Fox Rothschild Podcast

The Presumption of Innocence

Episode 70: Fireside Chat With Rachel Barkow and Casey Michel

Featuring Matt Adams of Fox Rothschild, Rachel Barkow and Casey Michel

Matt: Welcome to a special live version of the " Presumption of Innocence" podcast, brought to you by the White-Collar Criminal Defense and Regulatory Compliance Practice at Fox Rothschild. We are at the fourth annual Fox Rothschild White-Collar Symposium, and for the second straight year, we're recording our award-winning podcast with a live audience. You've been a great, very engaged audience throughout this afternoon's program and from the outset. Let's give a warm welcome to our two return guests on this live edition of the program, Professor Rachel Barkow and Casey Michel.

Now, of course, you know Professor Barkow from episode 55 and episode 64 of the program, where she talked about the power of the presidential pardon and the making of the mass incarceration problem in America. Professor Barkow is the Charles Seligson Professor of Law at NYU and the faculty director of the Zimroth Center for the Administration of Criminal Law at NYU and a former member of the United States Sentencing Commission.

Casey Michel, you know him from episode 50 and 54 of "The Presumption of Innocence," on how kleptocrats exploit U.S. financial systems and discussing the feeble oversight that the Foreign Agents Registration Act provides. He's an investigative journalist and oversees the Human Rights Foundation's Combating Kleptocracy Program, focusing on transnational corruption, illicit finance and the corruption that links dictators around the world.

Now, let's set the stage quickly. In your latest book, Professor Barkow, called *Justice Abandoned: How the Supreme Court Ignored the Constitution and Enabled Mass Incarceration*, you chronicle six Supreme Court decisions that you argue have paved the way for our mass incarceration problem in the United States. The biggest failure-- I would submit --of our criminal justice system. And those six decisions are *United States v. Salerno*, *Bordenkircher v. Hayes, Harmelin v. Michigan, Rhodes v. Chapman, Terry v. Ohio,* and *McCleskey v. Kemp*. We're going to get into those in a bit, but your central theory is that those six pieces of judge-made law have essentially softened up our criminal justice system.

Casey Michel, in your latest book, *Foreign Agents: How American Lobbyists and Lawmakers Threaten Democracy Around the World,* you compose a damning indictment of FARA and you posit that its failures threaten to actually end democracy as we know it. It's not just hyperbole. Your work follows some of the most despotic regimes around the globe, and now they have found material aid and comfort in the United States from U.S. powerbrokers and lawmakers. You tell the story of the likes of Ivy Lee, the inventor of the PR industry, and a man who found among his client base the Nazis,

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Mussolini and the Soviets. You also tell the story how American capitalistic impulses collide with power to create an industry in our country that is undermining U.S. policy. You bring your readers full circle with a close examination of the Paul Manafort situation and Russian interference in the 2016 election.

So when we think about a common unifying theme for each of your respective works, where I go is in the area of criminal law we're talking about on the one hand, decisional law-- judge-made law-- and then statutory law that primarily gives us the moral guiderails for our society.

According to each of these authors, our guests on the program today, there are inherent flaws in both of these sources of law. And with both of these sources of law seemingly susceptible, it begs the question, how do we fix them? As to the latter point, one of my guests on this very program, on episode 65 of the podcast, UC Berkeley Law School Dean and noted constitutional scholar, Erwin Chemerinsky, posited, as the name of his latest book suggests, that we ought to scrap the U.S. Constitution altogether. His book is called *No Democracy Lasts Forever: How the Constitution Threatens the United States*, and he suggests, throughout his work in recent years, that we need wholesale changes to the sources of law that comprise our criminal law structure in this country, including a new Constitution in order to fix some of these systemic problems. For some that would be too drastic. For others, not drastic enough. Either way, over the course of the next hour, that's what we're going to focus on. We're going to focus on distilling the common themes from both of our guests' work into something manageable, talking about constructive criminal justice reform.

I'm going to start with you, Professor Barkow. Why did you choose those six U.S. Supreme Court cases that you did in *Justice Abandoned* to sort of chronicle the endemic issue of judge-made law falling flat, or even enabling a system of mass incarceration as we know it today?

Rachel: Okay, thanks. Well, first I just want to thank you for having me back. I got the hat trick on your podcast. Um, so the cases that I picked for the book, well, let me back up one step and say, the reason I wanted to write about the Supreme Court and its role in mass incarceration is because I think the court has been given a pass in terms of how important it has been to allow America to look the way it does when it comes to having so many people incarcerated, so many crimes, very little oversight of that. And most of my career has been writing about the politics of that and the media and other things that drive it.

But as I was doing all that other research, it occurred to me no one has really called out the Supreme Court. So I wanted to explain why it's also a key contributor. And in making that argument, I didn't want to just pick cases that I personally don't like. I wanted to show the cases that I can argue are wrongly decided no matter what constitutional methodology you follow. So these are cases that, even if you're an originalist and you believe we should stick to the original meaning of the Constitution, the court departs from them in these--

Matt: And now would be a good time to point out that you were a Scalia clerk.

Rachel: Yes. So I'm pretty familiar with originalism as a methodology and I understand it. And I was very careful in the book to explain, you know, what the original meaning was in each of these cases

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and how the court departs from it. And we can talk more about that if you want to. But the other key factor in picking the cases was they had to be really important for mass incarceration.

So they had to be things like the *Salerno* case, which really paves the way for pretrial detention to take place on a massive scale in America. And so if you ask how many people are incarcerated in America, you know, it hovers right around the 2-million mark and about 500,000 of those people are in jails and almost all of them are there pretrial. And *Salerno* is the key case that allows that to really flourish.

Bordenkircher is a case that condones plea bargaining, and we would never have mass incarceration if you couldn't process cases en masse. And that's what Bordenkircher does.

So each of the cases I talk about are really important for allowing the conditions of massive numbers of people to be incarcerated to take place, either because it makes it easier to admit them, because they stay in longer, because prison conditions lets you pack them in, in overcrowded ways. And they're cases that I think can't be justified if you're looking at text, if you're looking at history and you're looking at precedent.

Matt: Are those six cases essentially about empowering law enforcement? Is that the common theme that those six cases have? Because we talk about *Terry v. Ohio*, reasonable suspicion, I don't see it anywhere in the Constitution.

Rachel: It's not, you know. It should be probable cause. And the court comes up with a new standard under the Fourth Amendment that does give more power to the police. So I think it's right to say that the cases share deference to the government. And the governmental actor, you know, could be the prosecutor, could be a police officer, could be corrections officials, or state legislators that decide they want to pack up their prisons. But it's a very deferential view to allowing the government to do what it says it needs to do as a matter of public safety.

And obviously, we're living in a time right now where, you know, you see echoes of really all the arguments that the government made in those cases. You know, you can see them today. They're very similar kinds of claims: you have to let us do this, it's an urgent matter of public necessity, and if we don't do this, you know, your lives are at risk.

Matt: So, Casey, how can we have this system that Professor Barkow describes in her book where we are so tough on crime that we've gone beyond the textual meaning of our constitutional rights, imprisoned more people than anywhere else in the world, but at the same time, our system lets the powerful, the connected and the resourced off with little to no consequence, as you chronicle in your work, *Foreign Agents*.

Casey: Well, Matt, it's a great question. Thank you so much to you, thank you to Rachel, thank you to Fox Rothschild for being here. It's great to be among so many podcast fans. So it's fantastic to join you today.

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Look, I wish I had an easy answer to that. You know, you mentioned last year you had Jesse Eisinger from ProPublica whose book, *The Chickenshit Club*, if I may use that term, was fantastic in chronicling just that, the skittishness, the lethargy, the lack of direction, and of course, what some of these prosecutorial forces are going up against-- in terms of those most high-powered individuals and organizations and networks in and around Washington-- why it is so difficult, and has been for so very long, to launch these successful prosecutions.

Bringing things to the foreign lobbying side, which is what this new book that I have written, that you all have copies of, Foreign Agents, is about. It's about the broader history of the foreign lobbying industry in the United States of America. These are the Americans who use their constitutional protections, those First Amendment protections, the right to petition the government for the redress of grievances, those lobbying-based protections, to service not other Americans, but foreign regimes, foreign kleptocrats, foreign oligarchs and foreign firms that are effective proxies for those regimes. Using those protections to lobby on behalf of those malign foreign influences and do so perfectly legally. It also tells the story of the Foreign Agents Registration Act, which is the key plank trying to bring transparency to this sector. Which for decades-- for nearly a century, frankly-- was a backwater. First at the State Department and then at the Department of Justice. And it wasn't until 2016 that folks-- I don't have to re-litigate 2016 in here, you were all alive and following the news at the time-- realized maybe some of these foreign lobbying networks were not just these kind of anodyne back channels that we thought that we could ignore, that these regulations we could leave unenforced, maybe they were actually causing real harm, not only to American domestic politics, but American national security, writ large. And maybe something needs to be done about it.

And of course, we saw beefed up prosecutions, new funding, new resources and new direction, including from the White House, to specifically target these networks and bring them to bear, bring them to light. Now, this is fast forwarding things. I'm sure we'll get more into the details. But it was just a few months ago, Rachel, right before your book came out, when the new Attorney General, Pam Bondi-- who herself is a former foreign lobbyist on behalf of the regime in Qatar-- issued a series of memos, including one that said the Foreign Agents Registration Act would still be in use, it would still be theoretically enforced, but it would no longer shine light on or be enforced surrounding foreign lobbying. It would only be something to be used in terms of quote unquote "traditional" espionage, which it had almost never been used before prior, and which any number of other laws and regulations and investigative bodies already target. This is the status and the state of the Foreign Agents Registration Act right now.

Matt: So we heard from Professor Barkow about the structural deficiencies in some of this constitutional jurisprudence. Boil down for our audience what you perceive to be the failures of FARA.

Casey: For decades, there were failures in terms of the types and typologies of lobbying networks. There were failures in terms of exemptions for scholars, for journalists, even for those in the legal space.

But those are almost secondary to the broader failure of strategic vision out of administration after administration and after administration, including just the general American body politic, that did not

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understand the threats that unchecked foreign lobbying presented. And I, it's not that I fault anyone in particular or fault Americans writ large.

We didn't know. And we didn't know what we didn't know. And it wasn't until 2016 that so much of this came to the fore, and we realized that figures like Paul Manafort-- who has since been pardoned --as well as a number of others, have been making millions of dollars to service these maligned foreign networks. It was a failure of strategic vision that took us to 2016. I'm not quite sure what to call it since those memos from the Attorney General came out. I don't know if it's another failure of strategic vision. That might be too charitable of a way to describe it. . It may be too early to tell. We shall see. But it was certainly a failure of vision from the very top for decades.

Matt: Professor Barkow, building on what Casey is saying, I want to revisit a point of contrast that I just attempted to explore with Casey a moment ago. How can it be that we have this system of judge-made law that you say has enabled the trampling of constitutional rights and perhaps resulted in the wholesale mass incarceration of large segments of our population on the one hand. And then, as outlined in Casey's work, we have toothless statutes like FARA that really don't do much of anything when it comes to keeping foreign corrupt influences out of our democracy-- which I think universally should be something we could all agree upon, regardless of philosophy, should be done. How can we have a system where we have these blind spots?

Rachel: So I should say, you know, I disagree with Dean Chemerinsky to scrap the Constitution. I like our Constitution. I think that, if there's been a failure, it has been in the people who have interpreted it to make sure that it gets enforced.

So we have all these pillars to protect individual rights in there. And in my book I talk about how the Supreme Court caved in the face of government arguments that they had to give way for public safety. And I think the reason that the court gave way to those arguments is the same reason the public does, is that there are certain things that the American people are afraid of that are very salient in their mind.

So there is not a *New York Post* cover that has a foreign lobbyist on it, or a video of a foreign lobbyist on a train stabbing somebody, right? That there are just certain images that capture public fears. And in America, you know, for certain, at least since we have had television and video, violent crime is it. And in the cases I talk about, it's really all about policing, street violence and street disorder. And it's frankly, people's fear that they could be the victim, right? You know, you think about it if you're walking in a dark area at night or you think about it if you have children, and it's kind of an ever-present concern.

And in the face of government claims that to keep you safe from that, we need to have constitutional rights yield, I think the justices and judges are like other people and they're scared.

And I think what's different about the kinds of threats that Casey writes about, those are not salient. You know, those are really hard for people to grasp. They're not something you think about in the day-to-day. And even when we found out about them, right, you know, that news cycle in 2016 was, like, bonkers in terms of what it was that you were supposed to focus on. And so --

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Matt: It was, it still is.

Rachel: It's still, right, exactly. It's now even worse. And so it's kind of hard to figure out what people focus on. But even today, right, what is the stuff that gets most attention? It's acts of violence, it's acts of physical violence and murders and killings. And I think in that world it's going to be very difficult to get kind of public reaction. So you would need to have political leaders and a real push to put an emphasis on the need for that. And I think what we're seeing right now is, you know, certainly the current administration has zero interest in that. And instead what they want to do is capitalize on the fear of violence to get other powers that they want.

Matt: So let's build on that.

Casey: If I could just jump in really quick, Matt. I was going to say, of course, this is by no means limited to the United States of America. This is a general tendency, general tension between white-collar crimes and, you know, violent blue collar, whatever you might, uh, term it. And I was going to say, just as it pertains to the networks and the tools and the policies surrounding transparency and prosecution on international corruption and transnational criminal networks, it's no surprise that on the policy side, the single greatest burst of reform, of successful reform, we have seen are in the immediate aftermath of national security crises.

Following 9/11, the creation of the Patriot Act and the broader anti-money laundering provisions within that. And then following 2016 and Putin's expanded invasion in 2022, the related anti-oligarchic and foreign lobbying related regulations. It is no surprise, shock, because of course, at the end of the day, this is the national security concern. It is war that moves so much of this legislation forward.

Matt: Rachel, let's build on some of that fundamental fear-based lessening of our constitutional principles, that your general hypothesis is, contributes to the mass incarceration problem in the United States. Give us a couple of concrete examples of how these judge-made legal doctrines eroding Constitutional norms have had on the rights of the criminally accused.

Rachel: Yeah, so I think the starkest example I can think of is pretrial detention. So I think if I were to ask you right now, I think the assumption people have is, of course somebody should be detained if we think they're dangerous and violent, right? And that is the clamor in the wake of that horrible Charlotte stabbing is, why wasn't he detained? And I think what people forget is 50 years ago there wasn't a lawyer in America who thought that it was constitutional to detain somebody before they had had their criminal trial. You could not detain people on the basis of dangerousness. You could detain someone because they were a flight risk or because they might tamper with a witness, but the whole point of detention was just to make sure the trial happened. Like that was why we detained people. And if you wanted to detain someone because you thought they were a danger to themselves or others, you had to go through a civil commitment process with clear and convincing evidence of what that danger was.

And it wasn't until 1968 that Richard Nixon decided, that he ran on a law and order campaign about he was going to make America safer. 1968 was another bonkers year. And he realized I have to do

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something about this, but like, what does the president of the United States actually do to address crime and disorder? So he came up with the idea that he was going to use the District of Columbia as kind of a little lab. And he had one of the people in his administration, a then young lawyer by the name of William Rehnquist, help draft a statute for DC that was going to be the very first statute in United States history that would allowed detention after arrest on the basis of dangerousness. And no one thought that that was constitutional. But the administration wanted to make the claim that it was. And so it basically wanted to start convince people that actually this is fine, even though you all thought this was wrong for 200 years, it's okay. So he had his attorney general write a Law Review article to try to explain why this is actually not a problem. It's a pretty bad Law Review article, I have to tell you as far as they go. It's not very convincing.

But the DC law, it passed. It went into effect. It had all kinds of limits on it because they knew they were testing the waters. So the government would have to show a substantial probability that they were going to win on the merits. You could only detain someone for 60 days. So it was very limited. And when that little tiny inroad that they thought, let's test the waters, it gets upheld. And then as soon as it gets upheld, states around the country are like, let's do this. Let's start detaining people after arrest because we're going to claim they're dangerous.

And we get to 1984 and Congress decides, we're going to go all in on that model and pass a federal law that presumes you're dangerous. You don't have to make a showing if you're just charged with a drug crime that has a sentence of 10 years or more, which is 93% of all federal drug offenses. So right now in America 75% of all federal defendants are detained. What became an exception that was only supposed to be for trial, like, you know, fleeing the trial, became a norm that became settled.

And so 50 years later, when you talk about pretrial detention, people look at me like I came from another planet when I say, this is actually not part of our constitutional origin. You can't do this. And, you know, you can now see the next chapter being written today. Because you can absolutely see what this administration is thinking about when it comes to detaining people and how they want to detain more people. And it's, you know, you, you make something that once seemed anomalous and wrong, you start to create, well, you know, is it? You know, and then once it gets its toehold, it becomes so normalized that if you're the person that tries to argue this was never right from the beginning, you really have a big hill to climb.

So I think that's the best example. But honestly, there's more.

Matt: And alas, we have now the largest jail and prison population in the world.

Rachel: Yes.

Matt: So Casey, let's take a hard pivot. In *Foreign Agents*, you take readers on this historical retrospective into the origins of foreign lobbying and up to the 2016 election. And there is a, uh, we were joking about it in the green room, there is this afterward that you've now had to sort of supplement your book with in the aftermath of one of the largest foreign lobbying scandals in the history of our country. But you bring us up to the tipping point at the 2016 presidential election,

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should foreign interference with the 2016 election be the proverbial tipping point for reforms to FARA in your estimation? And if so, why, and how do we get there against what seems like, as you've described, a regulatory and enforcement environment that is even perhaps more lax than it was in 2016?

Casey: Well, I certainly would've hoped it would've been a tipping point. And for a considerable amount of time, I thought it was, frankly, up until just a few months ago. You know, and again, you know, the Foreign Agents Registration Act, it goes back to 1938 when one of the gentlemen you mentioned earlier, Matt, this guy Ivy Lee, who was known for many things. He was known as the creator of the public relations industry in the late 19th, early 20th century. He invented the press release. He invented the crisis management playbook. He was extremely successful. He worked with the Rockefellers. He worked with Woodrow Wilson. He worked with Charles Schwab. He became very much a celebrity unto himself.

And then in the 1920s realized he could make significantly more money abroad than from Americans. And it just so happened all these new regimes were popping up, around Europe, especially looking for help in Washington. Regimes in Rome under Benito Mussolini. Regimes in Moscow, under the Soviets. And especially regimes in Berlin under the Nazis. And they all went to Ivy Lee and said, can you help us lobby? Can you help us open doors in Washington and push, pro-Nazi, pro-Soviet policy? The ideological differences could not have been starker. I think it highlights that for many of these guys-- and they're all, all too often guys-- it's not necessarily the ideology, it's about the money.

And Congress eventually realized what happened, uh, held a series of hearings and passed the Foreign Agents Registration Act in 1938, bringing transparency to this sector. But as I was talking about earlier, it effectively became a backwater. People forgot about it. They didn't appreciate-- in the post-World War II environment-- just what a threat these networks could present. And so staff was cut. Investigations never happened. Funding was slashed across the board. And that was the case through the sixties, the seventies, the eighties and the nineties. Which I, I have to tell you, I do look at you as a little bit of an alien right now talking about the kind of normalism --I never thought about pretrial detention being anything anomalous, anything other than the norm as it's been since 1776 or 1787, or pick your, pick your date. And yet, it got me thinking about this process of normalization, because in the late 1990s and the early 2000s, there was a gentleman, long-time senator from the great state of Kansas, one-time Republican nominee for president named Bob Dole, who a lot of folks remember and think of as this kind of --

Matt: America's grandpa?

Casey: As America's grandpa. For folks who are a little younger, I only knew him from the Viagra commercials, but that's a separate story. But also this kind of, the symbol of an era of bipartisan politics. And Rachel, you mentioned normalization. You know, through the 70s, the 80s and much of the 90s, you know, Ronald Reagan, Bill Clinton-- although that's a separate story-- uh, George H.W. Bush, they did not leave office or leave a presidential campaign or a longtime tenure in Washington and begin working directly on behalf of foreign regimes. But that's what Bob Dole did. Bob Dole didn't retire to Kansas and start writing his memoirs. He signed up governments in American allies--

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in Kosovo and Taiwan-- but also in autocratic regimes around the world. Democratic Republic of Congo. He even became the mouthpiece for, some of you may know him, Oleg Deripaska. Anyone familiar with that name? One of the most notorious Russian oligarchs, Putin's right-hand man, et cetera, et cetera. For months, for years, Bob Dole was his mouthpiece in Washington.

A lot of folks looked at that and said, if someone like Bob Dole can normalize this process, if he can do this, why can't I? Why can't we? And you see this kind of cycle begin to build and build and build. And again, if someone like Dole can do it, why can't Democrats, why can't Republicans. Absolutely a bipartisan issue. And it builds and builds and builds from there until it crescendos into 2016. And if I remember correctly, Paul Manafort was the convention manager for Bob Dole in 1996. So it can be a very small world at times.

Matt: So we've set the stage. How do we fix the problem? Rachel, I'm going to go to you. You've isolated these issues with our constitutional jurisprudence in your book. And it's a great, now is a better time than any to, to point out to you, all of our audience today the firm has purchased copies of both *Justice Abandoned* by Rachel Elise Barkow and *Foreign Agents: How American Lobbyists and Lawmakers Threaten Democracy Around the World. They're* in the bags on your table. And, Casey and Rachel graciously agreed to sign copies for you in the lobby as we have a cocktail or two in the social portion of the program that's coming up next.

But, turning then to the solution, right? I mentioned Dean Chemerinsky's solution, drastic, and, I think you've laid down a marker that you disagree with it. So how do we do it? What's the less drastic way of taking 50 years of constitutional jurisprudence, maybe 75 years, if you keep going past the period that you cover in your book.

How, how do we fix it when we have a principal source of our criminal law in this country that is inherently flawed and has drastically abandoned the constitutional norms, no matter which way you read that text?

Rachel: Yeah. So I wish I had the master --

Matt: Crystal ball--

Rachel: Yes--

Matt: --professor.

Rachel: But I will say this, I mean, I think what is interesting to me is that there has been a movement on the right, on the conservative side of the political spectrum, that has been going on for decades, against, for example, independent agencies where the people appointed to those agencies have for-cause removal protections. And people on the right have been railing against that. You know, particularly, like Nixon administration types who have never really liked the limits on presidential authority and power. And many of those people became thought leaders in the Federalist Society and in, you know, conservative elite legal circles, and have, you know, written and educated upcoming lawyers and law students about how this was wrong from the beginning, it's still wrong

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today. And I think it's about to have its moment where the Supreme Court is going to agree and it's going to overturn 90-year-old Supreme Court precedent.

And so what I take from that blueprint is that you sometimes have to play a long game if you have a goal of pointing out where a constitutional area of law has gone wrong. And you know, step one of the long game is first you have to convince people that these cases were wrongly decided. So, you know, I viewed the book as step one, like, I want to convince you, I want to show you that these actually at the time they were decided were wrong. They were wrong based on the precedent that existed. They were wrong as a matter of original meaning. And the reason they were decided the way they were was just pragmatic concerns, that the government said they were necessary for public safety.

So if you can say step one, they're not right, you know, under principles of stare decisis, you could get a Supreme Court to overrule them. Step two is the doozy though, because you need justices who are willing to take that step. And I think they're only willing to take that step if they think the sky won't fall if they do it.

Now we have justices who, I think, think it's fine to get rid of all independent agencies in America and let the president fire anybody that he wants to. Maybe not the Fed, we'll see. But they don't seem worried about that. And so step two has to be to convince people that if you did overturn these cases, we won't turn into some version of the Purge, where there's so much violent crime that, you know, people are unsafe.

I think that's fully backed by empirical evidence. And if we could get justices to see that and not be scared by their own reading of the news, I think it's possible. So my vision would be changing who's on the bench, maybe even convincing current people who are already on there to overturn or limit cases. But really it's about public education. It's really educating the public about things, that they're afraid of the wrong things when it comes to how you address violent crime. Like of course, everyone wants to be safe, but the things we do to address that aren't really making us safer. There's so many things we could do better, and a lot of the things we do do make things worse.

You know, the people who come out of prisons, they are not doing better when they come out, for the most part. We've made a lot of people worse off. And so part of it is just getting people to see this problem. Both, there's the legal arguments, but then there's the pragmatic policy ones where they don't have to be afraid to overrule it.

So in my dream world, you know, it would be getting the current justices to see that. There's originalists on there. They're willing to overturn stuff. And in the ultimate fantasy part of this, it is a way for them to be able to say, I'm not a hypocrite. I don't just overturn conservative cases. Look, I'm willing to overturn, or excuse, overturn cases for a conservative, and look, I'm willing to overturn a case, that produces a more liberal outcome

Matt: In a true Scalia-type fashion.

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Rachel: So he used to like to talk about his vote in the flag burning case-- also back in the news, I don't know if you have seen this, but you know, the president's very big now on wanting to criminalize burning the flag. And there is a Supreme Court case that says you can't do that, that's protected First Amendment activity. And Justice Scalia wrote that opinion. And he used to like to tell the story on the speaking circuit, you know, do you know how hard it was for me to go home to Mrs. Scalia after writing that decision? You know, she'd look at me and she'd say the flag, Nino. And he liked it because what it showed was he has a methodology, he sticks to the methodology even when it produces a result he doesn't like. And he did not like letting people burn the flag.

And what I think is interesting about this current court, I don't think they have any cases they can trot out and say, gosh, I, you know, I voted this way, but boy, I hated it. And that's bad for them. That's why their polling numbers are bad. That's why their legitimacy is so bad. Everything seems results-oriented. So I guess in my grand strategy, it's to put this out there to say, if you really mean it about overruling cases that were wrong from the day they were decided because they conflict with originalist meaning, here are those cases. And get to work overturning them because we'd all be better off.

Matt: I'm going to put you on the spot, okay? And we're going to stick with this fixing the constitutional jurisprudence. We have a Supreme Court that has at least demonstrated some penchant to overturn existing precedent. *Roe*: overturned. Of the six cases that you present in the book as having weakened our criminal justice system and contributed to mass incarceration in our country, which of them do you think that this court-- as presently constituted-- would be most likely to overturn in the same manner that it reversed on *Roe*?

Rachel: Yeah, so I think it would be *Salerno,* pretrial detention. The original history is plain as day, and it was a terrible decision-- written, I should have told you, by William Rehnquist. So after he wrote that law, by the time it gets to the Supreme Court, he writes the decision, lo and behold, upholding his work. And then the second one would be *Terry v. Ohio*. It is nowhere that if you read the justices' papers when they decided that case you do not want to see how that sausage was made, but it is quite clear, that they pulled that one out of thin air. And if the current court looked at that case and looked at the history and the text, there's no way they could uphold it. They could only uphold it because they want to respect it as a matter of stare decisis. And I don't believe it deserves that respect.

Matt: Alright, so Casey, we're going to fix the statutory source of law using this FARA example. And if we're being intellectually honest, statutory law is far easier to fix than our constitutional jurisprudence. Yet it would be a cop-out for you to just sit up here and say, FARA has to go. It's toothless. Let's make it stronger. What's it going to take to change these failures that you identify so powerfully in your work for *Foreign Agents*?

Casey: Well, look, first things first, of course, get Rachel up on the Supreme Court so she can decide some of these cases. And second of all, statutorily, I actually like FARA.

I think it is a deceptively, almost elegantly, simple piece of legislation and regulation. Of course, again, it does not ban any of these practices. If you are an American, you can lobby on behalf of

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whichever regime you would like to do it. You can get paid however much you want. You can go advocate for Russia, China, North Korea, Venezuela, you name it, or of course any of their oligarchic or corporate proxies.

The problem is enforcement. Again, I've said this a couple times already, for decades, up through 2016, it was not enforced. Those of the Justice Department were not funded. They were not provided. I was, you know, again, glancing through the book earlier, and one of the data points that came out is that originally they didn't even have enough resources to file the cases alphabetically, which is, uh, look, it takes a long time to do that if you're doing it manually, I understand. But it is a testament to just how atrophied that entire department was.

It is a great building block for what needs to come. There need to be updates to the digital database. There need to be ends to the exemptions for the academics, the journalists and the legal teams that are representing these clients of theirs, not in the court of law, or not as actual academics or as journalists, but are acting as effective lobbyists. It needs to be expanded to things like think tanks and consultancies and other PR shops. It needs to increase its scope, either within FARA itself or something else that can be applied to nonprofits and other foundations that are accepting money hand-over-fist. Tens, if not hundreds of millions of dollars from foreign regimes out of Saudi, out of the Emirates, so on and so forth, that are certainly not doing any good with that, but are acting as effective mouthpieces and foot soldiers for these regimes.

There are any number of specific elements that you could grow FARA out with, or you could create some kind of parallel legislation and regulations surrounding. But at the end of the day, it has to be transparency. Because you are going to butt up against all number of constitutional issues if you are trying to ban these networks outright. Again, the First Amendment, the right to petition the government for redress of grievances. Not that there aren't ways to go about that. Not that there aren't cooling off periods for former officials. Not that there aren't ways to ban family members of those officials themselves, but it is transparency, public education, allowing Americans the tools to track and trace these networks, that, as far as I can tell from where I can sit, is going to be the most effective means of shining a light on all of these networks and finally raising enough of a public ruckus to lean on prosecutors and officials to go after those that are not complying with the law.

Matt: Well, if the problem is enforcement --and we've spent the better part of today talking about shifting enforcement paradigms, whether it be the administration's pivot away from some white-collar concepts into other areas-- how do you do that swimming up tide against political forces that aren't going anywhere?

Casey: Again, it's a great question. The only solace that I take-- and this is going to be detailed in the next book I have coming out next year-- is that there have been a number of, there are two that I identify, periods of American history that are in any way comparable or commensurate to the amount of gross and rank corruption and corrosion of American public services and American public service that we are currently seeing take place in and around Washington. And again, it's not limited to the administration, but it's certainly been highlighted by the current administration. And that is the tail end of the Gilded Age in the late 1890s and early 1900s, which ushered in the initial

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progressive era, the reformist leadership of Teddy Roosevelt, and eventually the creation of things like the FDA, the elimination of corporate finance in American politics and so on and so forth.

And the other era is the tail end of the Watergate and the initial post-Watergate era. Which yes, of course it's about a burglary at the Watergate Hotel. Yes, of course it's about gross political abuse. But it is also-- and this has been kind of forgotten of the story of Watergate-- a gross corruption-related issue of American corporate financiers, sending suitcases full of cash to the Nixon administration, in some cases bundling it into envelopes and giving it directly to the sitting vice president.

It is the revelation that American corporations are going around the world and highlighting the bribes that they are giving to autocrats and strong-men and dictatorships around the globe. Things that birth the Federal Elections Commission, things that birth the Foreign Corrupt Practices Act. Those eras at the tail end of the Gilded Age, at the tail end of the Watergate era, appeared as far as I could tell, just as concerning, just as damning and just as similar to the feeling of swimming upstream as we see right now. Those eras ended in a burst of reform.

I have no doubt-- maybe have a little doubt --that the current era will also end in a burst of reform. And it is incumbent upon us, all of us in this room and myself included, to begin sketching out and formulating thoughts for what that reform could actually look like, because there will be an opening. Because these corruption scandals all have a limit.

Matt: I hate to be too stark, but can we continue to operate as a free society with the barrage of foreign influence that you chronicle in your work with this sort of seemingly incessant campaign of foreign regimes trying to influence U.S. policy?

Casey: I certainly hope so. I would like to, for my sake, for my little two-year-old daughter's sake, so we don't have to move to Canada, wherever it may be. You know, it's, I'm deeply grateful to be here today to be speaking in front of a room full of lawyers. That's why I don't just have to not explain so many of these terms, but because the thing that has concerned me most over the past five, six, seven months, it's not just the decline in enforcement surrounding FARA, the gutting of the Foreign Corrupt Practices Act, the dissolution of the Corporate Transparency Act. It was the Eric Adams case, which has concerned me most of all. And I don't say that just as a New Yorker, who's going to catch a train back there later today, uh, or just as an American, but because the root of the case was Eric Adams allegedly going to sources in Turkey to try to pony up funds for his reelection campaign.

Not New Yorkers, not other Americans. This is the reddest of red lines in American politics. This is what Eric Adams, as the prosecutor so ably laid out, did. And as Eric Adams said, everything is about the money. Everything else is fluff. And if Eric Adams is allowed to get away with this-- which it seems like he's able to do-- I have extreme doubts about the sanctity and security of American elections moving forward as it pertains to them being funded, to being supported and to being organized by American forces alone. That is an extremely dour note. I'm very sorry to bring the move down right before happy hour.

Matt: I told you he was going to do that.

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Casey: But again, I bring things back to where we were in the 1900s and where we were in the 1970s, and that's what gives me hope at the end of the day. The faith, the trust in the American public and the faith that a moment of reform is coming.

Matt: Well, I do want to leave some time for some questions from our studio audience, but I want to take a couple more minutes to do a bit of a role reversal now, all right? Rachel, the question is to you, and I want you to opine on your best solution for the problems that Casey chronicles.

Rachel: Wow. I guess, um, ah. Can I say what worries me most of all is that-- and why I am less optimistic about those other periods leading to widespread reform-- is I worry that right now with social media and a distrust of the press, that it's hard to get the public educated on what the truth actually is.

And in those prior eras, I think, there was a little bit more of kind of commonly accepted sources of basic facts and information that were shared, at least among a big proportion of the people. And I guess what I worry about today is that we don't have that. And so if you have someone like Eric Adams saying, oh, it's all a pack of lies, and you know the Trump family, it's all lies, so don't believe what is actually right in front of you. It's all lies. It's all lies.

Matt: Fake news.

Rachel: If everything is fake news, I guess what worries me most of all is just that you don't have the rallying cry to fix things if we can't all agree that there was a problem in the first place. And so, I guess when I think of solutions to things like that, for me, part of it is figuring out how you get past the social media bubbles that people are in so that there is a common baseline of empirical information that we could all agree on. And so I guess my solution would also involve finding a way to break through that. And I don't know if that's how we think about educating our kids or how we figure out how to make social media less of a pernicious force in our life. But I, I feel like that has to be part of the solution, because I don't think you get the reforms or the enforcement unless you get people to care. And I don't think you get people to care unless you can break their bubbles.

Matt: Casey?

Casey: Look, I mean, look--

Matt: You're not off the hook.

Casey: No, no, no, of course not. You're exactly right, Rachel. Of course, if you don't want to be the Supreme Court, I will vote for you for presidency. Because that is still, at the end of the day, the biggest bully pulpit here in the country.

I mean, look, what can I say? You're exactly right. The fractured, scattered media landscape in the United States of America has opened up an absolute sewer of rots and malign influence, both domestic and foreign. I mean, the only thing I can think is that the 1960s and the early 1970s were an era of even more assassination and even more regular bombing. And arguably just as much, if not

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more polarization than we see now. Although your point on the media consumption absolutely stands.

To Rachel's solutions, I won't pretend--

Matt: How do you fix the constitutional issues that Rachel outlined?

Casey: Well, given that I didn't know pretrial detention wasn't as old as the American Republic until about 10 minutes ago, I'm not going to pretend I have many solutions. Although I will say this does, yes, of course, in a perfect world, the originalist arguments would stand among those justices that profess to believe in them and use them as their guiding lights. But unfortunately, of course, the current justices-- or at least some of them-- and what we have learned about their behavior and their patterns of behavior in recent years intersects with my broader world of corruption-- not on the foreign front, thankfully, but certainly on the domestic front. And I think of course, Justice Thomas and the revelations of his private jet escapades, I don't remember all the details. Yachts, maybe there was a hunting party involved, among a number of high-powered individuals that seemed shall we say pertinent to some of his caseload at the time that maybe he could have recused himself from or not decided to go on that specific yacht party or whatever it is he's accused of doing.

Matt: Yeah. Well, for the sake of the republic, I hope that both of your respective solutions are, implemented in some way, shape or form.

We're going to take some questions from the audience. You have copies of *Foreign Agents* and *Justice Abandoned* in front of you. They are organized in a great manner. Our two guests today have, these are great books. They're not their only works, but these are fabulous reads, and I encourage all of you to please take them home and read them.

Uh, what questions do we have from the audience for our two fantastic guests here today?

Don't all jump up at once.

Let's get the microphone, because we are live on the podcast.

Audience Member 1: I was curious, Professor, if Justice Scalia was still alive, how do you think he would feel about where the court is at the moment?

Rachel: Oh, I do ask myself that question. And I like to think that he would stand up to egregious abuses of power, but I also think he would be right with the current conservative majority overturning *Roe* and probably overturning the prior case law that allowed there to be independent agencies.

I think those are so central to the conservative Federalist Society platform that he would be part of the coalition that would do that. You know, the case that I wonder about, is *Trump v. United States*, and I'd like to think he would've at least written separately in some way, to call out things in that opinion.

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So, but, but who knows? You know, it's, it's really hard to say. I do think though, he would be with the other justices who are overturning well-settled precedent.

Matt: What other questions do we have while we have a couple more minutes remaining with these fabulous guests? We're talking with Rachel Barkow from NYU School of Law, and Casey Michel, the Director of the Human Rights Foundation's Combating Kleptocracy Program.

Audience Member 2: Yeah, so, obviously a lot of originalists and a lot of talk about the originalists think and want to do. I'm curious, uh, as a professor of law and with all the experience you've had, and after looking at the situation of mass incarceration in particular-- which to me, you cannot, uh, separate race from-- like, where do you stand on originalism? Because clearly the concept that we have a country where we follow around what a bunch of guys who wouldn't let women or Black people in a room with them decided we should 200 years later is kind of, an anachronistic, anachronistic.

Rachel: Yeah. No, I, I mean, so what I tried to do in the book and is basically make the argument based on a host of constitutional methodologies, so I hope that people who read it who are not originalists will also be persuaded that these cases were wrongly decided.

But I think just as someone who has litigation strategy or outlook in America today, it'd be foolhardy not to address the leading interpretive methodology that the, a large group of the justices at least claim that they adhere to. And I agree, they are not always faithful adherence to it. And one of the things that's kind of interesting if you do criminal law is it happens to be one of the few spaces from originalist methodology that is liberty protective and does actually protect individual rights, poor people and particularly in America, poor people of color, given how those laws operate.

And it would be an example of being able to use originalism actually to benefit a group of people that all too often isn't. Now on net would that mean that originalism would be, you know, good for particular classes of people? I don't make that claim, but I do think that it's a shame to leave a methodology off the table when it is being used, particularly when this is the one space where if you were to kind of go back in time and ask the framers what they were most concerned with, it was about government abuse and criminal matters. And it's all over the Bill of Rights, it's all over the Constitution, like the tyranny of English rulers against subjects to punish them was a grave concern, and that's why we have so many protections. But we just have not had a court willing to enforce them. So that's why I emphasize it. But I do agree with you that, you know, it's a problematic methodology if you're going to stick to it in, in narrow ways and across the board.

I will say though, that the other thing that I think is important is its originalism at the time that a constitutional amendment is written. And so the other odd thing about the current originalists on the court is they tend to really only like that 1787 and earlier, and they're, they're not as big a fan of the Reconstruction amendments and the background behind those. But if you're a true originalist, you also pay attention to what was being done with the, post-Civil War amendments. And one of the cases that I talk about in the book is *McCleskey v. Kemp* and how you prove racial discrimination. And I think the court got it wrong in *McCleskey* precisely because it wasn't really fully giving meaning to the 14th Amendment.

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Matt: We have time for one more question for our superb guests. So who is it going to be?

Audience Member 3: Um, also for the professor. So you say 1968 is a turning point for pretrial detention and before that it was only a matter of civil commitment. The 60s were also a turning point for civil commitment. Before the 60s it was quite common to civilly commit someone forever. So how does that factor into the change we saw in the 60s? And then also if we're looking to the court to say like, the sky's not going to fall down if we get rid of criminal pretrial detention, do we need to bring back really robust civil?

Rachel: Yeah, no, it's a really good point you raise. You know, so I don't think any of these would be a cure-all. And I think there are pressures for dealing with people who present dangers are great and people find a way to address it. And, and there is, a lot of people have pointed out the connection between, so we had a lot of, institutionalization of people with mental illnesses in America. If you have like, in your states, you can see a lot of those old big state hospitals. They're kind of dilapidated now, and you see them in upstate New York. And there was a big movement to deinstitutionalize them also in the late 1960s. And in fact, that movement, there were supposed to be community mental health care centers to replace them that never really came about. And in fact, what instead happens is you get a whole lot of people with a lot of very serious mental illnesses that are unhoused, no place to go, no families to support them. You know, you can't prove with an empirical study the causal link, but it's absolutely true that as the population of state mental health hospitals went down, the incarceration population went up. And a lot of the people looked very similar, that we just dealt with a problem in a different way.

So I think you're right to ask a question about whether or not we would see that. The reason I still think it would be better, though, to properly keep the structure that the Constitution envisioned, is that it is so much harder to get somebody civilly committed, to detain them. The burden of proof is different, you know, for pretrial detention you can do it on a preponderance under these laws and it's clear and convincing evidence in a commitment proceeding. And you'd need medical testimony and evaluation. And right now, for example, in the federal system, you just need a prosecutor charging you with a drug crime. So I think that, would there be pressure to civilly commit more people? Yes. But by the way, we have that now anyway, even with the pretrial detention. Those of us in New York know it well because our mayor has been pushing to have broader civil detention capacities too, to address people on our sidewalks and our streets.

So I think you're right to ask it. I, I still think we would be better off keeping the protections we have and then addressing that problem when and if it comes. But it's an issue.

Matt: We've been talking with Professor Rachel Barkow from the NYU School of Law, and Casey Michel from the Human Rights Foundation.

That's all the time we have on this special live edition of "The Presumption of Innocence Podcast." Till next time, we'll see you.

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