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How Technology is Making Corporate Lawyers More Powerful

Parts one and two of a two-part Q&A with Jeffrey Rosen

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Jeffrey Rosen

A few years ago, *The New York Times Magazine* asked constitutional scholar and legal commentator Jeffrey Rosen to imagine the future of technology and law. His subsequent reporting produced a sense of how inadequate the U.S. Constitution is to deal with some of the challenges posed by technological advances in fields like genetic selection and surveillance. It also revealed the profound role of corporate legal departments—sometimes ahead of courts and judges—in making determinations about privacy and free speech.

Those ideas are at the fore of *Constitution 3.0: Freedom and Technological Change*, a new compilation of essays edited by Rosen and Benjamin Wittes and published by The Brookings Institution. Rosen, a law professor at George Washington University and legal affairs editor at *The New Republic*, spoke with CorpCounsel.com about the book, legal battles to come, and how in-house counsel can have more power than the Supreme Court.

Below is part one of an edited version of that conversation (see part two here).

CorpCounsel: Given how much you had written on this topic, what surprised you about the essays in the book?

Jeffrey Rosen: I was very struck when I read the finished collection, both by the creativity of the thinkers, and also by how much people disagreed about the appropriate regulatory, legal, and technological responses. Some people put a lot of emphasis on judicial doctrine as the best way to protect liberty. Others emphasized administrative regulations and statutes. Still others were more interested in technological changes.

CC: Where do corporate lawyers fit into this equation?

JR: I became very interested in the role of corporate lawyers in protecting liberty when I was sent by the *Times Magazine* to interview Nicole Wong, who was then the deputy general counsel at Google. I wrote a piece called 'Google's Gatekeepers,' which argued that Nicole Wong and her

colleagues in the deputy general counsel's office had more power over the future of free speech and privacy than any king or president or Supreme Court justice, and I expanded on this theme in a chapter for the *Constitution 3.0* book.

Nicole Wong resigned recently, but Google entrusted her with the ultimate power over content decisions on YouTube and the more than 100 country-specific search sites Google operates. That's why her colleagues—Kent Walker, the general counsel told me—jokingly referred to her as 'The Decider.' She was the ultimate authority to decide what stayed up or came down.

It's just a dizzying range of problems she confronted. One example is the Greek football fans who posted YouTube videos saying that Kemal Atatürk, the founder of modern Turkey, was gay, which they like to do to rile up their rivals. This is illegal in Turkey, and Nicole Wong is woken up in the middle of the night and has to make a decision about whether the videos are clearly illegal under Turkish law, in which case they come down, or whether they might be plausibly protected as political speech, in which case she'll keep them up. She ended up taking down some videos, but only in Turkey, which wasn't enough to satisfy Turkish prosecutors. A judge then ordered Google blocked entirely in Turkey for a long time.

These are the kinds of decisions that we used to imagine governments making, and now that companies like Google and Facebook and Microsoft really determine the scope of free speech and privacy and many other values on the web, whether we like it or not, lawyers and corporate law departments are going to have to become interested in these issues.

CC: Did Wong give you an indication of any changes she made in the law department in order to accommodate those types of decisions?

JR: She had to set up a chain of command. So the first responders in making YouTube content decisions aren't Nicole Wong, they're a group of 22-year-olds in flip-flops and T-shirts at the YouTube headquarters near the San Francisco airport.

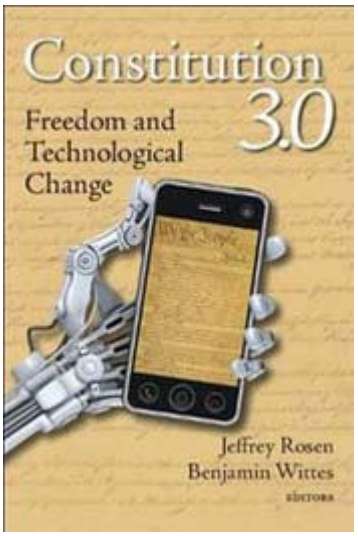
There are also first responders in Dublin, and around Europe. They make the initial decisions based on flags that are placed by YouTube users, suggesting that content isn't appropriate. Then if a decision seems hard, it gets filtered up the pipeline and eventually will reach Nicole Wong. It's a really tough decision.

CC: Have you found that these questions are more pressing abroad than in the U.S.?

JR: I think the problems are pressing both abroad and in the U.S. Abroad, of course, the consequences of making a hasty decision can be much more unfortunate. Yahoo got into trouble a few years ago when it turned over the email of a Chinese dissident who was later persecuted. But Google and Facebook and other tech companies are confronting tough choices in the U.S. all the time, too.

Recently, Sen. Joseph Lieberman, who has appointed himself as the kind of free speech prosecutor of the Senate, has put pressure on Twitter to take down pro-Taliban feeds. And Twitter refused, saying that the feeds didn't lead to criminal incitement of violence and were

essentially news feeds for the Taliban.



Basically, Twitter—and to a lesser degree, Google—have embraced the U.S. free speech standard, which is the most protective in the world. It says that speech has to be protected unless it poses an imminent threat of serious, lawless action. That's a much more rigorous standard than even Europe has adopted.

And I can also think of a whole lot of areas where we're about to see a dramatic clash between U.S. and European laws when it comes to privacy and reputation and defamation. And that's going to make the job of corporate counsel even more challenging.
CorpCounsel.com recently spoke with constitutional law scholar, writer, and legal commentator Jeffrey Rosen about his new book, *Constitution 3.0: Freedom and Technological Change*, and the role of corporate legal departments in making significant judgment calls on issues of privacy and free speech. In part one, he discussed how Google and other tech companies have led the charge on deciding free speech standards. Today, the conversation continues with what Rosen sees as a looming, "dramatic clash between U.S. and European laws when it comes to privacy and reputation and defamation."

Below is part two of an edited version of that interview.

CorpCounsel: Where do you see those battle lines being drawn between U.S. and European law?

Jeffrey Rosen: I think we're about to see a titanic battle over something that the Europeans are calling 'the right to oblivion.' It's proposed by the French, and it's very French. It seems straight out of Sartre. The idea is that if you post pictures of yourself on Facebook or MySpace, and later come to regret it because you've been fired or are embarrassed, you should be able to take the pictures down, and the Internet service provider should be forced to comply.

From the Americans' perspective, this right to oblivion really is hard to reconcile with our free speech values. We generally don't believe that you have the right to selectively delete your past, or to remove legal—but embarrassing—content. Europeans have a very different notion. They have strong legal enforcement for dignitary rights and the idea that you have a right to your image, or the integrity of your personality.

I think the enforcement is going to be very challenging. When I asked the French data commissioner how he meant to enforce it, he suggested the creation of something like an 'International Commission of Forgetfulness,' which would decide on a case-by-case basis what stays up and what goes down. And I can imagine lots of counter-suits in the U.S. over that. When you have a really basic clash of values, between Europe and America, and when many of the companies are based in America, I think that this is going to keep corporate counsel very, very busy indeed.

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CC: Did you come across any ideas for what might remedy these situations?

JR: The solutions I've been most impressed with are technological. When we think about the right to oblivion, I think a better alternative is the model of having expiration dates for data. Facebook could, if it chose, allow us to specify more easily how long we want pictures or posts to last—a day, or a month, or forever. If that kind of option were available more broadly, then there'd be less need for removing stuff after the fact.

CC: It sounds so beautifully simple. Are any companies that you know of doing that right now, voluntarily?

JR: Yes, one of the first was a company with the wonderful name TigerText. It promised disappearing text messages and it was named, the founder said, before the Tiger Woods text messaging scandal. They allowed on a small, small scale the ability to say whether you wanted the text message to last for a day, or an hour, or forever. More recently, there's a German company called X-Pire, which is experimenting with this, and there are researchers that are perfecting the idea of 'rusting' encryption keys, which is the technology that makes it possible to read material for a certain amount of time and not after.

So I'm hopeful that the technology will soon be available to really make this scaleable, as they say, and available for prime time. Then it'll just be another challenge for the corporate counsel of Facebook and Google and other companies about whether they want to make this part of their default settings, or make it easy to download apps that can allow disappearing data. Or whether their business models instead depend on most data staying up for longer, rather than shorter, times because of the desire to sell ad space on it. In which case, they might make a decision that would serve their business models, but would not serve the cause of privacy and liberty.

CC: In the meantime, how should in-house counsel be thinking about their responsibilities as they confront these challenges?

JR: I think it's helpful for corporate counsel—especially those working at companies that have great control over speech and privacy—to realize that they have a responsibility not merely to serve the bottom line, economically, but also to think about the effect of their actions on basic constitutional values.

It's also helpful not to be unrealistic about the need to be guided by fiduciary responsibilities. If companies like Google and Facebook and the many other technology companies that work with them are not sensitive to these values, they may find that there's an economic backlash. Google's good brand, for example, depends on being perceived as a company that cares about these values. So these are not the kind of questions that are the exclusive concern of constitutional law professors or civics classes. They're now questions that really should be at the center of corporate counsel thinking.