



Lana Ulrich: [00:00:00] Hi, We the People listeners. I'm Lana Ulrich, senior director of content at the National Constitution Center. Jeffrey Rosen is away this week. Last week the NCC traveled to Berkeley, California, where Jeff joined best-selling author, Michael Lewis for an event at Berkeley Law. Jeff and Michael moderated conversations with current and former judges on the human side of judging. The judges shared candid commentary about how they approach their work, and the challenges they often face on the bench. This episode was originally published on our companion podcast Live at America's Town Hall which features live constitutional conversations held here at the National Constitution Center in Philadelphia and across America. Jeff will be back next week for our regular weekly show of constitutional debate, and will review the 2018, 2019 Supreme Court term. So we'll see you back here next Thursday. Enjoy the show.

Tanaya Tauber: [00:00:54] Welcome to Live at America's Town Hall, live constitutional conversations held here at the National Constitution Center in Philadelphia and across America. I'm Tanaya Tauber, director of Town Hall programs. Last week, America's Town Hall traveled to Berkeley, California where the National Constitution Center partnered with the Berkeley Judicial Institute to host conversations on the human side of judging. Current and former judges explored what it means to be a judge, and candidly discuss the challenges they face in their work. The first panel featured moderator, Michael Lewis, best-selling author of Moneyball and The Big Short, and host of the podcast Against the Rules in conversation with Justice Eva Guzman of the Supreme Court of Texas, and Judge Charles Breyer of the United States District Court for the Northern District of California. The second panel was moderated by NCC President, Jeffrey Rosen, who sat down with Berkeley Judicial Institute Executive Director and former U.S. District Judge, Jeremy Fogel, former Associate Justice of the California Supreme Court, Carlos Moreno, and former Chief Judge of the U.S. Court of Appeals for the Tenth Circuit, Deanell Reese Tacha. Here's Michael Lewis to get the conversation started.

Announcer: [00:02:08] Michael Lewis.

Michael Lewis: [00:02:09] Thank you. Can you hear us? Is this good? All right. So I'm unqualified to be here. I mean, I am here because I met Jeremy through this podcast, and the podcast was about umpires and referees and various walks of American life, and one of the episodes was about judges, and just examining the various forces that were coming in on them that might undermine their authority and make their lives difficult. Otherwise, I know very little about the law except to run from it. I'd like to start by just I'd love you each to introduce yourselves and what you do, where you are to the arts.

Charles Breyer: [00:02:58] Go ahead.

Eva Guzman: [00:02:58] The federal judge is making me go first so I'll go first. As you heard I'm Eva Guzman. I have the great privilege and pleasure of serving on the Supreme Court of Texas. It is the highest civil court in Texas. I've been on the court since 2009. I served on an intermediate appellate court before that for about a decade, and initially entered the judiciary as a trial court judge appointed by then Governor Bush. My journey has been



marked by first Latina on the trial court in Harris County, first Latina on the intermediate appellate court, and first Latina elected to statewide office in Texas. It's a job I enjoy.

Michael Lewis: [00:03:48] And you received more votes than anyone has in the history of Texas.

Eva Guzman: [00:03:53] Well, since you brought it up. Texas elects its judges that's riddled with all sorts of cons and a few pros, but the last election, 2016, I did become the highest vote getter in the history of the state of Texas for any office anytime.

Michael Lewis: [00:04:14] Who voted for you, Chuck?

Charles Breyer: [00:04:15] Yeah. Fortunately, we didn't have an election, which I actually thank my lucky stars when the first case that I had was a case involving a fellow by the name of Ed Rosenthal, who had what's called the Oakland Cannabis Club. It was a case that ultimately went to the United States Supreme Court where they prosecuted people who had manufactured and distributed marijuana. It turned out that Rosenthal had been authorized by the city of Oakland to be the official grower of marijuana. Okay, fine. The feds decided that he ought to be prosecuted because of this thing called the Supremacy Clause, and he was prosecuted in my court. It was the first case that I had as a trial judge.

Believe me, I thank my lucky stars that I wasn't up for election. It turned out that he was convicted, ultimately. I sentenced him what I thought was appropriately which was one day in jail credit for time served, and that was that case, but it highlighted for me and it would be a fascinating discussion about what does the independence of the judiciary do to the individual judge who doesn't have to be concerned about being popular? The fact that you got the most votes, actually, is the best thing I've heard about the election process, but I would be concerned. I would be concerned, and there are a lot of examples that we can give even in California, even in California about judges who render unpopular decisions, and then are voted out not because that judge didn't do his or her job, but because that judge rendered an unpopular decision. That since I thought we're talking about stress that will give you stress I'll tell you that.

Michael Lewis: [00:06:32] So I want to do with both of you what I did with Jeremy when I first sat down with him because it's not obvious how a person becomes a judge. The social role is so powerful. Once you're the judge that's all you are, but once upon a time you were little kids with other ambitions in life. Could you just start by explaining how, and Eva you start here just how you become a judge, how this happens, and is there anything in your past that sort of led up to it where you said, "This all made sense, made an awful lot of sense that I ended up here."

Eva Guzman: [00:07:13] Well, everybody has a different path and a different journey, but in the end I think they do. So there are people sitting in the audience right now that are law students that know they want to be a judge and that's their goal. That really wasn't my goal. I didn't see myself in the judiciary, but it was a little serendipity, a lot of hard work, and in the end it's public service. So I've been doing as a young lawyer I served on a grievance committee, I did a lot of community work, and there were a lot of ways where I engaged



with the community. A judge passed away and I had four or five people come to me and say, "You ought to apply for this job." It's political in Texas. I was a political, and they already had 30 applicants for this particular vacancy, so I thought, "Well, why not just ahead and do it because the odds are really against you," but I did.

Michael Lewis: [00:08:11] Did you think they were going to reject you?

Eva Guzman: [00:08:12] Yes. No, do it because it was an opportunity.

Michael Lewis: [00:08:16] Right.

Eva Guzman: [00:08:18] You have to take those risks, so I did. I think any lawyer sitting in a courtroom and you're watching the judge, and you're "I could do that job so much better."

Charles Breyer: [00:08:30] That's what they say in my court all the time.

Michael Lewis: [00:08:35] I want you to actually back up just a little more before we jump forward into what you're doing on the bench. I grew up in a house my father was a lawyer, and told me to run as far as fast as possible away from the profession. He was a lawyer wished he was something else. How did you get interested in the law?

Eva Guzman: [00:08:52] That's a great question. Yesterday I was ... I'm from a very working class background, but yesterday I was in the airport and it was late, and I walk in the ladies room and I see the custodian. She's on her knees cleaning, and I'm thinking about coming up here to be interviewed by thee Michael Lewis.

Michael Lewis: [00:09:16] There are lots of them.

Eva Guzman: [00:09:18] And I thought about my mother. I'm one generation away from that life. She was a custodian at the University of Houston where all her kids went to college, so that just kind of came back to me, so that's my background. So when I thought about the law why do I want to be a lawyer? For me it was to make a difference. It was to really go back and engage with people that grew up like I did who are invisible, and I would see them as a lawyer in ways that other people wouldn't.

Michael Lewis: [00:10:05] So it was justice, social justice that interested you.

Eva Guzman: [00:10:08] Yeah, it was making a difference.

Michael Lewis: [00:10:10] Chuck, how did you get into this?

Charles Breyer: [00:10:13] That's a tough story to follow.

Michael Lewis: [00:10:15] No, not.

Charles Breyer: [00:10:17] Because I wanted to be an actor, and I failed at that.

Michael Lewis: [00:10:24] Did you?



Charles Breyer: [00:10:24] Well, it was during Vietnam, and you had to ... I succeeded in college in that, and then I wanted to go out and see whether I could actually make it as an actor. The problem was that you'd be drafted, so my father who is conservative in that regard said, "You better go to law school." So I ended up here. At the end of the first year I was really unhappy at law school. Didn't like it, didn't like what they did. I didn't find it particularly interesting, and I said, "I'm quitting. That's it. I'm just quitting and I'll figure out what I'm going to do." And he said, "Well, before you do that why don't you work as a law clerk to a personal injury lawyer, a lawyer by the name of Marvin Lewis in San Francisco. Just follow him around."

Well, that's what I did, and I went to depositions, and I went to trials, and I thought, "My goodness, this is fabulous. You write the play. You act in the play. You direct the play. You produce the play." You know? And there's generally some kind of audience. That's actually what I got as a judge. I got my audience, but, indeed, I have to tell you what I would say to people, I mean, and I think really to answer your question what does it take to be a judge? It takes luck among other things, and it should never be downplayed. Federal judges always say, "What does it take to be a judge? You have to know a United States senator that's what it takes to be a judge." I think, actually, it takes luck among other things.

So how did luck play with me? And I will tell you that I think that because I had so many different experiences as a prosecutor. I was a Watergate prosecutor. I was a defense lawyer for 25 years. I did all sorts of different things, and those experiences that I had I actually think I was able to bring to being a judge. I tell law students, look, you'll have a lot of opportunities. Take the path not traveled, or take the difficult path because it will make you a different person, and if what you want to be is a judge it's great to have different experiences. It's great to have your experiences. It's great to be able to relate to people, especially, as a trial court judge. The only way you're going to relate to people is to have had different experiences. That's what I think qualifies a person to be a judge.

Michael Lewis: [00:13:08] What year did each of you become judges? When did you both?

Eva Guzman: [00:13:13] When we first became judges?

Michael Lewis: [00:13:14] Yeah.

Eva Guzman: [00:13:14] Gosh, a long time ago, 1999.

Charles Breyer: [00:13:17] That's great, '98.

Michael Lewis: [00:13:19] So you're older. Had the pressures on you changed? Has the environment in which you're judging changed noticeably to you in the last 20 years?

Charles Breyer: [00:13:31] I'd say absolutely.

Michael Lewis: [00:13:32] How so?

Charles Breyer: [00:13:33] I think and I guess my greatest concern is that the judiciary become polarized. It's very, very dangerous that the courts start to take positions that



appear to be partisan positions. That will be more destructive of the judiciary and the rule of law than anything that I can see, so I am alarmed by it. I have some of my colleagues here. I know my colleagues. My colleagues will not do that. My colleagues will try to call them as they see them. Call the balls and strikes that's what we do.

Michael Lewis: [00:14:16] Actually, what I meant is more when you walk into your job and you sit in the chair are there different pressures on you now than there were 20 years ago? Do you feel watched in different ways? Do you feel scrutinized? Do you feel criticized? Are you worried about different things?

Eva Guzman: [00:14:34] Well, I think the dialogue has changed, and the conversations have changed. I mean, I became an appellate judge in about 2001. I wrote an opinion. Maybe the newspaper picked it up in Houston and that was it. Maybe they had they rarely praise, occasionally, but if they wanted to criticize it it's there. Now I wake up, and I go to Twitter because that's the first thing I do in the morning and there it is. So as the judge that brings stress. I'm being criticized in Kentucky, or wherever.

Michael Lewis: [00:15:10] So we should stop here for a minute. You tweet?

Eva Guzman: [00:15:13] Yes, @Justice Guzman, just in case.

Michael Lewis: [00:15:17] Do you tweet?

Charles Breyer: [00:15:18] No, no.

Michael Lewis: [00:15:19] So is this the difference between us?

Charles Breyer: [00:15:20] I have no social media. I have no social media skills.

Michael Lewis: [00:15:25] How do you know if you haven't done it? You might be a-

Charles Breyer: [00:15:28] I wouldn't even know how to do it.

Michael Lewis: [00:15:29] Right.

Charles Breyer: [00:15:30] I mean, I have to phone my son to connect the telephone or something. I mean, it's terrible what I am. I'm sort of this antediluvian skills, so I can't really do anything, but I will tell you that the judges are really discouraged from engaging in social media. Interesting, I was just away for four weeks just traveling having a great time bicycling and so forth, and we decided as a group not to read the paper, not to watch TV, and you know I felt better because there's nothing you can do about it you see.

Michael Lewis: [00:16:13] Right.

Charles Breyer: [00:16:16] It's a good idea to detach yourself from all of this.

Michael Lewis: [00:16:20] But there's also an argument for not being too detached. I mean, let me just stop you. You said judges it's frowned upon.

Charles Breyer: [00:16:32] Yes.



Michael Lewis: [00:16:32] But you do it. It's a different situation because, I mean, you're an elected official. You have to. It would be political malpractice for you not to engage with your audience, but what's the argument for?

Eva Guzman: [00:16:48] You know, I think the public it gives the public an insight into the judiciary. When you think about the public's confidence in the judiciary it may be at an all-time low. It certainly is among minority communities. Civics as you know, civic education people just don't know. They don't know whose on the Supreme Court, how many judges are in a court, what judges do. Their idea of judging is Judge Judy, I mean, that sort of thing. So when you're on Twitter, when you're accessible the public gets an insight that they wouldn't otherwise have. They see the process. They see you. They hear your voice.

At the Supreme Court all of our oral arguments are on the web. You can tune in live. You can watch it later. It's scary when you're the judge and there's a T-shirt that I think says, "If my mouth doesn't say it my face will." That's sort of me on the video on the court so I really work on the stoic face, but, again, it's the public having an opportunity to see their courts at work, and to understand a little bit more about what kind of questions do we ask. We've had issues come up involving religious issues, or gay marriage, and the public gets a chance to see what kind of questions the judges are asking.

Michael Lewis: [00:18:13] How do you feel about that Chuck?

Charles Breyer: [00:18:14] I am in favor, actually, of cameras in the courtroom in particular types of cases very controversial. I was very disappointed that the prop eight case wasn't broadcast. That would have been the greatest learning experience that the American public could have had about gay marriage and myths that surrounded it, and process to develop what is the evidence of this idea and that idea, and regrettably it wasn't broadcast. I think, our Supreme Court, your Supreme Court they do broadcast the arguments. The Ninth Circuit broadcasts arguments. I think it's a good idea. There are concerns, privacy concerns, or concerns about protecting witnesses, and so forth, but you address it on a case by case basis.

Michael Lewis: [00:19:09] Right.

Charles Breyer: [00:19:10] You just don't have an ironclad rule.

Michael Lewis: [00:19:13] You're just saying that public approval of the judiciary is at an all-time low. How is that affecting your lives? I mean, are you on the receiving end of hostility, criticism, pressures that maybe you wouldn't have been?

Eva Guzman: [00:19:30] It's just part of the job. The public has a right to voice disagreement. In fact, we should listen to voices that are different from our own voices. I wish that as a society we engaged in more conversations with people who don't think like us, with people with different ideas, but one thing that came from this idea that the public doesn't have a lot of confidence in the judiciary was a summit that I put together in Texas. It's a summit that the thing was the implicit bias in the justice system, so I invited Professor Rachlinski from Cornell to come down. I had about four or five hundred ... The court did I led it, but it was a



Supreme Court initiative. We had about four or five hundred stakeholders, prosecutors, defense attorneys, judges. That was right after the seven police officers had been killed in Dallas. We had the wife of one of those police officers there. We also had some of the folks that had experienced police brutality. A man who'd spent 20 years in prison wrongfully convicted the system had failed him. That's how the judiciary can respond to concerns about confidence in the justice system. So that was one thing I did that I'm very proud of in Texas.

Michael Lewis: [00:21:01] It's interesting we're clearly out of an earlier era where the judge could sit behind the robes and hide, and nobody paid too much attention to who he was as a person. You can't do that anymore. You can't hide anymore. You can't hide specifically, generally, and this is one of the things we explored in the podcast was everybody is aware of human error. Everybody is aware that human beings that there's cognitive bias. Have you had to adapt to the growing awareness of your own fallibility? I mean, have you had training, for example, in cognitive bias? What has been the response to defend yourselves?

Charles Breyer: [00:21:51] Jeremy Fogel was a great leader on the Federal Judicial Center which put an emphasis on making judges aware of such things as implicit bias, and we now have fashioned videos that we show jurors, perspective jurors, and we give them examples of implicit bias, so that they're aware of it. We have fashioned instructions that we give, I give, and my colleagues give both before jury selection, after a jury has been selected, but before the evidence, and, finally, at the conclusion of the case so that people are aware. The irony of implicit bias as you guys say do you believe in implicit bias? Of course, not. Of course, I don't, I'm not biased just ask me. The problem is it's implicit, and you have to make people aware of these problems. I think that that's something that now the courts are very aware of, and I think juries want to be honest.

Michael Lewis: [00:22:58] What kind of training does one get to be a judge? And when you get the job what do people do to make you ... How do you learn how to do it? What's required of you in the way of? Are you given the robe and you just climb into the chair and start doing it?

Eva Guzman: [00:23:13] You go to Baby Judges School, so most judges go away for a week, and you do that. I went back to try to be a better appellate judge. I went to Duke Law School. They have a judicial LLM. I spent 2-1/2 years in that program, but I think judges have to work at it. Every state has mandatory training, mandatory continuing education that you do. If you're a smart judge you recognize what you don't know, and you ask the right people, you do the research. You continually work to improve yourself, and one way to do that is to ask a lot of questions.

Michael Lewis: [00:23:57] Are you ever presented do you have feedback the way I don't know NBA referees have now where you get your errors played back to you so you can see the mistakes you made so you could improve?

Charles Breyer: [00:24:08] That's called the circuit.

Eva Guzman: [00:24:12] It's called appellate court.



Michael Lewis: [00:24:12] So you do get to see your mistakes.

Charles Breyer: [00:24:18] Well, yeah, you get to see. There's a tendency to bury some of these mistakes. I think there are a lot of types of feedback, and a lot of types of instruction. Of course, you have Baby Judges School, and so forth, but one of the great resources that you have are other judges are the colleagues of your court. If you are lucky enough to be in a collegial court, and we are where we will have lunch frequently four or five times a week together where we discuss problems. Where you can walk down a hall and go into another judge's chambers and say, what I am going to do? What do you think about this? What do you think about that? It's that constant feedback from other people that give you an insight, and change your behavior. It actually changes your behavior, so I think that that's extraordinarily valuable, but it is only as valuable as having a bench that's diverse, that will make you aware of different problems because it is the fact.

My life I wasn't aware of all ... I mean, it's a great contrast because I wasn't sensitive to all these things. I just had my 60th high school reunion and just before I went to it I read Rosa Parks' story of how she was arrested in Birmingham. She was arrested when I was a freshman at high school in San Francisco, and I guarantee nobody in San Francisco was aware that I was aware of was aware of that injustice. So you've got to have a diverse bench. You've got to have people who've had different experiences because that's how you learn. That changes your behavior.

Michael Lewis: [00:26:17] This is getting back to the original question, but has anybody ever pointed out to you a mistake you've made where you went, oh, my God, that was a mistake?

Charles Breyer: [00:26:27] Yes, here. I sentenced somebody and I'll tell you a bit why. It may be interesting. I don't whether it is or not.

Michael Lewis: [00:26:34] It's already interesting.

Charles Breyer: [00:26:36] I sentenced somebody to whatever it was. It was a lengthy sentence. As soon as it came out of my mouth I knew it was a mistake. I walked off the bench and I got to the door, and I turned to my courtroom deputy, and I said, "Bring him back tomorrow. I want to change his sentence. It's just terrible." Well, the law is ... Every now and then you have to look at the law. The law is that you can't change it after you've left the court.

Michael Lewis: [00:27:06] Is that right? You're not allowed to change your mind?

Charles Breyer: [00:27:07] You cannot change it. It's called sentencing remorse. You just can't do it, but I did it anyway seated in my court. Yeah, this is terrible. Yeah, seated in my courtroom was the United States attorney at that time a fellow named Bob Mueller. You may have heard of him. So he's sitting there and I'm changing this sentence, right? I'll just change it. I said, "Well, I meant to say 38 months not 48 months," or whatever it was, dada, dada, dada, dada, and I walked off the bench.

About a week later I saw him in the elevator and he said, "Oh, that was very interesting," he said, "very interesting." He said, "Some question is whether or not you had jurisdiction to do



that." I said, "I can understand that reasonable minds might differ on that issue." He said, "Well, you know what? We're not going to appeal you because we think you came out with the right answer." So, yeah, that's called sentencing remorse. I made that mistake, and Bob Mueller has been correcting my mistakes for years I think so.

Michael Lewis: [00:28:12] Eva, have you ever had a moment where you realized that something you had done you wished you hadn't done?

Eva Guzman: [00:28:19] You know, I think as a trial judge there may be those moments that may come more frequently. On the appellate court it's a little different. We don't decide these cases in a vacuum. You have the briefs, the oral arguments, the lawyers come and present their cases. You have your colleagues that weigh in. Then you have these law clerks right out of law school with great ideas about what the law is or ought to be. So you don't decide in a vacuum. You talk, you have these conversations, and you have an opportunity you can issue an opinion. I've had very few that can file what's known as a motion for rehearing, and you can actually ... We don't have remorse about these things. You can actually change, and the court has in the past, and I have in the past, actually, changed my mind on rehearing. It doesn't happen, but you realized you made a mistake. Judges are not infallible. There are times when you just got it wrong, and that's when you'll see those rehearings granted.

Michael Lewis: [00:29:17] If you were sitting down with someone who wanted to be a judge, and you had to evaluate whether they were actually suited for this what would you look for in a person? What makes someone good at it?

Eva Guzman: [00:29:36] In my view a commitment to public service. A commitment to fairness and to impartiality. There's a certain skillset. Ideally, if you're going to be a trial judge you want someone whose actually been in the courtroom, and to tell you that I was thinking about this story because it was so different. In the early '90s my first jury trial by myself I was so nervous, and it was in a small rural county in Texas, and the judge says to the opposing counsel, "Mr. So and So, I'm going to take Ms. Guzman back and we're going to pray. I'm going to open the Bible and we're going to read some scripture before closing arguments. Now you can join us or you can stay right here." So the judge and I went back and we prayed and I won the jury trial. That's how different it was in the beginning, and you couldn't do that now. You wouldn't want to do that now, but you could back then.

Charles Breyer: [00:30:30] I would say a couple of things that are important in addition to having the Lord on your side, and I don't know too much about that to be truthful, but I think that you have to have the ability and a willingness to make decisions. Now I'm talking about basically a trial judge. If you don't like making decisions if you're one of these people that says, well, on the one hand there's this, and on the other hand there's that, and I don't know, and so forth. Look, we're paid to make decisions. I mean, paid, not paid, but we're there to make decisions that's number one.

Number two is don't have an agenda. Just listen to the evidence. I can't tell you how many times my mind has changed after listening to the evidence. It's just great, and why I love my job, and I do love it it's because it's exciting, because it's filled with unknowns, because it's



intellectually interesting, because it can make a difference in people's lives, it really can, so all of that fits as long as you have the temperament, one, to make decisions, and, two, don't become so invested in your opinion that you're not going to listen to whatever the evidence is.

Michael Lewis: [00:31:52] All right. This courtroom is adjourned.

Charles Breyer: [00:31:54] Great.

Eva Guzman: [00:31:54] Thank you.

Michael Lewis: [00:31:55] So, thank you.

Jeffrey Rosen: [00:32:09] Well, this court is now in session, and that one was a tough act to follow, but we have a panel of extraordinarily distinguished former judges and are hoping that all of you can reveal a side of judging that the sitting judges were not able to reveal. The judicial code of conduct prescribes what a sitting judge can say, so I want to start with the toughest case that each of you has decided and take us inside your decision-making process to reveal the human cost, and the way that you struggled with it. Jeremy, Judge Fogel, you have described the California lethal injection case, *Morales and Tilton*, as the most challenging case you ever decided. You said, "It demanded the most of me intellectually, emotionally, and spiritually of any matter that has ever appeared on my docket." Take us inside your thought process and describe emotionally, spiritually, and intellectually what it was like to decide that case?

Jeremy Fogel: [00:33:09] Well, I don't want to take up all the time, but I wrote that in a law review article a number of years ago, and I would adopt every word of it today. This case involved the protocol that California was using at the time to carry out executions. The issue was actually quite narrow. The question was whether the protocol the drugs that were used to carry out the executions were performing properly. The showing that was made by the plaintiff was that it wasn't that there had been 13 executions and that there had been problems in the majority of them that were demonstrated by basically undisputed evidence. I was faced with this decision where I had to decide whether to allow an execution to proceed. The defendant in the capital case, the plaintiff in my case, as most capital cases are the crime was absolutely horrific, and the evidence was very, very strong. There was no question about whether he was guilty nor was there really any question as to whether the death sentence was appropriate given the death penalty.

I'm not going to go into that moral issue now, but just the criteria that were in place at the time, but there were problems with the protocol. There was pretty compelling evidence that there were problems with the protocol. So I needed to do something about that because the problems in the protocol would have resulted in anybody being executed under it being exposed to a level of suffering that the state stipulated was unconstitutional. It was not a question of my beliefs. It was actually an undisputed fact. So I stopped the execution. Then there was proceedings for quite some time after that trying to figure out what the remedy was going to be, and then a lot of other stuff happened, and there haven't been any executions since then.



The point is that my job in that case was to decide a very discreet issue which was, was there an unconstitutionally great risk of suffering that violated the Eight Amendment? What happened in the actual event was that it was seen by the public as a case that had to do with whether the death penalty is a good thing or not, whether Mr. Morales the plaintiff deserved to die or not, whether the victim, Terri Winchell, deserved retribution for what had happened to her, and that's what everybody got excited about. There was a firestorm that was all about that stuff and had nothing to do with the decision that I made. I had to live with that. I was saying in the green room that I'm so grateful that it happened before anybody had heard of social media. I got some nasty mail no question about that. I got some letters saying that I was an idiot, and so forth. I got some email. There was email then, and I got some email saying essentially the same thing, but it was a couple hundred letters and emails.

Today, if I had made that decision, or if social media had existed then there would have been millions. I assure you millions of responses. There would have been death threats. There were former colleagues of mine in the federal courts who had that type of response. Decisions they made in cases which were much less incendiary than the case I decided, but even so I was afraid to leave my house for several days. There certainly was a level of trauma that I experienced that it took me a while to work through. Actually, writing the article that Jeff quoted helped me work through that because it was really reminding myself that that's my job, and people could disagree with the decision we made, or not, but it was from the beginning it was about what the law required. It wasn't about how I feel about the death penalty. It wasn't about how I feel about Michael Morales.

I had to come back and anchor myself to the reason why I was doing the job. Justice Guzman and Judge Breyer said it absolutely perfectly I think. Your job is to decide the case based on the facts and the law. It's not to stick your finger in the wind and figure out what the public wants, and it's not to go off in directions that don't have anything to do with the case before you. I'll just finish by saying a couple years later a group of people who don't like the death penalty wanted to honor me for making this decision. I said, "I wish you wouldn't do that because I didn't make my decision because of any feeling I have about the death penalty. It was a decision I made because I'm a judge whose trying his best to follow the law." So that was and still is the hardest case I think.

Jeffrey Rosen: [00:38:53] Justice Moreno, you were the sole dissenter in the prop eight case where the court upheld the anti-gay marriage proposition, and you made that decision at a time when you were being considered for the Supreme Court by President Obama, which made the decision especially courageous. Describe whether that played any role in your decision, and how you dealt with what you must have known would be considerable pushback.

Carlos Moreno: [00:39:22] Well, I mean, absolutely that didn't impact how I felt about that case. Actually, the matter had been already argued before us some months before that period of time when I was on the short list. I felt very strongly about affirming our earlier decision in the marriage cases finding the Family Code statute to be unconstitutional. What was difficult about my position was not so much the public exposure, but to find a way that I



could in a principle way find that the measure of proposition eight itself was unconstitutional, so together with my various law clerks I had written earlier about the distinction between an amendment and a revision of the constitution. I mean, judges are obligated to follow the constitution, and if you recall in this case the constitution had been amended by proposition eight.

Therefore, I was obligated to follow the constitution so in that sense my hands were tied, but the device if you want to call it that, that I used was that there were so many constitutional rights that were implicated in that proposition whether it's the right to privacy, the right to marriage, and so forth that the only way that the constitution could properly be amended was by constitutional convention. I didn't get any votes, but I think I just had to stick with that decision because I thought that the constellation of rights that were implicated by proposition eight was not the right way to really fundamentally change that fundamental right.

Yeah, I just wanted to say something about the death penalty, though, because that was from the court. I probably participated in about 200 death penalty decisions, most of them were affirmances, so you do develop kind of an attitude towards cases, and as Jeremy pointed out generally you see the worst of the worst. I mean, there are disparities from county to county in California, but putting those aside the main concern I had about the death penalty, and I can say this now because I joined a rebuttal statement in one of the elections, I think, it was 2012. My position was that for the expense that these appeals, and the habeases in federal court and state court go through, and the lack of deterrence, the disproportionality of who you kill and where you live, all of that stuff, and then the lack of trained attorneys who can really handle that speciality of death penalty appeals and habeas even Chief Justice Ron George and others have said, "The system was dysfunctional and broken."

My opposition to the death penalty in that ballot statement was basically addressed to that, but in terms of another trial there might be trial defects as well. Putting those aside, I mean, I had some concerns about certain trial defects I don't need to go into, but that was the principle reason that I was against the death penalty, but when you mention the most difficult case, and I think some of the federal trial judges would appreciate this. The cases that I actually struggled with were the illegal entries with was it two prior, two predicate felonies? Sentencing someone who came to this country when they're two years old, didn't speak Spanish, no relatives in whatever Latin American country they were from, and here they are they have a family that's in the audience, and then the guidelines required at least at that time, we didn't really have a early disposition program in the central district. I think San Diego did, but to sentence someone to eight years I think I sentenced some for eight years in federal custody only to be deported he'd be deported to a country that he really had absolutely no memory, no connection to whatsoever. I mean, I had to follow the law. I mean, I could depart in some rational way, but not a lot to make a difference, so to me personally those were actually the most difficult sentencing decisions I had to do.

Jeffrey Rosen: [00:44:31] Judge Tacha, you had an extraordinary range of cases from Eight Amendment cases examining whether exposure to secondhand smoke is cruel and unusual



punishment to some really important equal protection cases involving domestic violence. What was the toughest? Was there a case in which you feared that you were not separating your political from your constitutional views where you might be succumbing to fear of public criticism where you really struggled to make the right decision?

Deanell Tacha: [00:44:58] Well, this is where you're probably not aware of your own implicit biases because I'd say, no, the answer to your question is no, but to the original question that you ask, and I think, and I, and to the process that a judge follows I'll tell a story on myself, Eight Amendment story. Again, death penalty story in our circuit. The states all had the death penalty along with the federal government. I was a very new judge, and it goes to what some of the panel before us said, too, there's Baby Judge School, but there's learning to be judge, and there's a big difference. I had a very difficult death penalty case as the panel author, and I followed the state involved it was Oklahoma it was a matter of record. I followed the line of cases on whether the death penalty was appropriate, and their standard was whether it was heinous, atrocious and cruel, so I followed all the cases, and we did a really good compendium of the outcomes of all those cases.

In the panel opinion I affirmed and upheld the death penalty. My court voted to rehear the case to the point that was made earlier. I changed my position, and I wrote the en banc opinion going the other way, and here's why. It's a matter of process. I took all those cases every single death penalty case from the state of Oklahoma up to that moment, and we dissected the facts of those cases individually case by case to see whether the state courts, this was habeas, see whether the state courts had uniformly applied the same standards to the same set of facts, so that for months I had a law clerk, and I, who were working on this table of what the facts were, so it wasn't only a matter of following the cases.

I, finally, in the end decided we have got to go delve into the facts of these cases, and the en banc opinion came out the other way, so to your original point, and that's an example of how judges work behind the scenes. It was because of the en banc rehearing process a lot of discussion among the judges. I'd challenge anybody to be in a harder meeting of any group anywhere than an en banc rehearing meeting of a court of appeals, and I assume the Supreme Court, but I've only seen the court of appeals. They are the most thoughtful, careful, non-emotional law related discussions there are, so what the public doesn't see about the decision-making process is it is made better by the quality of the court, and the quality of what is insisted upon before you come to a final decision, so that one was hard.

The secondhand smoke one I got to just say I got reversed at the Supreme Court. This was before we really knew how bad smoking was, but it's another example of how the court works together. It was a garden variety pro se case. I wrote a really short opinion saying, "Putting a smoker with a nonsmoker in a cell is not a violation of the constitution." Duh, at the time. Well, one of my colleagues said, "You know, Deanell, I think we better look at this. There is some evidence out there." And this was a pro se, so you have to construe liberally and all those things. So, well, fast forward we continued to hold that it was not a violation of the constitution and guess what? It turned out to be a violation of the constitution, and I got all kinds to the point of long before social media I got the funniest, funniest cartoons and letters. One of them was the warden of the prison with a napkin over his wrist saying,



"Would you prefer smoking or non-smoking?" So the process itself works very, very well when you work in a collegial court, and you put your colleagues to the test of what the evidence is, what the law is, all of those things, so there's kind of two examples.

Jeffrey Rosen: [00:49:55] Great. Well, Jeremy, unsurprisingly, since we picked the judges so far the audience has examples of models of reason rather than passion both current and former judges resisting pressures and making the right decisions, but you've had a bird's eye view on your life of judges. You've taught them and describe the role of a judge as closer to a clergyman than anything else. The need to set aside your ego to be governed by the truth. What I want to just ask you candidly is do you believe that the pressures of social media are as Judge Breyer said polarizing judges leading them to seek the approval of the crowd sometimes making the popular decision rather than the wrong one? Give us a specific example or two of cases where you think that actually is happening.

Jeremy Fogel: [00:50:43] Yeah, so let me answer your question this way. I don't think it's quite as linear as that. I certainly don't know of any judges who wake up and read Twitter and then they just figure out that's how they're going to decide their cases that day. I don't think it works like that, but I do think that what's happened is that it's harder and harder to insulate yourself from what's going on in the community, and you don't even have to be a Twitter follower. I mean, I am, I don't tweet, but I follow. You see the stuff people are saying, and you see the ways people are perceiving things. I think somewhere it embeds itself in your consciousness. And then you see things happen to people, and I need to mention a couple. The travel ban cases, well, which there were several, but the first one was decided by Judge Robart in Seattle. Just because it seems relevant to say this, Judge Robart was appointed by George W. Bush, he's a Republican, so he wasn't somebody that's always one of those liberal activist judges, and he's not, but he decided this case, and he decided it against the administration.

He got in a relatively short period of time over a million hits on Twitter and other social media, basically, suggesting that he was a traitor. There were people threatening his life. Some of the death threats were credible enough that the Marshals had to provide security for him. I've talked to him he's a friend. He said, "It was incredibly traumatic for him to have gone through that experience." And all he did was ... Actually, his hearing was videotaped. The Ninth Circuit you can have cameras in the courtroom, so his hearing is actually there's a video available of it, and you can watch it. At least from my perspective, and I know that I'm looking at it as a former judge he was a model of decorum. He listened to everybody. He was very careful. He was very thoughtful. Everybody had a chance to make their arguments, so I'm watching this thing this is great, I mean, people should see this because this is what judges actually do. That didn't stop people from just pillorying him on social media, and it had effect on him, and he's a federal judge with life tenure.

So then you go to the state courts. We haven't really talked about the state courts. We have a federal heavy group here, although, Justice Guzman is a state court judge. Then you're talking about people who don't have that protection. They have to stand for election in most states. They're in smaller communities. I mean, judges in small counties where you can't go to the grocery store without running into somebody who knows you as a judge, and then



you add social media to that, and there literally is nowhere to hide, and you have people who don't understand what you're doing. So it's a real problem, and I think that it is an added stressor for particularly state court judges, but it's a stressor for federal judges, too, to know that there's this chatter going on, and that so much of it is not informed. That's not to take anything away from the public's right to have opinions. I mean, we need to do a better job of explaining what we're doing and why we're doing it, but it seems to me the fact is that there's a lot of disinformation and misinformation.

I'll just mention one other case since I already mentioned one very controversial case I'll mention another one. It's not one of my cases. It was a case that happened in San Jose, which is where my life was until I went to the Federal Judicial Center. We had a judge on the Superior Court there who decided the Stanford swimmer case. It got international attention, and who ended up being recalled because he had made this decision that was perceived as being too lenient. I'm not going to weigh in on this. I mean, I will say because I'm being candid, and I can be now, I would have given a different sentence. I would have given a more severe sentence than he did, but that's irrelevant to the point I want to make, which is that the case became about how do you feel about sexual assault? That's what the case became about just like my case was how do you feel about the death penalty? It became about how do you feel about sexual assault.

We need to make a statement that the treatment of people who commit sexual assaults is too lenient, and this is the way we're going to make the statement. We're going to hold this judge accountable for giving a sentence that was recommended by the probation officer was within the legal range articulated. There was nothing from a legal standpoint wrong with what he did. It raises a question of what we're doing, right? I mean, where's the line between judges making decisions based on the law and the facts, and then the public's desire in a given case for a particular outcome. I think that's an incredibly stressful place for judges these days, particularly judges who have to stand for election. I think it's been amplified enormously by social media, so that's my answer.

Carlos Moreno: [00:56:09] I'll add to that since I've served on both the state bench and the federal bench. One of my predecessors on the California Supreme Court, Justice Otto Kaus famously said, "It's hard to ignore the crocodile in the bathtub while you're shaving." That was before social media, but I think that by and large I think my colleagues would agree, I mean, judges bring a degree of integrity and fidelity to the law and they decide on basis of principles, and legal principles, and so forth, so I don't have any qualms about that, but I think what's happened in the last 10, 15 years I'd say is there's a perception now that judges are predisposed. One example would be based on who was the executive, the governing authority that appointed them. It was an election here in San Francisco. It didn't matter if the judges were actual Democrats or Republicans, but if they were appointed by a Republican a group from a certain office opposed those judges just on the basis of that perception. So perception now seems to control the day, and the general public. I mean, they do look at Judge Judy, of course, but they think that judges are partisan, and that they come to cases predisposed they rule a certain way. I think that's not true. It's completely inaccurate.



Jeffrey Rosen: [00:57:50] Judge (inaudible) should judges tweet? State judges-

Carlos Moreno: [00:57:58] Absolutely not.

Jeffrey Rosen: [00:57:59] You said absolutely?

Carlos Moreno: [00:58:00] Absolutely not.

Jeffrey Rosen: [00:58:01] Absolutely not.

Carlos Moreno: [00:58:02] Yeah.

Jeffrey Rosen: [00:58:02] Is there a difference between the state and federal bench in that regard state judges have to be politically appointable as Justice Guzman said?

Carlos Moreno: [00:58:09] You know, at least in California I don't think there's really ... The code of conduct would ban their prescribed judges tweeting. Even I'm now an arbitrator and one of the questions in the forms the disqualification forms we fill out, are we active on Facebook or any other kind of social media because lawyers now they'll search a whole history on your views and so forth. That's all discoverable in litigation as well, so I would askew any kind of activity of a political or judicial nature on any kind of social media because in the line of work that I am now in if I were presenting my views on social media a creative lawyer who was unhappy with one of my rulings could claim that I was predisposed in the outcome of the case reflected that bias.

Jeffrey Rosen: [00:59:16] Judge Tacha, what do you think about tweeting judges? I know that for James Madison the idea of even tweeting presidents would have been anathema because he said, "Any direct communication between representatives and the people would encourage passion rather than reason. Judges are supposed to be even more insulated." Is there a danger that tweeting judges will play to the crowd and be susceptible to being swayed by the passions of the crowd?

Deanell Tacha: [00:59:39] I'm sure that I fall into the Judge Breyer category of being of a certain age and not knowing how to do anything, but I will have to say, and easy for me to say because I have never been a state judge, and have never had to run for election, but I believe whether you're a current judge, or a former judge you have a role to play in modeling for the rest of society what civilized discourse and civilized disagreement looks like, and allowing each side in a controlled environment to have its say is really important. Also, this whole notion of judges being because of who appointed him, or being partisan politicians it seems to me encouraged by every modicum of a judge taking sides before he or she has heard the case, been involved in it, decided it.

We have a job to do, and it is to say to the public there is a third branch of government here, and the third branch of government takes an oath to follow the law. We do the best we can to come to the right result. Now if that does not answer the tweeting question, and my friend, Justice Guzman, I suspect doesn't tweet about the outcomes of cases, or anything like that. I suspect, although, now I'm going to have to figure out I'll get some kid to show me how to look at her Twitter thing.



Jeffrey Rosen: [01:01:17] It's not that hard.

Deanell Tacha: [01:01:19] No, I actually do have Twitter on my phone. I almost never look at it for totally different reasons. I find it distracting, but if anything verged in social media on calling into question the judges view on a case, or attorneys, or on litigants, or the kind of issue involved, or anything that verged on the substance it would really be for me the kind of thing that would at least challenge my understanding of the impartial judge.

Carlos Moreno: [01:02:01] Let me just add to that and that is that I don't think judges should be recluses or ciphers. They're human beings they should participate in society, but I do think we have I think you were hinting at this, Deanell, is that we have an obligation to do public outreach, to educate the community, students, law students, the general community, the different clubs that exist out there so in that sense we are public figures, and I think we have an obligation to educate the public on the legal system.

Jeremy Fogel: [01:02:34] I completely agree with that. I would just say that I'm not sure we're doing it entirely the right way. I think the civics education part of it is necessary, but it's not sufficient. I think it is important that people understand how judges are different from legislators, or different from executive. I think that's very important. I think it's great when students come to courtrooms, and they see what judges are doing. I had a junior high school class come to my courtroom a number of years ago, and really what they were most interested in was the leg monitors that the people were being given when they were put on supervisory release, but, I mean, at least they were getting a sense of how things work.

I think what we're not doing, and really this had something to do with why we wanted to do this program is we're not really telling our story, and I think we're trying to do this tonight. I think we're going to keep trying to do it we're trying to tell our story, but this is a profession that we have, so I was very grateful to Michael for the podcast. This is a profession, and the profession has principles. The profession has values. Every judge I know with very, very few exceptions, and I've known thousands of judges really tries to emulate the values of the profession, and some do better than others, but I don't think the public really understands what those values are. I think to a large extent that's on us. We don't do a good enough job of talking about what we do, and how do we do it. I think that's a missing link.

Jeffrey Rosen: [01:04:12] Can I just ask you?

Jeremy Fogel: [01:04:13] Yeah.

Jeffrey Rosen: [01:04:13] We're going to go to questions in a moment, but this is your chance because we held this program to educate the public. You talk about the need not only for spiritual integrity setting aside your ego, but for mindfulness, for tuning in during a sentencing hearing not getting bored and distracted, but actually deep listening to the human stories in front of you, and now judges are confronted with these new pressures that are so polarizing our elected officials that our society is retreating to armed camp, so psychologically and emotionally what can judges do to maintain the ideals of impartial deliberation that are necessary for the future of the republic to survive?



Jeremy Fogel: [01:04:53] I'll send you my check for asking you that question.

Jeffrey Rosen: [01:04:56] No, no.

Jeremy Fogel: [01:04:56] No, no, no, no. I mean, this is really important.

Jeffrey Rosen: [01:04:59] Yes, it is.

Jeremy Fogel: [01:05:01] When we founded the Berkeley Judicial Institute what are the three things we care about? One of them is ethics. One of them is independence, and the other one is resiliency. It's what you're asking about. It's how do you keep judges psychologically healthy so that when they're dealing with these awesome responsibilities that they have how do you keep them attentive enough, and managing their stress, and managing their emotions, and being present for people so that they can do the job right so that the people who come through the courtroom have a positive experience, have a sense that they were taken seriously and respected and listened to. I mean, this is what we aspire to. We want people to have this experience of procedural justice, and being respected. We also want to be able to take care of ourselves and not burn out. I think this issue of resiliency and what judges need to be resilient is enormously important. We're just really starting to get a handle on it. I think mindfulness is part of it. Self-care is part of it. Just learning about active listening is part of it. Dealing with implicit bias is part of it. It's getting yourself right to do the job and live up to the professional standards.

Deanell Tacha: [01:06:20] Could I just add to that? This is from somebody whose left the bench, so easy for me to say, but I believe that in the name of being impartial, and not have conflicts of interest, and not violating the codes of ethics to some extent the judiciary and this is a terrible generalization has withdrawn a bit from the community. For me, maybe the most important thing that a judge must do is remain in constant contact with the community outside the courtroom. It might be a 4H club, it might be a Sunday school group, it might be your local hospital, it might be the homeless shelter. I don't care what it is, but I have seen numbers of judges who say, "Oh, I don't I better be on that board." And by the way, the codes of ethics lets us be on educational and philanthropic boards, or for sure we can work in soup kitchens, or whatever else it is.

I have heard way too many colleagues across the country say, "I just worry that I'm going to run into somebody, or the newspaper is going to be there." Wrong answer. I think one of the things that keeps us rooted, and one of the things that I think made me a better judge was I was burning the candle at all ends, working in schools, doing all kinds of philanthropic work in my community. As I reflect back on how I approached being a judge I believe I approached it, I hope, I approached it as a solid member of the community that when they saw me in the grocery store they didn't just immediately think federal judge. They thought, "Oh, yeah, she's on the board of the arts center, or she's working with the homeless shelter." We have got to be identified with our communities along with our courts.

Jeffrey Rosen: [01:08:26] So, Justice Moreno, you have the last word before the questions, but I'll just note that you have talked very movingly about the support that the Latino community has given you at every state in your career, and I want you to describe what is



the right way for you to interact with our community in a way that avoids being partisan, but nevertheless, sensitive to their needs?

Carlos Moreno: [01:08:45] Well, a long time ago a drama schoolteacher wrote in a book that I still have I think as I was going off to college he said, I think, quoting Aristotle said, "Remember, that you are a part of all who you have met." So, I mean, I come from a Latino community working class background, et cetera, so that sort of phrase always sticks in my mind that I came from these roots much like Eva did, and that's part of who I am, and that leads me to the question I wanted to answer.

Jeffrey Rosen: [01:09:25] Please do.

Carlos Moreno: [01:09:25] I heard from the Judicial Appointments Secretary, Marty Jenkins, he asked Governor Newsom what are the qualities he wanted in judges? He laid out courage, commitment to public service, intellectual capacity, ethical behavior, humility, and other factors. They're all important, but then he said, "Governor, what is the most important factor you want in the judges that you're going to appoint?" And Governor Newsom said, "Humility." I think that's very telling, and it's along the lines of what you said. Humility, the Latin root is probably human that we'll all human. We all have to be humble, and you have to recognize where you came from, where you are, and your obligation to do justice.

Jeffrey Rosen: [01:10:19] That is a wonderful quality to sum up. Judges from Judge Hand to Justice Ginsburg have noted that the spirit of liberty is the spirit that is not too sure that it is right, and humility is a quality very elusive in our polarized time when both red and blue camps are so certain of their own premises that we've forgotten Justice Holmes' admission that the constitution is made for people of fundamentally differing points of view, and it gets to Jeremy's notion that ultimately it's a spiritual task of setting aside your ego, being open to others, and letting the light flow through you. We have time for one or two questions.

Speaker 11: [01:10:57] Can I ask you one?

Jeffrey Rosen: [01:10:58] Please.

Speaker 11: [01:10:58] Question here. I'm a trial lawyer and I've been a trial lawyer for 36 years both in California, and Justice Guzman's jurisdiction where I started. I've been sitting here increasingly feeling that I believe very much in the model of judging that I think the panel has described and it's pretty consistent. I think it's a vital thing and our rule of law depends upon it, but it's been my experience increasingly over the last several decades that it doesn't fully fit the judiciary. I would have assumed that judges decided the way you all described when I started, but in areas including Texas, including the Fifth Circuit where there's been decades of a very politicized selection process. There also are judges who I would not characterize that way, and I think you could show from the results. I worry greatly when I see all the normal checks and balances of federal selection for the federal judiciary being discarded, so my concern is you've described the model of the best judges, but what do you see that's happening now because I don't think there's a culture so strong in the judiciary that it doesn't matter who gets appointed it will then cure problems with the appointment.



Jeremy Fogel: [01:12:18] I think that's a fair question. I think is a troubling question because I think the culture is strong. It's not so strong that it's going to get everybody. You could always try to find people who don't care about it, or who have an agenda, and it goes back to what my friend, Chuck Breyer said. I mean, it's very important not to have an agenda. We have life experience, and I think in every judicial selection process that I've ever seen, and I've read about going back to the founding of the republic the life experience of judges makes a difference. I mean, you see it around the edges of their decision-making just how they see facts, what they think is important, how they use their equitable powers so you're going to get differences, but it's all within a framework of a legal culture, of a process that we all are committed to. So the fact that you have even significant differences between say the Fifth Circuit and the Ninth Circuit to me that fact in and of itself is not a bad thing, but I do think the premise of your question concerns me.

When you start appointing people not because they're going to be good judges, but because they're going to be committed to a particular agenda in an unswerving way, yes, that concerns me, too. Now whether that is happening and whether that is happening to a degree that the strength of the judicial culture won't turn it around, or that just the political process over time will correct whatever tendencies are there I don't know, I mean, I can't look into the future. I think it is something we need to be very careful about, and I don't it's something that this is not about the current administration or some future administration. It's when any president starts to appoint judges solely because the president thinks that the judges are going to vote certain ways all the time then we really are in trouble. I think it's a reasonable concern to raise. I do maintain a certain degree of optimism.

One of the things I liked about the FJC job so much was I got to go everywhere, and just since you mentioned the Fifth Circuit I spent a lot of time in the Fifth Circuit, and I think there's a lot of strength there. It's a much more conservative area than California, and is going to be reflected in a lot of decisions, but I'm not ready to throw the whole thing out on the theory that it's hyper partisan, so I just think it's a good caution flag to raise. I'm not quite ready to raise the red flag yet.

Deanell Tacha: [01:14:55] May I just add one thing to that? I don't think it's only the executive. The legislative branch, the Senate, because of their role has a role to play here in also modeling constitutional values, and understanding the difference between the legislative process and the judicial branch and its process. I think for every citizen out there voting when you are thinking about your candidates and talking to them one of the issues is whether you're talking to them directly not about the outcome of a judicial appointment, but rather about what judges should do, and must do for the future regardless of who the administration is. We only have checks and balances if all three branches work the way they're supposed to.

Jeffrey Rosen: [01:15:52] Wonderful. Well, Jeremy I'm so grateful for this collaboration between the Berkeley Judicial Center, and the National Constitution Center. Let us keep this conversation going, take the show on the road, and continue to illuminate the human side of judging. Please join me in thanking our panelists.



Tanaya Tauber: [01:16:09] This conversation was presented in partnership with the Berkeley Judicial Institute at Berkeley Law. This episode was engineered by Greg Scheckler and produced by me, Tanaya Tauber, and Jackie McDermott. If you enjoyed this constitutional conversation please rate, review, and subscribe to the show, and tell your friends about it, and check out our companion podcast We the People, a weekly show of constitutional debate that's available wherever you get your podcasts. On behalf of the National Constitution Center I'm Tanaya Tauber.