



Should the Supreme Court Be Reformed?

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[00:00:00] Jeffrey Rosen: Hello friends in honor of the 234th anniversary of the ratification of the U.S. Constitution. The National Constitution Center is launching a crowdfunding campaign. Thanks to our friends at the John Templeton Foundation every dollar you give to support, We the People, will be doubled with a generous one to one match up to a total of \$234,000. We're right now we have 91 donations from 24 States for a total of \$14,407.90. Let's keep the donations coming and be wonderful to have support from all 50 States. We don't yet have any donations from Alabama, Alaska, or Arkansas. So if you're a listener in one of those States, it would be so wonderful, if you would consider donating \$5, \$10 or more. It's a great opportunity to show your supportive constitutional education, please go to constitutioncenter.org/wethepeople. That's all one word, all lower case. Now, onto today's show.

[00:01:01] 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, non-profit chartered by Congress to increase awareness and understanding of the constitution among the American people. Last spring, president Biden issued an executive order to form the presidential commission on the Supreme Court of the United States, a bipartisan commission charged with examining proposals for Supreme Court reform. The commission submitted its report to the president just last week. Joining us to unpack that report and discuss proposals for reforming, the Supreme Court are two of the distinguished legal scholars who served on the commission. Tara Leigh Grove is the Charles E. Tweedy Jr. endowed chairholder of law and the director of the program in constitutional studies at the University of Alabama School of Law. Tara, thank you so much for joining.

[00:01:59] Tara Leigh Grove: Thank you.

[00:01:59] Jeffrey Rosen: And Keith Whittington is the William Nelson Cromwell Professor of Politics at Princeton. He is the author of Political Foundations of Judicial Supremacy, the presidency, the Supreme Court, and constitutional leadership in the U.S. Keith, it's wonderful to have you back on the show.

[00:02:16] Keith Whittington: Thanks for having me.

[00:02:17] Jeffrey Rosen: Let's jump right into chapter two of the report, which examines proposals to expand or otherwise alter the current structure of the court. Tara, tell us about the arguments expressed by supporters and opponents of expanding the court and what your view is.

[00:02:39] Tara Leigh Grove: Right. So the, the chapter two goes through and, and discusses both legality first of court expansion and dis, and says, you know, Congress has changed the size of the Supreme Court many times from 1789, um, until really the late 19th century. And so the report concludes that Congress has the power to expand the court, and then the question becomes a matter of policy. So the arguments in favor of court expansion say, this is a unique political moment in American history. After Senate Republicans blocked Merrick Garland, Neil Gorsuch was put on the U.S. Supreme Court. Some people view that as a stolen seat, they're also concerned surrounding the confirmations of Justice's Kavanaugh and justice Barrett for, for many people in our society. And they say that such actions require a response, and a response would be to put more justices on the Supreme Court under this view to balance the Supreme Court.

[00:03:38] There's also to some concern about the future direction of the Supreme Court's jurisprudence that is expressed by proponents of court expansion. Opponents of court expansion that you call it court packing, say this would be detrimental to our constitutional order. It would subvert judicial independence, harm judicial legitimacy, and also give the politic branches of power over the federal judiciary that could be deeply dangerous in our society. One does not have to believe that if court packing happened right now, it would be deeply dangerous to assume that in the long term, giving the political branches, this kind of power could be deeply dangerous. And so we have two sides, one arguing for what they it's balanced and the other arguing for longer term constitutional concerns.

[00:04:26] Jeffrey Rosen: Thank you for that judicious summary of the positions. Keith, you expressed your views on this position in The Wall Street Journal, you wrote in a piece called, court packing is discreditable as ever that it still a bad idea and should be pushed back to the margins of political life. Other commissioners have expressed different views, Laurence Tribe, and Nancy Gertner wrote after the report came out in the Washington post that, "We started out leaning toward term limits for justices, but against court expansion and ended up doubtful about term limits, but in favor of expanding the size of the court." Give us a sense of the debate within the commission, uh, that led people to change their minds. And, and then, and then why you believe that court packing is a bad idea.

[00:05:10] Keith Whittington: Well, I think you're seeing in public now, some of the, uh, disagreements that existed on the commission itself, as we, uh, grappled with these ideas, there are those who are on the commission who thought that court packing would be justified undercurrent circumstances. Um, Laurence Tribe, and Nancy Gertner were certainly, uh, among those and have ably staked out their position in public at this point as to why they think, um, at the end of the day, that's the right judgment to make. Part of our charge as a commission was not necessarily to make recommendations to the president, but to try to lay out, uh, what the different considerations were.

[00:05:44] So the president is well informed about, um, the range of reform options and the perceived pros and cons, um, of those reform options that made it a little easier to come to some agreement, um, across the commissioners as to how to structure the report, 'cause, 'cause we weren't asked at the end of the day to take a vote for example, as to whether or not we thought,

um, expanding the court would necessarily, uh, be a good idea, but instead our charge was primarily to try to explain to the president what the arguments for, uh, pro and con actually were.

[00:06:14] Personally, I certainly come down on the con side of that debate. I think it would be, uh, far better not to, uh, go down this road of trying to expand the size of the court. Uh, I do think that this is very much going to be affected by one's judgment about what the current situation is with the court, both how troubling were the force of the Senate confirmation of nominees, um, over the last few years, but also, um, how does one assess the court's uh, jurisprudence and how, uh, troubling you might think it is.

[00:06:46] But for me a core concern of this is that the bar for undertaking this kind of project has just gotta be extremely high. Uh, because I think once we open this door, especially under current circumstances, where is a serious party competition and uh, we go back and forth between, uh, who controls Congress, that if one, uh, narrow majority were to, uh, expand the size of the court during one Congress, you should very much expect that, uh, a subsequent partisan majority is going to, uh, respond in the same way. Um, and in the long that's, uh, going to seriously undermine, uh, the ability of the court to do the kind of job that we wanted to do within our constitutional system.

[00:07:25] Jeffrey Rosen: Tara, I think it's worth one more beat on the question of court expansion, 'cause it was an impetus for the commission being called. In your scholarship, you've talked about the structural safeguards of federal jurisdiction and described the ways that over the course of history, the executive branch has tried to limit the effects of Congress's encroachments on the Supreme Court's power. Did that history inform your views on the court expansion question and, and tell us also about aspects of the debate, which included the very nature of what creates legitimacy in the Supreme Court itself?

[00:08:07] Tara Leigh Grove: Right. So I, I've studied, uh, not only the history of jurisdiction stripping, but also the history of, uh, attempts at court packing or court expansion. And I, I've studied the, the development to the norm against court packing, which we had, which was actually a very strong norm up until I published a piece in, in 2018. And I think, um, that matters a great deal. Now, it's interesting, the executive branch has been more opposed to things like jurisdiction stripping, um, but more in favor historically of things like court packing and makes a good deal of sense. The president is in charge of nominating justices. So if there are more justices to nominate, the president is gonna have a tremendous influence over the development of the U.S. Supreme Court.

[00:08:52] If Congress takes away federal jurisdiction that actually gives the president less influence, 'cause a lot of the president's influence over the federal judiciary. Um, as, as I've written also as, as Keith has written, um, a lot of the president's influence comes through litigation. And so the president tends to want the federal courts to have jurisdiction. Um, and historically at least some presidents were more pro packing the Supreme Court because they could do so in a way that would enhance their own power. But presidents haven't tried to do that in a very long time. We've had nearly a century of a norm against court packing and I think that's been crucial for the federal judiciary. I don't think people understand what the stakes were in

1937. Um, and I think it's important when we think about our current political moment to look back at 1937, this was a time when the country was in the middle of the great depression. People were deeply suffering, it was an economic crisis, and to Roosevelt, it was also a constitutional crisis.

[00:09:50] Roosevelt believed that the federal government not only had the power, but had the responsibility to help people in this national economic crisis., and the Supreme Court seemed to be standing in the way. President Roosevelt not only wanted to expand the court, he had a, a Congress that was controlled, dominated by Democrats over 70% of the house of representatives, and the Senate was controlled by the democratic party. I emphasize all of this because this was a time if there was ever a time when the court would be expanded, that it would be expanded and yet the president's own party or at least prominent members of the president's own party said no.

[00:10:30] Now people are gonna disagree over why they said, no, there's a lot of scholarship on this point, but I think it's a really important historical point that at a moment when the country probably could have justified court packing the most, the country nonetheless said no. Um, and I do wanna get back to your earlier question. Um, if you can't tell, I, I am one of the commissioners that was opposed to court expansion. I probably came into it with a lot of skepticism toward that particular reform. Um, my own, my own views actually, uh, hardened more against court packing during the course of the eight months that we were on the commission, as I watched things, uh, developments in the country, I, I think it would be a very dangerous reform right now.

[00:11:13] Jeffrey Rosen: Keith Whittington tell us about the lessons of 1937 and for you the report, it's very rich historical section notes that scholars disagree about the magnitude and cause of the doctrinal shifts that followed the president's failed efforts to pack the court and tell us also how, and if your views about court expansion changed in any way, based on the deliberations of the commission, which reported interesting findings including how the Supreme Court derives its legitimacy. So tell our listeners what else they should look for in the report that might be relevant to shaping a view on, on court packing.

[00:11:53] Keith Whittington: Yeah. So in, in '37 or, or at least by the time of '37, the Roosevelt administration of course had been in place since Franklin Roosevelt's first inauguration in 1933 and had encountered a lot of obstruction from the U.S. Supreme Court for really central provisions of the new deal policy. The administration was trying to advance when Roosevelt and the Democrats were extremely successful, uh, in the 1936 election and build up their, built up their majority, um, even more Roosevelt than, uh, somewhat surprisingly through his support behind proposals that, uh, had been advanced by some, uh, Democrats in Congress, uh, during his first term of office, um, of expanding the size of the court. And, um, while Roosevelt initially, uh, suggested this was, uh, entirely politically neutral, um, just, uh, in order to help the court keep up with its workload, it'd be useful if there were additional justice, um, uh, that was pretty quickly abandoned.

[00:12:48] Um, and the administration was quite straightforward, um, that really what they wanted were just that would agree more or with the administration and change the direction, um,

of the court's, uh, jurisprudence. That did lead to a, uh, surprisingly bitter fight. I think surprising given, um, uh, how overwhelming the, uh, power of the Democrats were at the time in part, there were many Democrats, um, in Congress who were very concerned that, uh, that kind of court packing measure and to increase presidential power in particular. And so, um, part of the objection, uh, was focused precisely on the extent to which this would help empower presidents at a time in which, uh, people were already very concerned about growing presidential power during, uh, the new deal and the, and the 1930s. And so that made a lot of people nervous and helped support, uh, rejecting, uh, the plan.

[00:13:35] There's also a concern about the future of an independent judiciary and whether or not to continue to do its work, um, over time, if you, uh, were willing to manipulate the size of the court in order to try to get the outcomes that you wanted through, uh, the judicial process. The whole thing, uh, wound up becoming at least, um, easier when, uh, the court, um, started upholding, uh, deal measures. And they started doing that fairly dramatically, uh, right in the midst of the debate over court packing. This is given a rise to, um, a longstanding scholarly debate, um, over the extent to which the court packing debate itself, uh, influenced the justices, uh, to, uh, make this, uh, turn, um, or whether or not they'd independently come to the conclusion that they ought be more supportive of some of these, uh, new deal measures. Um, but the results, um, that emerged out of '37 was, Roosevelt didn't get his court packing plan.

[00:14:24] Um, the court stayed at nine justice. The Senate judiciary committee, uh, in particular issued in an extremely strong report, um, denouncing court packing, um, as, uh, a threat to the constitutional system. And now not something we should ever repeat, um, again, but at the same time, um, conservative justices started retiring from the court and gave, uh, Roosevelt opportunities to, uh, change the direction of the court through the normal appointments process. And the court became, uh, much more accommodating to new deal policies as a consequence.

[00:14:54] It is remarkable, the extent to which that debate in 1937 has really shaped perceptions, um, among academics in the political elite, um, about the legitimacy of court packing, the appropriateness of court packing. As policy, I found it quite remarkable that in a very short period of time, uh, we've mainstreamed this view in ways that I never would've expected, uh, 10 years ago. For example, uh, mainstream did such a degree that we needed a Supreme Court commission, um, appointed by the president, uh, in order to evaluate these kinds of arguments. And I doubt that the work of the commission has sort of taken this off the table as firmly as the, uh, '37s and judiciary committee report. Um, uh, did I suspect we will continue, um, having debates about, um, court packing and the appropriateness of engaging in court packing, um, in coming years now that we've put it on the table, um, to the degree that we, uh, have.

[00:15:44] Jeffrey Rosen: Well, let's turn to chapter three involving term limits, uh, for the Supreme Court. The commission report noted that, "When the National Constitution Center organized separate groups of conservative scholars and progressive scholars to draft their own proposals for improving the constitution, both groups concluded that Supreme Court justices should be limited to 18 year terms at the same time, the commission notes, the arguments against term limits, including the claim that term limits would further politicize the Supreme Court and

would heighten the belief that justices or allies of the president and the president's party." Tara, give us a sense of the nature of the debate on the commission about term limits. The commission did conclude that problem believe they'd have to be enacted by constitutional amendment, not by statute, and maybe even start by telling us how would it work, the the, the commission describes how an 18 year term limit amendment might be drafted and implemented, how might it be drafted? And then tell us about the debate over written and whether or not you would support such an amendment?

[00:16:50] Tara Leigh Grove: Well, it's extraordinarily complicated. I say, I think there needs to be a constitutional amendment. And I think other commissioners, um, came to that conclusion as well. The report itself doesn't come to a firm conclusion on that point. Um, the report offers how it could be done by constitutional amendment that acknowledges that in the view of at least some members of the commission, uh, it can be done by, by federal statute. Um, that is not my view, but I just wanna be clear that the report is not, um, decisive on that, on that matter. So the logistics are extraordinarily difficult. I think for most of us, if we were designing a system from scratch, we would limit the terms of justices. We would not give them, uh, terms that call... It, it's technically not life tenure, right? The article three says during good behavior, and that has come to be understood as life tenure, absent impeachment. But once you have that system, it becomes extraordinarily difficult to change.

[00:17:48] Um, so even if we did it by constitutional amendment, the question becomes, what can the constitutional amendment look like? I think for some folks, it, it feels uncomfortable to have the constitutional amendment apply to current justices. The ideas when they were, when they were nominated to their positions, they assumed they would have life tenure, and so one possibilities to leave that in place and have 18 year terms come over time. But if you do it that way, it takes decades. I think it's on the score of 40 to 50 years before an 18 year term limit can get into place. So it takes an extraordinarily long amount of time, and yet if you apply it to current justices, that obviously creates a real political problem because people think about the, the identities of the current justices rather than kind of a long term future of the Supreme Court.

[00:18:37] I also wanna note another logistical problem, and I suspect Keith will, will have thoughts on this as well. One of the arguments for term limits is that it will decrease a politicization of the judiciary because presidents will have an opportunity to, to, to nominate two justices each presidential four year term. Um, and this will kind of lower the temperature, the ideas that if we even things out and as presidents change, each one gets a, um, gets a stab effecting the Supreme Court, everything will be better. And I sure that's right. Um, I do worry if every single presidential election becomes about the U.S. Supreme Court that could increase the politicization of the judiciary and increase the temperature surrounding the Supreme Court because every presidential election will then focus on the U.S. Supreme Court, and 18 years is still a long time. So if a president get, if we're, we're dealing with Supreme Court nominations every two years, I think that could make things a lot worse.

[00:19:40] We're, we are now in a period where we've had Supreme Court nominations almost all the time since 2016, right? We forget how long it was, um, in a, in 1990s and early 2000s where we didn't have any Supreme Court nominations at all, and that can happen in a system of,

of life tenure. It cannot happen in a system of term limits. And there's something to be said for, uh, a little bit of haphazardness and randomness when it comes to the selection of justices. All this is to say for my own perspective is a policy matter. Uh, term limits would be great, starting from scratch and are just extraordinarily complicated in a system that has not had them.

[00:20:21] Jeffrey Rosen: Keith, as Tara says, it's very complicated to draft an amendment. Our National Constitution Center drafting teams will attempt to do just that when they come to Philadelphia in May of 2022 to hold a virtual and in person constitutional convention and see if they can come up with a language for an amendment, but just reading the report, I would have trouble quickly summarizing what such an amendment would look like. The report notes that the amendment would have to make choices about the, when the amendment would take effect the timing of appointments, how to fill seats that become vacant due to retirement. There are three options for that, as well as designing the transition to fixed term appointments. Can you, as simply as possible explain basically what the amendment would look like if folks were inclined to propose one and then tell us whether or not you would support it.

[00:21:10] Keith Whittington: Yeah, I think it is, uh, extraordinarily complicated to come up with, uh, what a detailed plan would actually look like to create a term limit. So notably of course, that would be true, whether it could be done by statute or by constitutional amendment. I lean toward thinking you would need a constitutional amendment, um, to do it as well. The, the report that was try to walk through, um, uh, what the legal arguments are as to whether or not this could be done by statute. And one thing that the commission report in general tries to do, is make sense of what the legal concerns are with various kinds of reform proposals. Uh, one thing that's different about the term limits, uh, chapter compared to the court expansion chapter is that there's, um, uh, pre broad agreement, um, in the commission, as well as outside the commission that court expansion can be done through simple statute.

[00:21:54] Um, you don't need a constitutional amendment in order to, uh, do that, uh, term limits on the other hand is a much dicier affair as to whether or not you could do it, uh, through statute. And, and so there's a, a lot of thinking that you would need some form of constitutional amendment, but regardless of how you tried to do it, it would be very complicated to design. And prior to the question about the complication design goes to fundamental questions about what you're trying to accomplish with, uh, term limits. But some of it, I think is simply, uh, embedded in, uh, the complexity of trying to design, uh, this kind of reform, uh, mechanism there, of course, are, are as very fundamental decision that has to be made about, uh, how long of a term, a justice, uh, should serve and whether or not that term ought to be, uh, renewable.

[00:22:36] At State level, we have a lot of instances of limited terms, primarily State constitutions impose limited terms of office, uh, for serving court justice. Um, in some cases that can be renewed, um, in some cases as they cannot, um, at the federal level, when we're looking at the U.S. Supreme Court, um, the tendency has generally been, and that's true of the commission report as well, um, to adopt a very long term of office, um, 18 years, much longer than what is true at the, at the State level, but one that's sort of consistent with what the historical practice has actually been about how long justices, um, in fact, it's served on the Supreme Court, and then if you're going to have very long term like that, then the assumption is you're not going to, um,

allow renewals. So, um, there's no option of a second term, but that opens up, um, all kinds of, of complications after that.

[00:23:23] What do you do with justice after they complete their, uh, term of office. For example, how much did you worry about what their, uh, post usual careers going to look like and does that affect, um, how they might behave, uh, while they're on the court? Um, and so one basic question that has to be asked if you, um, adopt term limits is can you restrict what justice will do after they leave office with a, with a goal of, uh, trying to, um, affect their behavior, uh, while they're on the court? Um, one of the challenges is trying to think about, um, uh, what that appointment process looks like to fill those vacancies. Unfortunately, we are already experiencing a situation where there could be very long vacancies on the court because of political polarization and disagreements between the Senate and the president over a suitable nominee.

[00:24:11] Um, and, uh, we may well be entering a phase in which, uh, those kinds of extended vacancies because of disagreements between the Senate and the president, uh, become quite common. And, and those vacancies could last, um, for quite, uh, some time, uh, imagine the Merrick Garland situation, but magnified in the future. That becomes a really problematic, uh, feature for us. But it's even more problematic if you're pursuing this kind of term limit approach, uh, where the goal precisely is to give each president a predictable set of nominees to make, if you don't deal with the confirmation process as part of that, you can instead find Senate in the president deadlocked, um, unable to come to any agreement, and then you scr- screwed up the entire thing you're trying to do, which was to regularize the process of appointments.

[00:24:57] Um, I think one of the real challenges to any kind of term limit, um, amendment or statute, um, is, uh, how do you deal with the confirmation process? How do you ensure, um, that you don't have a, a series of vacancies just piling up as the Senate and the president disagree, and if an important goal of, uh, the term limit process, um, is to guarantee that each president's going to get a fixed number of justices on a fixed schedule. Um, if you can't solve the confirmation, uh, problem, then you haven't done what it is you were trying to accomplish, uh, through term limits in the first place.

[00:25:29] And I have to say that that element of it in particular, um, has made me very skeptical, um, about term limits as a solution. And I was, uh, weekly skeptical about term limits often seemed like a solution search of a problem from my perspective, it wasn't obvious, uh, what, uh, was people thought they were trying to accomplish, uh, through term limit proposals. Um, but the more I look at the, um, uh, challenges of how do you get, um, just as actually confirmed in our current environment and what the implications are for a term limit system, the more skeptical I am about, um, designing that kind of system and thinking it might accomplish the goals, uh, people have for it.

[00:26:05] Um, I suspect that if you really wanna do it, you have to radically redesign, uh, the confirmation process, um, as well, it's not enough just to cap term limits, you'd have to start thinking about things like, would we even have Senate confirmation or could the president simply put whoever they want, um, on the court? Um, so you solve this problem of deadlock, but

you've, uh, dramatically expand presidential power to reflect, um, uh, justice by going down that route. So it's a, it's a complicated problem. And unfortunately, um, to some degree, it's a complicated problem for us anyway, [laughs] because of core feature of the complication is this confirmation dilemma that I think we're gonna face regardless.

[00:26:41] Jeffrey Rosen: Tara, I think this is worth another beat. If you were advising our progressive, libertarian and conservative constitution drafting teams who will be reconvening in May to try to draft a term limits amendment, what did you learn from the commission deliberation that Keith just identified a host of complexities, which make it sound pretty, pretty tough to draft a term limits amendment? Did the commission discuss the possibility of outlining an amendment and then delegating to Congress, the power to work out the details, or if the goal is to get to some kind of agreement, what did you learn and, and what can you advise?

[00:27:14] Tara Leigh Grove: Well, I think chapter three of the report actually does a pretty good job of describing in detail, both different ways of doing it, and also the, the various hurdles that one faces and, and has, has to address. I think that chapter three actually lays out a pretty good roadmap for any member of Congress who wanted to design or constitutional amendment or any, anyone at the National Constitution Center who wanted to try to design a constitutional amendment, 'cause they'd realized, wait, it's not just about current versus future justices, it's not just about versus 18 years, it's also about the confirmation process. And I think the amendment might actually have to say, there are certain time limits on when the Senate can consider a nominee. One of the challenges as, as Keith was alluding to is making sure there's a functional confirmation process without giving too much power to the president.

[00:28:04] And that's something I'm not sure how to design via constitutional amendment, how to limit the power of the president, because we clearly don't want a situation where the president nominates someone and they just sit in limbo for years and years and years, if there is a Senate of the other party. But we also don't want a situation where the president knows, well, if I nominate two people and they have to accept number three, then I could just nominate a couple of people. The Senate will never, never confirm, and then I get my real choice for number three, kind of guaranteed. And I think that's extremely difficult. Now, it would be nice if we could count on having the country elect presidents in the future, who would always exercise good judgment and selecting and judicial nominees, and then we wouldn't have to worry about this. But history has shown us, we cannot always count on that. And so I think we have to be pretty wary of presidential power. And I think this is yet another hurdle that we face in designing a new system.

[00:29:01] Jeffrey Rosen: We the People relies on the support of listeners like you to, by nonpartisan constitutional education, to Americans of all ages, every dollar you give to support, We the People will be doubled with a generous one to one match up to a total of \$234,000. That campaign is made possible by the John Templeton Foundation visit constitutioncenter.org/wethepeople. That's constitutioncenter.org/wethepeople, all one word, all lower case. Thank you so much for your wonderful passion engagement and support, and back to the show. Keith, you've identified some of the complexities of a term limits amendment. And as Tara says, uh, presidents have not behaved like angels in the past and have often, uh, put up nominees they expected to be rejected so they could get their second choices. So what would you

say to the conservative and progressive teams of the constitution center? And of course this is not, we, we have no institutional position we're just convening these teams. Uh, what would you say to the teams that have voted tentatively in favor of an amendment to try to change their mind and, and get them to abandon the project?

[00:30:13] Keith Whittington: Well, I think I would, uh, try to focus people's attention very much on the confirmation process and force people to really grapple with what we're confronting when it comes to trying to get judges confirmed. Um, we've had now almost three decades in which the Senate obstructs presidential, um, appointees, uh, to the judiciary. Um, that's most visible, um, in the case of, uh, Garland with the Supreme Court justice, but we've really been fighting this battle for a very long time at circuit court level, the intermediate courts of appeals they're extraordinarily important. Um, but the Senate has been extremely obstructionist, um, about appointees to, to bench at that level, um, for a very long time. Partially the Senate has made some reforms to make it easier to get, uh, nominees through when the Senate and the president, um, or of the same party that at wound up benefiting, uh, Donald Trump during his administration.

[00:31:05] Um, it benefits, uh, Joe Biden now, but that doesn't solve the problem, what he do when the Senate and the president are in, um, opposite hands. Um, and that's going to remain a problem at the, at the, uh, circuit court level. It's going to be a problem in the future, um, at the Supreme Court level. Um, and I really think if you're going to think seriously about turn limits for justice in some ways the deeper problem, um, is the confirmation problem. One thing about the nature of, of American constitutional design, um, is that when the founders are drafting the constitution in 1787, and they're hoping for, um, a political system that doesn't emphasize political parties, um, and they largely are designing a system that assume that, um, you don't have that kind of factional disagreement in play that affects things like, um, how they imagine presidential elections looking.

[00:31:51] Um, and so, uh, they set up a system in which the vice president is simply the runner up, um, in the presidential election, uh, which might make sense in a world without parties, but makes absolutely no sense in our world. Um, and they wind up having to change that, um, through the 12th amendment in order to account for the fact that we're going to have running mates, uh, for vice president because parties aren't reality. That also has consequences though, for things like judicial appointments. Um, uh, we have not had a similar constitutional amendment to the 12th amendment that has incorporated parties, um, explicitly into the constitutional system and anticipating how it is judicial confirmations are going to work, and we continue to struggle with what that looks like. If we are designing a constitutional system from scratch, I think we'd have to grapple with the fact, um, that there's going to be, uh, political parties that are going to organize our politics.

[00:32:35] We'd have to grapple with the fact that that means there's sometimes going to be divided government, uh, between the Senate, um, and the white house. Um, and I think that would, uh, make us think differently, um, about what a, a reasonable confirmation process looks like, um, in order to fill the judiciary, but also probably, uh, in order to fill the executive branch as a whole. I lean a little bit toward even thinking that if you want to keep the Senate in the

process at all of confirmations, uh, maybe the right thing to do is actually lower the confirmation threshold, so that you go back to part of the founder's concerns of saying, uh, well, what if the president makes a really lousy choice? The Senate ought to be some quality control on that. Um, but we might think quality control can be accomplished with, for example, 40 senators, um, agreeing to of something.

[00:33:19] On the other hand, what we have now is not only quality control, um, of don't put somebody on the bench who, um, doesn't, uh, belong there at all. Um, but we also have, uh, fundamental political disagreements about how, uh, the law ought to be interpreted, what those kind of officials ought to do in a world of partisanship. It's, it's hard even to get some majorities on that, let, uh, super majorities. I don't think there's a really good solution actually to how we, uh, do that, but I think it really focuses our attention. We need to think fresh and from the ground up, um, about what the confirmation process, um, ought to look like, what the overall appointments process, um, looks like fulfilling, uh, certainly the judicial branch by I think the executive branch as well, probably.

[00:33:59] Jeffrey Rosen: Well, let's turn to chapter four, the court's rule and the constitutional system. The chapter examines three main proposals to curb judicial power, including one stripping the Supreme Court and other federal courts of jurisdiction to hear certain kinds of cases, two imposing super majority voting requirements or requiring courts to give deference to legislative judgements about constitutionality and three authorizing congressional overrides of judicial decisions striking down legislation. Tara you've written powerfully about the history of court curbing efforts. What does that history teach us about the wisdom and viability of these three proposals? And what's your position on the proposals?

[00:34:41] Tara Leigh Grove: The running theme for jurisdiction, stripping and super majority requirements, um, and a constitutional amendment to allow Congress to override Supreme Court decisions has been that our country has rejected them time. And again, when, when one political party has proposed to such measures, the other political party has tended to fight back and in our, in our system that requires super majority for legislation. It turns out to be really hard to enact. There have been a few jurisdictions stripping proposals that have, have been enacted over the years, but really very, very few. And I, I think people don't actually contemplate just how, how difficult it is to get these things through.

[00:35:19] I think a lot of people understand that it's difficult to en- enact a court packing or court expansion measure, but it's pretty hard to get jurisdiction stripping as well. So I think that's an important point to realize from, from our history, there's, there's a lot of fighting that goes over, over the, on this. In terms of what it would do, chapter four deals with a set of proposals that if, if enacted would be designed to reduce the power of the federal judiciary in a lot of areas. If you take away jurisdiction, then these are issues the federal, federal judiciary cannot decide.

[00:35:50] If the Supreme Court cannot strike down legislation, unless a super majority of the Supreme Court agrees to do that, then that's gonna allow potentially federal legislation to stand that even five or maybe even six justices think is unconstitutional or depending on how the super majority requirement worked, potentially allows State legislation to stand, even though five

justices or six justices think that the State legislation is unconstitutional. If there was a constitutional amendment that said Congress could override Supreme Court decisions, that would also reduce the power of the federal judiciary. And I am sympathetic in, as a general theoretical matter to reducing the power of the federal judiciary and increasing the power of the political branches. That's just where I come down. I'm not sure jurisdiction strippings are a great way to do it, um, I am more in favor of the, of the Supreme Court itself adopting modes of deference, expanding the scope of rational basis scrutiny, keeping things like Chevron deference, which is now extraordinarily [laughs] controversial as it turns out.

[00:36:49] Um, so that, that's my own view on, on deference, but the idea of deference is very appealing to me. What I think is interesting is how, how little legal community in recent years has, has favored deference. Whether one talks to progressives or one talks to libertarians, or one talks to conservatives, everyone wants the federal judiciary to be doing something. They want them to be doing different things, but they want them to be doing a lot and really radical things actually. One of the things that struck me over the past several months is that there's been a lot of talk about Texas's, um, SB8 legislation.

[00:37:29] And, um, and which just looks like it's gonna be replicated in Alabama, uh, fairly soon. And I think there's a lot of reason to focus on that legislation, but it's interesting to me that some of the same people that were worried about Texas's legislation were also talking favorably about things like jurisdiction stripping and super majority requirements. And the two don't really make a lot of sense together because if one is worried about a State legislature attacking federal constitutional rights, then presumably one would want to stop jurisdiction stripping measures, stop super majority requirements, um, and enhance the power of judicial review because only then, are you gonna have a federal judiciary that is gonna come in and stop a State like Texas.

[00:38:12] Jeffrey Rosen: Thank you so much for that. There was so much in that rich answer. And Keith, I'll ask you about several of the points. First, Tara noted that historically there have been only a few successful jurisdiction stripping efforts. The report notes that after the civil war Congress enacted a law depriving the court of appellate jurisdiction over repenting habeas case, which was upheld in *Ex parte McCordle*. During the new deal, there was a small spate of legislation restricting the jurisdiction of the federal courts in the 30s primarily to limit the remedies lower courts could issue for violations of the law, but these are the exceptions. And then Tara notes that there's little support across the board for deference. Although that tradition of bipartisan judicial deference embodied by Holmes and Frankfurter and Brandeis and Byron White was in ascendant when I went to law school. Tara accurately says that, but nei- neither side consistently seems to favor deference today. Your response to the jurisdiction stripping proposals in the report, your sense of what history teaches us about them and your sense of whether or not we should revive the tradition of bipartisan judicial deference.

[00:39:27] Keith Whittington: Yeah. So just starting with jurisdiction stripping, we should be clear as to what we're talking about exactly. 'Cause it is a rela- a relatively esoteric, uh, reform, uh, not as well known as something like, uh, court packing that people in- intuitively understand and has been talked about more in public. Um, but jurisdiction stripping really involves removing, uh, certain kinds of issues and as consequence, a whole set of cases, uh, from the

jurisdiction of, uh, potentially the Supreme Court specifically or maybe the federal courts more generally and not allowing those courts to hear those, um, sets of, of cases. Um, one of the real complications and one reason why, uh, there, we have not had much more jurisdiction stripping over time is that if you take those kinds of proposals seriously as a solution, it's not enough to be mad at the Supreme Court, um, and, and think the Supreme Court's, uh, getting some things wrong, uh, because what you're doing, um, with those kinds of provisions, um, is leaving those cases in, uh, some lower court, whether it's the lower federal courts, um, or leaving them in the State courts.

[00:40:28] Um, and it's generally the case that, uh, Congress has not, uh, maintained very much enthusiasm for the idea of we ought to have lots of cases involving federal questions resolved, uh, in the State courts with no capacity for the federal judiciary to weigh in and get a, a different answer. And so even if Congress thinks the Supreme Court, um, is getting the wrong answer, sometimes they're not very inclined to think the State courts are going to be more reliable, uh, from that perspective. And so tend to be pretty skeptical about these kinds of jurisdiction stripping measures in general. It's just a really blunt instrument for addressing the kinds of concerns people often have. It'd be a different question, I think, and there were, and there were people, um, in the early 19th Century, for example, who really did take the view, um, that they want the federal judiciary, mostly out of these questions.

[00:41:12] They want a lot of autonomy, uh, for the State courts to make their own decisions. Um, but that's a view that's very much out of favor even more so, um, I think that this kind of judicial deference, uh, consideration it, uh, had a lot of sway in the ear- early and mid 20th Century, for example. It's been even longer, uh, since, uh, very many people have been systematically in favor of the idea of, uh, let's just let the State courts do what they want to do when it comes to interpreting the federal constitution, for example, um, and keep the federal courts, uh, largely out of it. I, I do think in general, there's just a lot of hypocrisy these days around the deference, um, question. Uh, people want deference on the things that they, they like. Um, they want activism on the things [laughs], that they like, um, as, as well.

[00:41:54] And so, uh, there's a lot of complaining when the court, um, gets the wrong answer, uh, from their perspective. But, um, I don't think there's a lot of support in general for just having courts out of the way, uh, in general. Tara pointed to, uh, one of these [laughs], very interesting disagreements we're seeing right now over SB 8 and, and the abortion, uh, rulings in general, where the Texas statutes precisely designed, uh, to get the courts out of the way, um, of abortion rulings and some of the same people that were calling for more judicial deference, um, are not [laughs] at all enthusiastic, um, about that way of, of accomplishing, uh, what they said they want. Which is, uh, courts outta the way, um, and letting legislatures make policy. In this particular area, when it comes to rights people, uh, like, um, uh, they tend to want courts, uh, in there aggressively enforcing them.

[00:42:40] Um, one of the things I suggested, uh, in the commission and there was not much, uh, uptake, uh, for this idea is we all take seriously the idea of, of revising Article V, um, of the constitution. Article V is the, um, provision of the U.S Constitution that lays out the amendment process. Um, uh, it creates a fairly high hurdle, um, uh, to adopting a constitutional amendment.

Uh, one way of addressing this kind of, uh, concern that people have that, uh, gets framed in terms of legislative overrides, for example, allowing Congress simply to override, um, what the court has done is to say, good, all be easier for the political branches to amend the constitution. So if you really disagree, uh, with how the court is interpreting the constitution, how the court has, uh, laid out the set of constitutional rules, um, they're going to guide the political process.

[00:43:26] Uh, then you ought to empower the elected branches to more easily be able to craft new constitutional rules directly through a constitutional amendment process. Right now that's very hard. Um, at the level of State constitutions, it's much easier and so, uh, we do see, um, uh, legislatures, uh, much more active in drafting new constitutional language, um, and new constitutional rules. Um, and when they don't like, uh, what it is their State courts, um, are doing under State constitutions. And that's true in other countries as well, other countries, uh, with written constitutions and, uh, also tend to make it easier, uh, for their legislatures to alter the text of those constitutions. Um, I, I do think that Article V, um, um, alteration would be consistent with the goals that people say that they want, um, of giving more of political support here.

[00:44:13] Um, and it's a much more straightforward way of giving, uh, elected officials a strong voice, uh, in determining what kinds of constitutional rules we live under. Um, I think there are all kinds of practical problems, uh, in the details, um, if you instead, uh, turn to something like, uh, a super majority rule for when, uh, the court can strike down a law, um, or some kind of legislative override procedure, um, that would allow Congress to override a particular decision the court has made through a simple resolution, for example.

[00:44:44] Jeffrey Rosen: Well, our last chapter involves the Supreme Court's procedures and practices. There were three areas the commission discussed, and here there are some gentle, uh, suggestions, uh, on the first issue of the use of emergency orders. The commission suggests there might be some value to greater transparency, including giving reasons and clarity on presidential values when it comes to the so-called shadow docket. When it comes to a judicial code of ethics, the commission says it's not obvious why the court is best served by an exemption from what so many consider best practices. And perhaps the court should adopt a code of conduct. And on the question of cameras in the courtroom, the commission notes that, uh, as an alternative, the court could continue its current practice of live streaming audio of oral arguments and, and talks about the value of that live streaming. Tara, what are your thoughts on those three issues and the commission's conclusions?

[00:45:42] Tara Leigh Grove: Right. So I, I, I think this is the part where the report basically says, "Hey, Supreme Court, here's some ideas, maybe you guys can think about it." The rest of the report is written for the political branches and the political process. This part says there, there are some things you could potentially do. And to my mind, um, having, having live-streamed oral arguments is kind of a no brainer. I, I don't understand why, why this is controversial. Um, I, I understand to some degree why cameras in the courtroom make some of the justices uncomfortable, even though I've always been, I've always thought that more, more transparency is probably better in that respect and I have serious doubts that if every Supreme Court oral argument were televised on C-SPAN 12 or whatever [laughs], wherever it would be, that there

would be tremendous attention paid to that, um, except by, by folks like me and, and, and Keith and other folks who follow the court closely.

[00:46:32] Uh, but even if you don't have cameras, I think live streamed, uh, over, over the radio waves is, is a great idea and over, over the internet is just an easy way to allow people to learn more about the Supreme Court. Judicial ethics also strikes me as something that should not be terribly controversial. The idea that we expand the rules that already apply to the lower federal courts, to the Supreme Court seems like a pretty easy reform. Um, and I, it it's actually striking to me how complicated that has been historically. I did some work, uh, for one project on norms of judicial independence, where I read the debates from around the 1950s to the 1980s of what became the, the Judicial Reform Act that actually governs the lower federal courts. And in those debates, members of Congress actually did propose having the same rules applied to the U.S Supreme Court.

[00:47:25] And there was a lot of pushback in Congress about that. Um, a lot of concerns that this would somehow interfere with the separation of powers. And I think that's, uh, another example of how the political branches have actually protected the Supreme Court but I think it's probably undue protection. The piece of the report that I think is, is the hot topic, at least in, in chapter five is the, is the Supreme Court's emergency docket, which has become to be known as the shadow docket. Now this, this is a, a docket that has existed for a very long time. I think that there's there, there's some thinking among my students and, and other folks that this is a new thing. Suddenly the Supreme Court is issuing emergency orders. No, they've been issuing emergency orders for a very long time. And of course they have to because emergencies arise, whether it's in Capital cases or other cases where first amendment cases, where people need an injunction right now in order for things to matter.

[00:48:20] And it's interesting to me that the shadow docket has become so controversial. And I think it's just that the Supreme Court has been issuing prominent decisions, uh, particularly during the pandemic, uh, through, through the shad- shadow docket that have gotten a tremendous amount of attention. Whether it needs to be reformed, I, I think the Supreme Court itself should probably do as little as possible through emergency order. Um, when it has a major issue involving religion, um, with respect to COVID restrictions or issues wi- wi- with respect to the rights to terminate a pregnancy, there are usually ways to move it to the regular docket and to move pretty quickly on the regular docket as we saw with the Texas SB 8 litigation. I think that's probably the best way for the Supreme Court to handle its, its emergency docket. Um, when it has something that really deserves a merit's review, to give it that merit's review. And that might be a way of reforming the system without actually reforming our current rules.

[00:49:21] **Jeffrey Rosen:** Keith, the last word in this very rich discussion is to you, what are your thoughts on the commission's recommendations about judicial ethics, audio broadcasts and most controversially, the shadow docket?

[00:49:36] **Keith Whittington:** I think there are some fairly modest reforms that the court could take on, um, itself. I think it could be most reasonable for the court to take on, uh, some of those reforms themselves. Um, there are some suggestions that Congress could impose, uh, some of

these, uh, things on the court and, and I think that's a much more problematic, um, idea. These, these go to questions about how, uh, an independent branch of government, um, internally operates. And, and I think most of that should be decided, um, by the justice, uh, themselves. And I think the commission report offers some reasonable options. Um, I, I do think that the possibility of live streaming, um, audio of oral arguments, um, is a reasonable those who compromised measure of creating a little more transparency, uh, for the court without going, um, all the way toward, um, cameras, uh, in the courtroom.

[00:50:22] Um, I am a little skeptical about what the, um, uh, long-term implications would be, um, of introducing, uh, cameras into the courtroom. There's some justice, of course, I think have concerns, uh, that they simply don't wanna be that well known. Um, uh, they like their relative anonymity and, um, having cameras would, uh, alter that dynamic. Um, I'm even more concerned though about whether it would simply change, uh, the behavior of justice over time, uh, to have cameras in the courtroom. Um, I think one thing is we've experience with the rise of C-SPAN, uh, which has been, uh, useful in lots of ways, but I think it does change behavior of how, uh, legislators behave on the floor, um, of, of Congress, if they're, um, under the eyes of a camera and you worry that justice might also, uh, change their behavior in ways they're not so attractive, if they were playing to an audience through video, uh, feed in a way that I think probably is, is much less true when it comes to audio feed.

[00:51:17] Often, I think it's very attractive to think more transparency is good. And I would, will say that probably the one thing in which there'd be unanimous agreement on the part of all the commissioners, um, on the Supreme Court commission is that the The Federal Advisory Committee Act, uh, which is a transparency, uh, statute aimed at, uh, presidential advisory commissions, like [laughs], like this commission, um, are problematic. And so The Federal Advisory Committee Act, um, really tied the hands of how the commission could work because it had lots of transparency requirements about what kinds of deliberations can be done behind closed doors and what kinds of deliberations, um, had to be done, um, in public. And that made it really hard for the commission to actually do its work. Um, we'd be better off [laugh] as a country, um, if we didn't have, uh, that kind of transparency actually, I think, on, on how a commission like this, uh, works. And so I don't, I don't think we should always be very quick to jump to the conclusion, uh, that more transparency is always better, uh, for how these institutions work. Uh, sometimes there's some real virtue in not being, uh, quite that transparent.

[00:52:15] Jeffrey Rosen: Thank you so much, Tara Leigh Grove and Keith Whittington for being so transparent about your service on the Supreme Court commission. Thank you for that service and thank you for a rich and illuminating discussion. Uh, Tara, Keith, thank you so much for joining.

[00:52:33] Tara Leigh Grove: Thank you so much.

[00:52:34] Keith Whittington: Thanks. Appreciate it.

[00:52:37] Jeffrey Rosen: Today's show was produced by Melody Rare and engineered by Kevin Kilburn. Research was provided by Sam Desai and Lana Ulrich. Homework of the week, read the Supreme Court commission report. It's deep and detailed, and there's lots to learn. Please

rate, review and subscribe to, We the People on Apple Podcasts or recommend the show to friends, colleagues, or anyone anywhere who's hungry for constitutional illumination and debate. And please consider donating to the, We the People crowdsourcing campaign.

[00:53:08] Thanks to our friends at the John Templeton Foundation, every dollar you give toward We the People will be doubled the generous matchup to \$234,000. As I said, we have donations now from 24 out of the 50 States, but we are looking for donations from Alabama, Alaska, or Arkansas. So if you're a listener in one of those States, we'd be so grateful for a donation of \$5, \$10 or more. And this is an amazing opportunity to show your support of constitutional education. Please go to constitutioncenter.org/wethepeople, that's all one word, all lowered case. On behalf of the National Constitution Center, I'm Jeffrey Rosen.