna be called upon to make these very thorny decisions about speech. And I don't think that they're gonna simply be able to bleed out, the First Amendment free speech and expect the United States Supreme Court to do that. So it raises the question of why so many individuals do that. And part of it may be that people are reading free speech broadly as a norm rather than narrowly as a rule. But I think the main reason people do that is that these speech issues are so difficult and so painful that it's much easier to just outsource them to the United States Supreme Court rather than to deal with them on their own.

**[00:36:17.4] Kenji Yoshino:** So, love it or hate it. One thing that I really do admire about Meta and the OSB is that they at least had the courage to say, we don't think that the United States Supreme Court can be our guide. We don't think that we ourselves can do it on our own. And so therefore, we want a separate independent body to do this. So when I think about this in the university context, whether that's NYU or Stanford or UPenn, I do think ultimately they are gonna have to create some version of the OSB. And what are the components of that? I think it's

gonna be a credible body of individuals who are independent, right? A credible body of law. So whether that's your own university standards, ideally it wouldn't be something that the university could just change at will. So ideally something more like international human rights law that stands independent.

**[00:37:02.6] Kenji Yoshino:** It could be AUP principles or what have you. But so long as the university can't unilaterally change those principles. And then finally, public reasoned opinions, because one of the things that Noah Feldman is often credited with driving, right? The creation of the OSB, at least in part said, was people are gonna disagree in good faith about correct or incorrect decisions. So the greatest kind of honor that you can do to the fact that they're dissenting views on this subject is to give public reasoned explanations for what you're doing. The universities in general that I've looked at do not have those open, transparent procedures of the credible body interpreting a credible body of law with public reasoned opinions. I think that those three elements are the core of what the OSB does, and I think what makes the OSB a noble experiment.

**[00:37:48.1] Jeffrey Rosen:** Credible body of law international human rights norms, and public reasoned opinions. Michael, do you agree that the oversight board might be a model for universities? And tell us how the oversight board has dealt with some of the issues that are now convulsing universities, including its decision to take expedited cases on speech and videos about Gaza?

**[00:38:15.0] Michael McConnell:** Yes. Obviously, the board is about social media and not about universities. But at Stanford, there was a group of law school people, including students who, five or six years ago, before the universities were convulsed with the really awful things that are happening right now, recommended that the university have a free speech ombudsman. This would be not quite a board, but it would be someone who stands outside of the needs, ordinary day-to-day needs of the university and specializes in, like would be chosen specifically for the purpose of thinking more in a more balanced way about a freedom of speech in the university context so that would be somewhat similar to the board.

**[00:39:17.9] Michael McConnell:** Also our board just we are only speaking directly to Meta, but there are other social media companies out there as well. And now we think, and I think we have sort of reason to believe through rumor channels and that sort of thing, that some of the other companies actually read our opinions and that we may be more influential than it appears on the surface. 'Cause, of course other companies are not going to say that Meta's oversight board is influencing their policies. But to the extent that we are offering, I think, thoughtful answers to some of these questions, I think it could spread.

**[00:40:05.2] Michael McConnell:** By the way, you've got Kenji and me on here to talk about what we think. You know, maybe you should have another program in which you invite critics of the board because they exist too. And they have something to say. I'm not going to tell you that every single decision of the board has been right. I've disagreed with some of them. I do think that the general direction has been excellent. And I think any powerful institution benefits by having independent people looking over their shoulder. It's not just what the people looking over their shoulder actually say or do. It's the fact that they are looking over their shoulder just brings more caution and thoughtfulness to the process.

**[00:40:55.2] Jeffrey Rosen:** Well, we would love to have more programs on this incredibly illuminating topic. Kenji, you've talked about the utility of the board's combining left and right cases on the same issues, like the board's decision to bundle abortion speech cases on the left and the right. And you wish that the Supreme Court could do the same thing instead of hearing single cases. Tell us about the expedited speech cases involving videos about Gaza. What issues did they raise and how did the board deal with them?

**[00:41:26.9] Kenji Yoshino:** Yeah, so sometimes just by way of quick background, we do formally bundle cases that are on a similar topic. And as you noted, with abortion speech, both pro-life and pro-choice, we bundled instances of that speech and then protected it across the board. So this is actually a very useful way, I think, to make sure that we keep the stakes of the cases steadily visible without it being about whose ox is getting gored or whose party is being favored or disfavored. So I just want to hearken back to an important thing Michael said earlier, which is that the Trump case wasn't just about Trump. In fact, its effects extend far beyond Trump.

**[00:42:09.7] Kenji Yoshino:** And it's really important to keep that as legible as possible. And one of the ways in which we do that on the board is to take speech from opposite sides of the spectrum to link them together and then let the ideologies cancel each other out while reaching, because we reached the same decision on both in a speech protective vein. So the expedited cases, which we just started taking this past year, well, in 2023, had to do with the conflict in the Middle East. And what we did was not to formally bundle, but to link two cases. And the two cases both concern quite harrowing, viscerally kind of moving videos from both sides. So there was one from Gaza City, a hospital there, that had just been destroyed. And then there were some very kind of poignant, powerful scenes of the suffering in that hospital.

**[00:43:10.6] Kenji Yoshino:** Then there was another video that depicted a scene from Israel where a woman was pleading with her kidnappers not to be kidnapped by them. We understand why the impulse might be no one should have to see this. You know, this is incredibly volatile period, incredibly sensitive time, but we felt that whether we protected or didn't protect, the videos would be better served if they were linked to each other. Because what we ended up doing

was to say both videos should be left up. You know, people in the hospital should have the capacity to know, right, that their relatives can find them. You know, people who are family and friends of the individual being kidnapped should be able to mount a search for that individual. Right.

**[00:43:55.0] Kenji Yoshino:** So there are really strong humanitarian reasons on both sides that without saying that this is not an incredibly difficult, sort of seemingly intractable conflict in the Middle East. This was kind of our piece of it to say, we're going to protect speech on both sides, and we're going to link these two cases so that people can understand why we did that without letting ideology get too much in the way.

**[00:44:24.2] Jeffrey Rosen:** Fascinating. Michael, how do you think the board is dealing with Gaza-like issues? Could one post videos from the river to the sea of the kind that became of controversy during the hearing with the college presidents? And does the board's approach to the Gaza conflict teach anything to universities who are dealing with the conflict today?

**[00:44:48.3] Michael McConnell:** So these first two cases were expedited, they were decided, and I think it was about a two-week timeframe, which they were the first ones we dealt with under these procedures. I think the biggest legitimate complaint about the board is just that ordinarily our work is too slow because of the way we go about things. But we did this, I think, on a rather rapid timeframe. But since then, there have been other related matters that come up, specific cases. And also, we reviewed a very touchy question that I don't think people in the United States are even aware of, which is the word Shahid in Arabic means, it has a range of meanings. It refers to people who have recently been or have been killed. It sometimes means martyr, and it is often used in connection with terrorists who die in the course of trying to do that. And that's, it touches on that issue we were talking about before of praise for terrorists or other dangerous organizations, but it has a much broader use than that. When a teenager dies in an automobile accident, they might well be referred to as Shahid by their family and so forth. And Shahid was the single word that most often led to takedowns of messages.

**[00:46:29.3] Michael McConnell:** And it had a really weird and sometimes counterproductive effect as applied. In the Middle East. Again, in the United States, we were kind of oblivious to that, but we issued a policy recommendation that drew much closer lines to try to make sure that the word Shahid is being disfavored only in contexts where it should be and not so broadly.

**[00:47:04.7] Michael McConnell:** Now, Jeff, you ask about from the river to the sea. There's been a public announcement that that happens to be a specific case that is being taken up by the board. And I'm not going to predict how it's going to come out. And it may be open. I can't remember exactly the timeline. But your listeners may be interested to know that we announce cases when they're being taken up and we welcome public comment. A lot of those comments

are from civil society groups of various sorts and academics who study the matter, but anyone is free to comment, and we take those all into account and very seriously. So cases like this, some of the listeners on this program may want to chime in.

**[00:48:02.0] Jeffrey Rosen:** That would be very constructive, and we will post the links to allow people to do that. Back to election integrity, the board has decided important cases recently involving a Cambodian Prime Minister. It overturned Meta's decision to lead up a video on Facebook in which the Cambodian Prime Minister, Hun Sen, threatened his political opponents with violence. And there was also a case involving reporting on the Pakistani parliament, which involved the oversight board upheld Meta's decision to lead up a post shared by a news outlet in Pakistan that includes a video of a politician giving a speech to the country's parliament. The board considers that safeguarding such figurative speech in the run-up to elections is fundamental. Kenji, tell us about these cases.

**[00:48:52.6] Kenji Yoshino:** Yeah, they're actually really good cases to consider together. So the Hun Sen case led to actually the entire oversight board being banned from travel to Cambodia 'cause we were deemed kind of persona non grata. So I suppose we can wear that as a badge of pride for having some effect there. But in that case, the Cambodian Prime Minister incited violence against his political opponents. This is now the father of the current Prime Minister 'cause there's been a regime change. But the Cambodian Prime Minister said, "We will go after our opponents with the bat," right, and incited sort of violence in that way. And we deemed that to be not permissible.

**[00:49:34.8] Kenji Yoshino:** We told Meta that it needed to be taken down. And then we also urged a suspension of the Prime Minister's account. The Pakistani case was on the surface, perhaps similar. It was an individual in the Pakistani parliament, so an elected official making a speech saying that individuals should be hanged. And so that might seem to be even more serious. But when we looked at the context, it was much more figurative. It was similar to our death to the Khomeini case, which we saw as kind of down with Khomeini.

**[00:50:10.2] Kenji Yoshino:** But one of the salient distinctions among those cases is that the media environment was very, very different in Cambodia, where Hun Sen kept the Prime Minister at issue in that case, had a very, very long history of suppressing traditional sources of media. And so in that media environment, his defense was this should be, and Meta's defense was, this should be publicized because it's newsworthy. And that just seemed a little bit backwards to us. It seemed like somebody was taking advantage of first shutting down any other sorts of media other than themselves, and then saying that their Facebook feed should be kept up because they were newsworthy.

**[00:50:49.3] Kenji Yoshino:** So this, to me, had the kind of tincture of that old law school saw that you can't sort of kill your parents and then throw yourself on ask for clemency from the court on the ground that you're an orphan. You cause the situation that you're now trying to take advantage of. And so one of the things that strikes me in these cases, I frankly wasn't anticipating as much, was how profoundly context-dependent each one of them would be. So those cases sort of rabbit off in different directions, even though they seemed like they concerned relatively similar forms of speech because of distinctions pertaining to media, but also others that made the difference between them.

**[00:51:36.0] Michael McConnell:** Can I just add one more detail about the Cambodian situation? I think this is an example of where having an independent board like the Oversight Board really helps Meta because Hun Sen's immediate reaction was to shut down Meta, shut down Facebook as the more important platform there, shut Facebook down entirely. And of course, they don't like that for commercial reasons, but they also don't like that because Facebook is such an important medium of communication among Cambodian people, not just for political speech, but even for very ordinary communication. And to have the whole country deprived of the platform was it was a very heavy weapon on Hun Sen's part.

**[00:52:30.7] Michael McConnell:** Meta can say, "Oh, but we are committed to following the oversight board's decisions." They can outsource the blame for this. And so instead, he banned the 22 members of the board from being able to come to Cambodia rather than shutting down Facebook altogether. And I think that there would not have been that kind of good cop, bad cop benefit in the absence of something like the board.

**[00:53:08.0] Michael McConnell:** Now, I should point out, 'cause this I think is a little disappointing, that the company did not fully follow the board's recommendations here. I think it's probably the only really important recommendation in the history of the board where they flatly said we cannot do part of it, and that had to do with the future treatment of Hun Sen's accounts over the platform.

**[00:53:39.6] Kenji Yoshino:** And can I slightly pull against that, which is to say good cop, bad cop to me, Michael, suggests that like it's the same kind of entity. Deploying two different tactics to achieve the same end. I think that kind of scans the fact that the reason that there's conflict is evidenced by the fact that they didn't sort of go, Meta did not adhere to the suspension, that we are really independent, that we come to different assessments, that they're looking at the world through, and they're totally entitled to do this from a profit maximization viewpoint. We're looking at it from a human rights viewpoint. So perforce, we're going to come to different answers. And just so there's no confusion among the viewers and listeners today about what's mandatory and what's not, whenever we have a take-down, leave up decision, Meta has to adhere by that. That is mandatory. And they have never flouted that.

**[00:54:28.2] Kenji Yoshino:** When we have recommendations, they have to respond, but they do not have to take the recommendation. And in this particular case, as Michael said, they did not. But this right of response that we have, I think is critically important because what I'm beginning to understand now, having been on the board, I'm the newest member of the board, so I've been on for a year and change now, is how iterative this conversation is.

**[00:54:52.1] Kenji Yoshino:** Inevitably, there'll be another case that raises the same issues and then we'll be right back into the conversation again. So the fact that we give recommendations and then they have to speak back to us and then we get to speak back to them again, next time similar issues arise, means that we're in this conversation together. But it's conversations. That are being approached through positions of complete independence from each other rather than trying to voice the same strategy in two different ways.

**[00:55:16.9] Jeffrey Rosen:** Fascinating. Michael, final thoughts on the Cambodian case, and then we'll have closing thoughts. I know you wanted to flag how people often use the pretense of misinformation to take stuff down and how quick governments are to latch onto this claim of misinformation when they're trying to avoid bad publicity. Is that one of the dynamics here?

**[00:55:35.8] Michael McConnell:** I think it is. In the Hun Sen case, it was a threat of violence rather than an attempt to get the company to take down alleged misinformation. But there are governments, China is one of them, that put tremendous effort into getting criticism of the government eliminated from world discussion. And they bring pressure in various ways. And we try to be alert to that and be a guard against it.

**[00:56:10.1] Michael McConnell:** And one thing that we've done, and this I think is a really interesting area, it's come up in the US Supreme Court again in a couple of cases this year, and we don't know. And that's what is the line between a government sharing legitimate information with the social media platform that's relevant to their taking stuff down versus an illegitimate use of the threat of regulatory retaliation to get to induce the company to take down material unfavorable to the government? It's a line somewhat easy to state in theory, but extremely difficult to police in practice.

**[00:56:57.7] Michael McConnell:** And we have come up with a solution to this that I really like and hope that it spreads. And we have recommended that whenever a government or government officials request takedowns of posts on the platform for reasons other than legality, that is, when the government is saying, "Well, this is hate speech," which is not illegal, or, "This is misleading information," or that sort of thing, that the companies simply make a public announcement, a list of the contacts from the government urging that, much of what the government urges is entirely legitimate, and making it public is not going to hurt anything.



**[00:57:46.6] Michael McConnell:** We're talking about governments all over the world, but the United States government is not immune either. But there are times when they are misusing their power over the companies to avert criticism. And so this is an area where a little sunshine would help the problem. The United States Supreme Court doesn't have that option. It has to decide the line about when the government goes too far and when it doesn't. But we and Meta have a chance of a solution that is less binary than that.

**[00:58:35.2] Jeffrey Rosen:** Well, that's a superb note to emphasize. At the end of this great discussion, I have to say how struck I am by the nuance and thoughtfulness of these discussions, and also by the fact that both of you, coming from different perspectives, really do find yourself substantively agreeing on these complicated issues more often than not. You both flagged the importance of transparency and accountability as one of the factors that's made that possible. But Kenji, as you reflect on why the board is able to have these civil discussions and to agree more often than not, what are some of the factors that you'd point to?

**[00:59:18.8] Kenji Yoshino:** Yeah, two come to mind. So one does us less credit and the other does more. So I'll emphasize the second one more. The first one is I think free speech makes strange bedfellows of politics. So that people who are from different sides of the ideological spectrum, as Michael and I are, I like to think that I'm a reasonable progressive and Michael is a reasonable conservative. But we are, I think we come at this from with different ideological priors sometimes when it comes to issues of free speech. You know, oftentimes that's totally irrelevant. Can you actually, as a political candidate, make inciting utterances saying that you're going to take the bat to your political opponent?

**[00:59:56.8] Kenji Yoshino:** The board was unanimous and behind that decision. So that's one idea of, like, speech makes strange bedfellows. The other one, I hope, does more credit to us, which is that we are in this kind of noble experiment together. We are driving towards the same end. If you work in diversity and inclusion long enough, as I have, one of the things that you realize can erode otherwise quite significant differences between individuals is a common goal and a total commitment to that common goal. So one of the great gifts, I haven't said this publicly before, Michael, but for my service on the board has been able to serve with people who are significantly more conservative than I and being able to team in them on these issues. I've learned an incredible amount from them. And I know that's near and dear to your heart at the National Constitution Center, Jeff. So I hope that this is an experiment that you can rejoice in as well.

**[01:00:51.8] Jeffrey Rosen:** I can absolutely rejoice in it and in this very inspiring discussion, which is a model for the kind of civil dialogue that we're hoping to encourage. Michael, last

word to you. What are the factors on the board that you think account for the civil dialogue and unexpected agreement that it is demonstrating?

**[01:01:13.3] Michael McConnell:** Actually, if you don't mind, I'd just like to say something to the audience, whom I assume is pretty diverse too, that the board will do better work if we get more input from the public in several different ways. One I've already mentioned, which is the public comments on the specific cases. Most of our cases come from user appeals. And I think there is a narrative out there that the board is just one more sort of globalist, left-leaning organization that doesn't care about conservative speech.

**[01:01:57.9] Michael McConnell:** And I just want to say, I don't think that that is at all true. I don't think it's true. Certainly isn't true of me. I don't, it's not true of Kenji. And if it's not true of Kenji, it's probably not true of anybody. But it can be a self-fulfilling prophecy. So I think there have been a lot of complaints from the right side of the spectrum that social media is silencing them, to which I say, appeal those cases, bring them to us and let us see if we can do something about it.

**[01:02:29.4] Jeffrey Rosen:** Appeal those cases and let's see if we can do something about it. Just inspiring words at the end of a great discussion. It was an honor to convene it, and it is a model for civil dialogue in a polarized age. Kenji Yoshino and Michael McConnell, thank you for your service, and thank you for educating all of us at the National Constitution Center. Bye. Hope to convene again soon.

**[01:02:52.1] Kenji Yoshino:** Thank you, Jeff.

**[01:02:53.6] Jeffrey Rosen:** Thanks.

**[01:03:00.4] Jeffrey Rosen:** This program was made possible through the generous support of Citizen Travelers, the nonpartisan civic engagement initiative of Travelers. It was streamed live on April 29, 2024. Today's episode was produced by Lana Ulrich, Samson Mostashari and Bill Pollock. It was engineered by Kevin Kilbourne and Bill Pollock. Research was provided by Samson Mostashari, Cooper Smith and Yara Daraiseh. Dear We The People friends, I am so grateful to those of you who've written asking for book plates for *The Pursuit of Happiness: How Classical Writers on Virtue Inspired the Lives of the Founders and Defined America*. It's been wonderful to hear from you about what do you think of the book, and what you think of the show, please email me [jrosen@constitutioncenter.org](mailto:jrosen@constitutioncenter.org) if you'd like a signed book plate, and to let me know what do you think of *We The People*. Please recommend the show to friends, colleagues or anyone anywhere who's eager for a weekly dose of civil dialogue, historical depth, constitutional illumination and debate. And who isn't eager for all of those things? Sign up to the newsletter at [constitutioncenter.org/connect](https://constitutioncenter.org/connect). And always remember that we're a private

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**[01:03:48.6] Jeffrey Rosen:** Get our emails, our updates, and the non-stop constitutional learning that my colleagues and I are honored to produce every week, and of course, please consider giving a donation of any amount to support our work, including the podcast, at [constitutioncenter.org/donate](https://constitutioncenter.org/donate). On behalf of the National Constitution Center, I'm Jeffrey Rosen.