



**JUSTICE STEPHEN BREYER**

**In Conversation with Jeffrey Rosen and Paul Holdengräber**

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**LIVE from the New York Public Library**

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**Celeste Bartos Forum**

**PAUL HOLDENGRÄBER:** Good evening, ladies and gentlemen, my name is Paul Holdengräber, and I am the director of LIVE from the New York Public Library.

Although a summer has gone by and a new motto should have been found for what LIVE from the New York Public Library stands for, I will still persist and say one more time that my goal here at the Library is to make the lions roar, to make a heavy institution dance, to make it, as it were, levitate. It is a pleasure to welcome all of you to our Fall LIVE from the New York Public Library season and to our opening night with Associate

Supreme Court Justice Stephen Breyer and author, legal scholar, professor Jeffrey Rosen.

Later this season, I invite you to come hear conversations between Angela Davis and Toni Morrison, David Grossman and Nicole Krauss, Antonio Damasio and Marina Abramović, Ruth Reichl, Rene Redzepi, and David Chang, an evening celebrating the *National Lampoon*, and the Robert Silvers Lecture, given this year by Derek Walcott as well as evenings with Lady Antonia Fraser, Keith Richards, Zadie Smith, and Jay Z.

Keith Richards has written in his upcoming autobiography that when he was a child there were two institutions that mattered to him, the church, which belongs to God, and the library, which belongs to the people. He has said that the library is a great equalizer. I would like to encourage all of you to become Friends of the New York Public Library. You will get discounts on all LIVE tickets and much more. I would like also to warmly thank tonight's sponsor, Sutherland Asbill & Brennan, a proud supporter of the New York Public Library and a member of its Lawyers for the Library committee. Founded in 1924, Sutherland provides legal services throughout the United States and worldwide to diverse clients in seven major practice areas: corporate, energy and environmental, financial services, intellectual property, litigation, real estate, and tax. Many thanks to Sutherland for their continued support and trust.

As always, I would also like to thank our independent bookseller, 192 Books. Supreme Court Justice Judge Breyer has agreed to sign his new book, *Making Our Democracy Work*, after our conversation. Our conversation will last about as long as a psychoanalytical session when your shrink is generous. **(laughter)** Stephen Breyer is an Associate Justice of the United States Supreme Court. He was appointed to the Supreme

Court by President Bill Clinton in 1994 and confirmed by the U.S. Senate in an 87-to-9 vote. He took his seat on the Supreme Court on August 3, 1994. In 2005, he published *Active Liberty. Making Our Democracy Work: A Judge's View* has been just published, is just out. It's a pleasure to welcome Justice Breyer.

**(applause)**

Jeffrey Rosen is author of *The Unwanted Gaze: The Destruction of Privacy in America*, which came out in 2000. He recently published *The Supreme Court: The Personalities and Rivalries that Define America*, 2007. Jeff Rosen is a professor of law at George Washington University and the legal affairs editor of the *New Republic*. You will also often and to great effect hear him on National Public Radio. The Los Angeles Times has called him the nation's most widely read and influential legal commentator. In 2003 his wedding was officiated by Justice Ruth Bader Ginsburg of the Supreme Court and officiated at the Arts Club of Washington. I would like to acknowledge and warmly welcome Jeff's parents, here tonight, as well as members of Stephen Breyer's family. Please welcome to this stage tonight at the New York Public Library Jeffrey Rosen and Supreme Court Justice Stephen Breyer.

**(applause)**

**JEFFREY ROSEN:** On behalf of all, I'm so glad to have brought you, and Paul is here because he runs a spectacular program that is an adornment to the cultural and civic life of our country and Justice Breyer has honored all of us...

**PAUL HOLDENGRÄBER:** It strikes me that I've never done this before, I have never interviewed or had a conversation with someone where there have been two interlocutors. I am particularly pleased to be welcoming Justice Breyer, and I want to explain very quickly that about four years ago, I met Justice Breyer at Sun Valley at the writers' conference, and I had no idea that in meeting a Justice from the Supreme Court I would be meeting a man whose interests are not only legal in nature, but with deep interests in literature, and I am particularly interested in speaking with him about that in a certain context. Here to assist me, and really for the meat of the evening, as it were, we have Jeff Rosen. Jeff will address the more important, one might say, appearance of this new book and will in some way talk to us about why this book matters now. I would like to ask the Justice, though, to start—I would ask the justice now why he wrote this book at this particular moment and why this notion of—what this notion of workable democracy means?

**STEPHEN BREYER:** Well, first let me thank you for inviting me to the Library, and I apologize for being late. They were showing me these terribly interesting things—Walt Whitman's manuscripts, Dickens's chair, I tried sitting down in that, I thought it might do me some good. My son, Michael, is now a library commissioner in San Francisco, so I'm going to say, "you can improve the library quite a lot if you just get the collection from here and move it out there." It's not a bad idea. So thank you.

Your question. Why did I write this? There are a number of reasons, some are quite personal. In part it reflects an interest of my looking back after sixteen years on the court

and wondering to myself whether the cases fit together in the kind of approach, or whether it's sort of decide this here, decide this there. I think it was the first, which I was hoping. But the more general reason is this. When I appointed, Harry Blackmun, my predecessor, told me two things. First, he said in a slightly facetious way, "you're going to find this an unusual assignment," and that was true, but secondly he said that he's learned that the American public has an unquenchable thirst to find out what this institution is, the Supreme Court, and he said, "When you have the chance, tell people what you do," and I've taken that to heart, and I can't speak to everyone, a certain number, though, more than I speak to, might read this book and if they do then they'll see my effort to say what this institution is from my perspective. And, after all, I only know it from my perspective, really, I think – and many people before have said this – but what we know best is our own thought processes, and the reason if I write from my perspective, that publics may see something, is they'll see it as one justice looks at it, and I've tried to be as general as possible in a way as noncontroversial as possible.

I want to explain what the institution is about, and I'm doing so for a reason, I believe it's important for people to support it in this country and have the idea of an institution like ours. Hamilton had a problem. When Hamilton wanted to have a constitution that could be enforced, he writes in Federalist 56, we should have someone who can enforce it even against the law of Congress, because, if we don't, it will be like—more like the Met than like the library, the document, this document would be a nice document to hang on a wall, to look at, perhaps as a work of art, but it won't be effective. And then he said, "Who should have the power to enforce it? The president? If the president does, then he will become a tyrant, he already has enough power. What about Congress? They're

elected.” But there, he said, lies the problem. Because they know how to be popular, there is no one who knows better. In fact, if this is to be enforced, many times, it will be have to be enforced in favor of people who are intensely unpopular. And do you believe that Congress often, having passed a law that made us popular, will then turn around and say it’s unconstitutional? And so he said, “We do have one other group of people, sort of obscure bureaucrats, judges, no one’s heard of them, they’re not very powerful, they don’t have the power of the purse, they don’t have the power of the sword and they’ll probably try to do their job, they won’t be too aggressive, and so they’re the ones we have to give the power to.”

Now the question he never asked was this: If these judges have neither purse nor sword, and few have heard of them, and the decisions they make will sometimes be very unpopular, why will anyone do what they say? Good question. That’s Hotspur’s question, you know that probably, in Henry IV, Glendower, who’s Welsh and therefore mystic, **(laughter)** says “I can summons spirits from the vasty deep,” and Hotspur replies, “Well, so can I, so can any man, but will they come when you do call for them?” **(laughter)**

Now, I want to write a little bit about history, so that people understand the fragility of this institution. I want to tell them stories about when presidents didn’t follow the decision of a court, and I want to tell them other cases, as when President Eisenhower sent paratroopers to enforce desegregation in Arkansas, some of us remember that. And I want to show people overall that it’s a strong institution but still fragile. Neither as fragile as it used to be, nor so strong that we can count on it forever, and of course I’m helping build support by showing what we have to do, and I want to explain to people, too, how it

looks when I do it, and there, to be very honest with you, I think if I ask in this room, “What is it that leads to these decisions?” you will all say “politics,” or many of you will, and many people will because what they read is what they see in the press, and the press’s interest in decisions that are very controversial from a political or social point of view, but that’s not what the job looks like inside, so I’m trying to explain why I think that word is not a very good description of what we do. I can’t say zero, but I’d say that if that’s the word you’d use, it’s a gross exaggeration, so I want to show what that’s like, and overall, I want people to try to learn the history of the court. What is this about last word, it’s an effort to do what Sandra O’Connor does every day and so does David Souter, to say, “Please, can we not return to a room where there is such a thing as twelfth-grade civics taught in the classrooms of the united States?”

**(applause)**

**JEFFREY ROSEN:** Now, Justice Breyer, twelfth-grade civics doesn’t do justice to this book, because one of its many pleasures is that it was written for the citizens as adults. You deal with complicated subjects and technical cases. You summarize them clearly for nonlawyers without simplifying them, and you make a nuanced, complicated argument that’s fresh and surprising and I want to ask you about different aspects of it. So you’re trying to answer Hotspur’s question, and you’re trying to say how can the court ensure that its unpopular decisions are accepted by the public, how does it maintain its legitimacy, and you give a bunch of reasons. The first way you say the court can do this is choose a method of interpretation that the American public can accept and you say that’s an approach called “living Constitution,” you say most people support that

approach and that they don't favor an approach based on the original understanding of the Constitution.

I'm pleased to report, Justice, that I did just a little research on this question to try to impress you with my diligence, and I found that you were right, actually, **(laughter)** a Columbia scholar, Nathan Persily, has done polls asking people, "Do you prefer the living Constitution or the original understanding approach?" And over a period of three years he found that 54 percent of the population supports the living Constitution approach and only 44 the original Constitution, and what I want to ask you, Justice, is does this matter? There are people marching on the Mall, the Tea Party people, waving the Constitution and saying we have to be originalists, say they persuaded the country and a majority came out the other way, became originalists. Would you then be an originalist?

**STEPHEN BREYER:** No, I would not. **(laughter)** Professor, one thing that isn't relevant when we're deciding a case, or deciding an approach to a case, is whether it's popular in a public opinion poll. The whole point of what we do, after all, is try to decide the application of the law, often a very difficult question, in instances where its very purpose in that Constitution would make it unpopular. I would say whether it's me or my colleagues, the number of times where a decision would change because an opinion poll showed the opposite was more popular, is near zero. If there's one thing that the nine of us understand is that. I mean, there are other problems, there are other difficulties, but that I feel.



Now, I'll make two other points. One, remember how I say I will answer, they can't know that, they haven't read that, but they might be interested in the answer, a great question asked me by a woman who is chief justice of Ghana. It's the kind of question I get often. She wants to make her court a better protector of basic rights and democracy, a more powerful institution in Ghana, and I get this question often from her and similar people, "What's the secret? What's the secret?" And my response is normally "I don't know. There is no secret." This document's brief, it's understandable, it's been around for a long time, but the secret, I think I'd better tell you a little history.

I'll do it in a much more summary way that I've done it in this book, but it's a history that's brought us to a world where we by and large accept decisions—think of *Bush v. Gore*. I was in dissent, that was not popular, and for me it was wrong, and yet I heard Harry Reid say, and I couldn't have agreed with him more, the most remarkable thing about that case, greatly remarkable, was there were no violent demonstrations. There was no violence in the street, and the public was willing to carry it out, and when you look at your television and see what goes on in some other places, you can understand why I think and I know he said he thinks, and I'm sure he does, that this is a treasure for this democracy, which is after all three hundred million people, every diversity under the sun, living together, and I see it in the courtroom, under law.

The court's role—I'm not saying that the court can command obedience, and I am not saying that what we do will make the difference to that, it's education that will do that, it's learning our history that will do that, but I'm saying the court has a role here, too, and the court's role here too even if it isn't the most powerful psychological factor is to try to

make the law that it enforces, whether statutory or constitutional, something that works better for the public, and then I explain what that means in about a hundred and fifty pages, **(laughter)** so I can't easily summarize it.

**JEFFREY ROSEN:** Let me ask you about the history, which is the first part of the book, and the stories are riveting. They're familiar cases to those of who are junkies, but you come up with fresh insights and surprising details. Each of the stories is complicated, but let me just try out a pattern that struck me as I read these four cases. Justice Breyer talks about the story of clashes between four chief justices and four executive officials.

Thomas Jefferson versus John Marshall, John Marshall against Andrew Jackson on the Cherokee Indians, Abraham Lincoln against Roger Taney in the Dred Scott case and finally Earl Warren against the governor of Arkansas, the Cooper-Aaron case, involving the integration of Arkansas schools. What struck me in each of these cases, is in the two cases where the president was strongly opposed to the court's ruling, the court backed down and or eventually lost.

John Marshall ruled for the Cherokees. Andrew Jackson reportedly said, "Marshall's made his decision; now let him enforce it," and eventually the troops were sent in on behalf of Georgia, not the Cherokees. Dred Scott was overturned by constitutional amendment. It was the other two cases. Marshall didn't confront Jefferson in Marbury versus Madison and therefore Jefferson had nothing to react to, and President Eisenhower supported Earl Warren and therefore the children were escorted by the National Guard to school, where the court came out on top. Does this pattern, if it's true, call into question

the court's ability to act unilaterally if it can only succeed when it's acting in conjunction with the president and Congress and not with their strong opposition?

**STEPHEN BREYER:** Acceptance is widespread, and that's why we want people to understand the Cherokee case. This is the 1830s. Gold is discovered on the Cherokee lands, it's in Northern Georgia, and the Georgians have this thought, "Why should they have it?" An understandable thought, perhaps, but a pretty illegal thought, and the court, with John Marshall, says "no, this land belongs to the Cherokees. You're absolutely right." Andrew Jackson said, "John Marshall's made his decision," he supposedly said, "now let him enforce it." And sent troops, you take the Cherokees where they run along the Trail of Tears, and those who survived, got to Oklahoma, where their descendents live to this day.

I want to contrast that with what I thought was a great moment, and I want people to know what happened in Little Rock. Little Rock, some of us remember, where Governor Faubus got up and said, "Those black children will not come into a white school, and I have the police, I have the militia, try it." There was a federal court order, if we would have had nine judges, nine hundred, nine thousand, he had the police, and President Eisenhower was told by Jimmy Byrnes, who was a great friend of Harry Truman, and had been on the Supreme Court when the mobilization effort, led it during World War II, and then was governor of South Carolina, he said to the president, "Mr. President, if you send troops to Little Rock, you will have to reoccupy the South. You will have to have a second Reconstruction, and the best thing that's going to happen is that they'll close the schools and nobody will get educated."

Herbert Brownell said the opposite, and Eisenhower, which was not an easy decision for him, took the 101<sup>st</sup> Airborne, which again, some of us at least in this room can remember who that was. The 101<sup>st</sup> Airborne was in World War II, those paratroopers who were hung up on steeples in Normandy and shot down when their parachutes landed them in the wrong place, and they were the heroes of the Battle of the Bulge, and Americans knew that, and that was why Eisenhower chose that division. He sent 1000 in airplanes and they came, and they took black children by the hand, and they escorted them into the school, and, of course, I think that was a truly great moment for the country and for law in the United States.

I told that story, because I like that story, it illustrates a change in attitude toward the court, towards a rule of law, which has grown stronger, not weaker, over time and I told that story to a Russian paratroop general. This paratroop general had previously been in charge of aiming missiles, and they had been aimed at the United States, and he'd been in charge of changing the direction at which those missiles were aimed, and when he came to America the State Department phoned and said we would be nice to this gentleman. **(laughter)** So he came to court and he wanted to know what some of my favorite cases were and I told him that one and I said, "So you see what that shows is that the paratroopers and the judges must be friends."

**(laughter)**

**PAUL HOLDENGRÄBER:** There was a famous photograph that went around.

**(crosstalk)**

**STEPHEN BREYER:** There are pictures, and the two photographs from that one that I think are absolutely terrific is one is a woman with her face just enraged as one of those very brave Little Rock Nine tried to get into the school and failed, and that picture went around the world and it was not a happy story being told, and then after when the 101<sup>st</sup> Airborne went in, a picture was also taken and it also went around, and it's those pictures, that change, that I think made such a difference in the rule of law, because it was after that the case went to the Supreme Court, it was after that where the nine judges signed their name all to an opinion which said there will be integration in Little Rock, and the next day you know what happened...

The answer is they closed the schools—that's what happened, and no one was educated for the next year.

**STEPHEN BREYER:** The die had been cast, the momentum had changed, and ultimately with what happened with the 101<sup>st</sup> and what happened with the Civil Rights marchers, and what happened with lots and lots and lots of other things as well as a lot of opinions ultimately led to a change of a dramatic kind in the legal situation, despite the fact and some of us can remember those signs that said "Impeach Earl Warren." So it's a good story for this reason, of course I like it because it has a happy ending.

**PAUL HOLDENGRÄBER:** But you also have stories that don't have happy endings—you also have many, yes, you're interested in the fragility of the court, the fact that they can't always convince, that people don't always obey its orders.

**STEPHEN BREYER:** Right, there in Little Rock the schools were closed, so that's the kind of thing I would like understood—the schools were closed for a year. Ultimately they reopened, and integration eventually took place, as segregation legally was dismantled. It still isn't perfect, as you all know, but the change in my lifetime is still tremendous, and it could not have been brought about simply by nine judges, though they helped, and it's the complexity of that role that I want people to try—that I want to try to explain to people, so that they see the court does play a role, not always perfectly, but it does play a role, and it's not easy to get busy people who aren't lawyers, who aren't judges, who have to lead lives that are sometimes somewhat difficult, and they don't have time between their marriage and children and five other things which we all understand, but they have to understand it enough, I hope, or will I hope understand enough to see why this institution which is there in significant part to protect people when it may be unpopular to do so, is worth supporting, even if they sometimes get it wrong, even if it's unpopular.

**PAUL HOLDENGRÄBER:** You certainly helped me read the Constitution, so you have one victory right here.

**JEFFREY ROSEN:** It's appealing and convincing when you say the court cannot totally—historically it's acted as a partner with Congress, and it should be pragmatic, but

pay attention to consequences. Now, I have to say I'm surprised, though, by one proposal that you made. You talked about the Korematsu case, that was one of the most notorious cases of the twentieth century, where the court upholds the internment of the Japanese Americans, and you don't let the solution of Justice Jackson, who said the court should have allowed the executive act, unconstitutional though it may be, in the emergency, and then struck it down later. You said that the court should have been a partner of the executive and allowed the internment but only under careful regulations the court specified, calibrating the duration of the internments, the procedures given, allowing for review, where you actually said the court should have endorsed—

**STEPHEN BREYER:** No, quite the opposite. I said that I thought the decision that was right was Murphy's. Murphy said it was wrong to begin with, and it's wrong now, and this is again a really fascinating court story. I can remember that. I was alive during World War II. I can remember the blackout shades in San Francisco, and I can remember my mother taking me in a car, we went to a racetrack, which you drive on by your way down the peninsula, and she said the Japanese in World War II, and the voice of approval, the tone of approval, was not in her voice. She thought it was terrible and then later the case came to the Supreme Court.

By the time the case came to the Supreme Court, the facts were really done, there was a General DeWitt, who was in charge of the sixth army in the Presidio, San Francisco, in January '42 when people were worried about invasion. He said, "We have to remove all the Japanese," i.e., by that he included 70,000 American citizens of Japanese origin. And

they can remove them, and now by 1944 the case came to the court, and was that constitutional?

By then, when I say people knew what the story was, there were two lawyers in the Justice Department, one named Enis and the other Burley, and they were pretty unhappy about what was going on, and they didn't trust what General DeWitt had done. DeWitt had written a report in which he said there's 700 and some odd instances of signaling to Japanese submarines from the shore, it must be a Japanese fifth column, and then he said there were five instances of sabotage. These lawyers called the FCC, the Federal Communications Commission, and they said, this is '44, they said, "Will you look into this?" They called the FBI, and they said, "Will you look into the sabotage?" Three or four weeks later, some people from the FCC show up in their office with a pile like this of papers, and they say there was not one, not one signaling from the shore. Two, the submarines, these were privates who were in the army for the first time, they'd just gotten in and they got everything mixed up, tracked every single one of these, there isn't one, and the lawyers said, "But how did you do that so quickly, in just two or three weeks?" and they said, "We did it at the time, and we told General DeWitt, so he knew what we had done."

The FBI came back and said, "those five instances of sabotage, three took place after they were already moved—removed, and the two others were people we knew. We knew which ones were the spies, and we had them on a list, and they weren't these 70,000 Americans." And J. Edgar Hoover told this to DeWitt at the time, so the department knew in 1944 what had been going on and they wrote a footnote in the brief, and it was pretty



obscure, but by the time it got to oral argument in the court, the lawyers at the ACLU made it nonobscure. They said, “Read that footnote and you will see that the Department of Justice is not buying into the theory of the War Department.”

Well, then the question comes up, why did they uphold it? And that is the mystery to me. And I have some answers, but the only one I can think of is they’re thinking in their minds, this is Justice Black, Justice Douglas, Frankfurter, the people who later signed on to *Brown v. Board*, why did they uphold this? And the only reason that I can think of is they’re thinking, “Well, there’s a war on and it might be wrong, but either Franklin Roosevelt runs the war or we do, and we can’t.”

Now, that to me poses a huge, huge problem. The problem is how does the court react in time of war or national emergency where we have civil liberties on one side and the war power and the need for security on the other? And I put in some things about Guantanamo, because to me it shows a court, I was in the majority in most of those cases, you will notice, I might tend to favor the cases where I was in the majority (**laughter**), but the point I think is that it is a court struggling to find a way to protect the civil liberties without undue intrusiveness that we deprive the president and Congress of power to protect the country where that really is necessary. But I did not think *Korematsu* was right, I thought it was wrong.

**JEFFREY ROSEN:** Forgive me, this is important, this is relevant to Guantanamo, too. The end of the *Korematsu* discussion, you say, the court might have found a workable way to hold the president constitutionally accountable. Perhaps it could have developed a

sliding scale in respect to the length of the detention, the intensity of the examination, he could have insisted on prescreening efforts.

**STEPHEN BREYER:** The second edition will make that clear. What I mean is a sliding scale, where on the scale *Korematsu* would have been off the scale, because it would have been illegal to hold the 70,000 Japanese citizens in the camps. I thought that was clear, but in the next edition, if there is one, it will be doubly clear.

**JEFFREY ROSEN:** This is important, because it does get to the heart of the objection, is what you're suggesting there is what you did in the Guantanamo cases, the Hamdi case, where you joined Justice O'Connor and said, "no, it's not like there's no access to habeas corpus at all, but you have to have procedures, we're not going to tell you exactly what they are, but you have to have some access to lawyers, some opportunity to confront." The critics would say you're enmeshing the court in this unholy system and trying to repair it and in the process blessing it. So what's your response to that?

**STEPHEN BREYER:** That's an excellent question. **(some crosstalk)** I wasn't trying to dodge it, it's such an interesting story, that when I get started, it's hard for me to stop in the middle of that story, **(laughter)** but in response to your question what I think, which is by no means absolutely clearly right, is the court is faced with a number of choices. On the one hand, you could have some kind of absolutely clear rule that would always apply, and that clear rule would say, "either you always can detain in such circumstances or you can never." Now the virtue of such a rule is it's clear. The vice of such of a rule is either it will give people too little protection, or it will give Congress and the president too little

power to protect the country in a circumstance that might be needed and valid, there we are, and you have to choose, and what I have shown is – it will be history, it will be thirty years from now whether the court decided correctly in the Guantanamo cases, and I don't necessarily argue those in any pattern. I do show how they are trying to track a path which does not abandon protection of civil liberties without—as Justice Jackson and Justice Goldberg said—“the Constitution is not a suicide pact, and we can't turn it into one.” However unsatisfactory those kinds of results are for people, like clarity of rule, clarity of rule, in my opinion, gets you into because it's a court—it isn't a laboratory. It gets you and potentially the country into serious trouble.

And that of course is what I find wrong with Jackson's approach. Jackson said, “Here's what we do. We keep a clear rule, this is absolutely wrong. Don't worry about inhibiting the president and the army because when the president and the army feel it's necessary to save the country, they will violate the rule.” That, he says, is perfect, because when it's necessary they violate the rule, and we come along two years later and say, “You violated it!” So they uphold the country, and we uphold the Constitution. **(laughter)** That is not a foolish position. The things I find wrong with that position are you don't quite know how it will work.

For one thing if the president and the Congress really follow the Constitution it could happen in a war or some other time, steps will be taken or won't be taken that really were necessary. The other thing wrong with it, and I think this is in a way a worse one, is they will get into the habit of violating the law. And if they get into the habit of violating the law, I don't know where we'll be, and if you want to think this is more than a theoretical

question, what I'd recommend to people is Israel has been right in the middle of this question, and their supreme court has had again and again to face this kind of question. And by putting it in very general terms, I would say you try more to just have a principle that's absolutely clear but expect people to violate it, or you try to get the law and what has to be done and the protection of the civil liberties to work out, and I think what you're seeing, it's just my opinion, and it's a commentary on it, I think you're seeing the Guantanamo cases, every one of which the prisoner won, I think you're seeing the effort by the court to protect the civil liberties without going unnecessarily far.

**JEFFREY ROSEN:** I thought of one other objection when I read the account of the Guantanamo cases, which is you suggest how remarkable an achievement the fact that the court was able in these four cases to rule in favor of the defendant and to be accepted as a sign of its power, but it did not seem terribly practical in working with Congress in a way that you endorse. In the Hamdi case, you allowed the detention of the citizens as enemy combatants, despite the fact that the Congress had not explicitly authorized it, then Congress did authorize it at the president's request, and you said that the Congress can suspend habeas corpus, so that was not good either. How is that consistent with the effort to work constructively and deferentially with Congress as you endorse so persuasively in the rest of the book?

**STEPHEN BREYER:** Two, not responses, but two comments. First is that when one of the least popular people in the United States, bin Laden's driver, can sue one of the most powerful people in the country, the president of the United States, and when he can win his case, which says that under the law he was not being given a proper kind of hearing,

that that is not a victory for the court, that is a victory for the country, and it reflects a very long history. My second comment is that trying to work with Congress does not mean giving them a blank check, that what we're trying to do in the court, is we are taking this document, this document is what I call a series of outlines. It is a document that tries to create in the first seven articles a system of institutions that will basically function democratically at the same time it tries to protect, particularly the first ten amendments, fundamental rights of individuals. It tries to divide power vertically between the states and the federal government, horizontally among three branches, so that no single group of people in the government become too powerful. It insists upon a degree of equality, and it ensures a rule of law.

Now, when I've given that rough outline, I think all nine of us would say, "yes, that essence is there, but you see it's an outline, there are general terms, and it is sketching guidelines, it is the boundaries. What people do in the United States is to vote as to what kinds of communities, what kind of states, what kind of nation, they want. What this does is set the boundary, so I think of our job is we are on the frontier. What we are saying is does Congress go inside or outside the boundary? And there is nothing in I hope that I've said or what any of the others of us have said is that Congress has a blank check to decide itself. That's the opposite of what Hamilton decided to do. So we're the boundary patrol. Is life on the boundary easy? I've said this a thousand times. I used to listen to Sky King of the Mountains. **(laughter)** He was up in Canada on the frontier. It was very cold and unpleasant and difficult.

Is abortion inside or outside the boundary? Is prayer in schools inside or outside the boundary? What exactly is the boundary sketched by this word liberty in the fourteenth amendment? What in fact is the boundary of the freedom of speech, which does not define itself? Of course those questions are difficult, and of course people can come to different answers on the same question. However difficult they are, the space that is not difficult in between is broad, and it is in that space that the democratic system operates.

**PAUL HOLDENGRÄBER:** I found a little quotation by Stewart Hampshire that might get to this point. He says that the value of a democratic constitution lies in the defense of minorities, not majorities.

**STEPHEN BREYER:** I think that's a reiteration, whether he knew it or not, of what Hamilton thought. Hamilton thinks if all we're doing is deciding what the popular thing to do is, let's have Congress do it, they're experts. If, however, some of the time at least we're going to have to say no to what's popular in order to keep the document alive, well, then it would be better not to have Congress do it. And those cases will be tested, tested by the unpopular minority is an issue, is it the least popular person in the United States, I don't know exactly who that is, but the least popular person in the United States has the same rights if he's accused of a crime as anybody else, okay. That's basic, just fundamental.

**JEFFREY ROSEN:** Justice, as you note in the book, this is a divided court, and you note that just a couple terms ago, December something, there were a series of cases involving campaign finance and abortion and affirmative action and antitrust, and there

were five different decisions, and you were in the dissent in all of them. Now, when the Chief Justice came into office, he said that he wanted narrow unanimous opinions. He said this would increase the legitimacy of the court, why hasn't he gotten them and is he likely to be more successful in getting them in the future?

**STEPHEN BREYER:** Well, he could have agreed with me, it would have helped.

**(laughter)** People don't always agree, and I used to think that—I was born in San Francisco, I lived most of my life in Massachusetts. I thought I'd met people with a lot of different opinions, ha ha ha, I mean, I've met people who have really different opinions, and when I think about that, of course it's irritating at some level when someone doesn't agree with you, we've all had that experience, but this is a very big country. There are three hundred million people, I mean, as you well know, they think many, many different things, and it is not such a terrible thing that there are people on my own court who fundamentally disagree with some of the things I think. Don't forget that we have quite a large number of cases, and probably we're unanimous 30 to 40 percent of the time and we're probably five-four maybe 20 or 25 percent of the time and it is not always the same five and the same four, so let us not lose sight of this forest and that's—

**JEFFREY ROSEN:** So inquiring minds want to know what is going to happen, and you don't know, and I don't know, but what does history teach us about what might happen if this court were to challenge the president and Congress on matters they care intensely about? Who will win, the Congress or the court?

**STEPHEN BREYER:** My job is a job to decide individual cases as they come up, and I've tried to devote my time and effort to that, to getting them right. It is the job of other people, you and historians and others to predict outcomes and consequences. And that isn't being coy, it's because if I don't know, I probably know less well than you. I mean, there are people who have written histories of the court. And I'll just stop because I don't think I can nor should I try to figure out what the consequences of that would be.

**JEFFREY ROSEN:** But the whole book is about how the court should behave to maintain legitimacy, so without talking about any particular cases or even anything specific, how should the court avoid a self-inflicted wound that you've described several times in this book that might imperil its legitimacy now and in the future?

**STEPHEN BREYER:** This part of the book that you're talking about is the following. I think this is my primary target, is that people think, "oh, it's all politics," and I want to say enough from my point of view that people will think, "if I start thinking it's all politics, I'm grossly exaggerating the situation," I mean, it's not the right word. It's just not the right word, and I try to say enough to become fairly convincing on that because I believe it. And then people as they think there's no politics, they think, "oh, it's just nine people up there just doing whatever they want to do," but we have criteria for taking cases. We take cases almost always when lower court judges have come to different conclusions on the same question of federal law, statute, or constitution, and while these criteria don't determine it, they make fairly clear what we'll take and what we won't take, and I don't sit there thinking how nice it would be to hear a case like this or hear one like that, so as far as doing what I like, I feel I never do what I like. **(laughter)**



As my wife, Joanna, she'll say I've had that self-pitying attitude for years. But the fact is no it's not doing what I like, but seeing the view of originalism, which is to do this on the basis of history that is has to be set forward, that it represents an effort by people to stop judges from using their subjective view of what's good or bad instead of the law and so those who favor it say, "look back to history in depth and in detail and that will control the judge." And why I've come out here is to say, "No, I feel that wouldn't work, that's not going to work." It's too hard to know what's in history on most of the really open questions in detail. You can know the values, you can know free speech is about expression, you know in general what it's about, but you don't know the details, so appoint nine historians instead of nine judges if you want to hear everything on the basis of history, and I go into this in some depth, and I say, "What's the alternative here?" So I say an approach that is the alternative and that's what I try to explain, is American and old.

Read Gordon Wood, he's a great historian, he talks about the judges here in the United States in the 1780s, 1790s. I love the quote he had which was from the judge from Connecticut, Jesse Root, who said the American tradition of law, of appellate law, of working out how the law applies to difficult cases and what it means, he said that's one of prudence and pragmatism, and the judges I admire and most people do learned it from him. Brandeis, Cardozo, Holmes, my goodness, they seem to me to exemplify that kind of attitude. So if I simply say something like, "well, it's an attitude that takes the values that were written into the Constitution two hundred years ago and applies them to today's changing circumstances." If I stop there, you're going to think that's a nice sentiment and

say it on the fourth of July, so what I've got to do is to put some meat on those bones and to try to say what something like that can mean to at least one judge in a number of different areas of law. I don't say it's the only way, but I do say it's mine.

**JEFFREY ROSEN:** You take up Justice Brandeis's challenges, I want to ask you this, because I'm very curious about the answer, and you insist on translating the Constitution in light of new technologies and this is a necessary and exciting project. What could we do, and again I'm not asking for a judgment, just an approach, about the fact that today the people who have more control over free speech and privacy and civil liberties than any Supreme Court justice or any government or any king are the lawyers at Google and Facebook—they're the one who decide who shall speak, who can demonstrate, who can take down their pictures, their drunken pictures you will find them forever, but they're not regulated by the first amendment or the fourth amendment. How do we translate those constitutional values, as you put it, into an age where it's the private sector and not the government that may menace them?

**STEPHEN BREYER:** Article of faith. Article of faith. It starts with Tocqueville, he says in 1835 or so forth, you know what he hears when he comes to the United States, he calls it the clamor, he says everybody's screaming at each other. That isn't very polite, but it does mean that they're in a discussion. Sometimes stronger, sometimes less strong. Privacy. What's happened to privacy with the new technology? How do we deal with it? Well, you'll write an article about it. And so will five thousand others. And we'll discuss this in classrooms, we'll discuss it at meetings, they'll discuss it in police departments, they'll discuss it at ACLU meetings, they will have hearings in states and cities, in the

Congress, there will be administrators who will try rules, we'll try it, it won't work, we'll change it, and everything will be open to criticism, and gradually, maybe something will emerge.

**PAUL HOLDENGRÄBER:** We're discussing it right here.

**STEPHEN BREYER:** If something emerges, then the last step is to see whether that which emerges is consistent with those guidelines in this document, and our court works best when all those other steps have been taken, that's called the screaming democratic process in action. It sometimes works, I think quite a lot, that's my article.

**(applause)**

**PAUL HOLDENGRÄBER:** I feel some of the ways in which you relish a disagreement comes from your appreciation of literature. This is my article of faith. I want to read this to you and see how you react. In 1856, in an essay she wrote on German realism, George Eliot had this to say, "The greatest benefit we owe to the artist, whether painter, poet, or novelist, is the extension of our sympathies. Art is the nearest thing to life. It is a mode of amplifying experience and extending our contact with our fellow men, beyond the bounds of our personal knowledge."

**STEPHEN BREYER:** I wish I'd had that. I was talking at New York Law School, and for some reason, we got off of the subject, and one of the students said, "What should I major in if I want to be a lawyer?" So being difficult, I said, "anything that has nothing to

do with law. It's a good chance for you." And someone said, "Even literature?" and I said, "Why not?" And I didn't say that, that's what she says. I mean, we have one life, this is what I out to the student, I said, "we have one life, one, we know our own and maybe we know a little bit of a few others, but if you read some books, you can be exposed to a lot of people's lives, and that's doubly true if you know a foreign language. It's fabulous. Learn a foreign language, and read a few books about other people, and that will in fact help you, because it will give you many lives, and indeed if you're going to be a judge and you're going to be locked up in an appeals court, and what you do every day is sit and read some briefs and turn around and look at the word processor, you'd better have had some experience beforehand, and you'd better be able to imagine if you are to understand the lives of other people, because what you write is going to affect those lives," so I wish I'd had your book.

**PAUL HOLDENGRÄBER:** Well, I'll give you the quotation. Tell me this. How does the reading of literature help? How does it help, how would you say that the way in which it helps is because it gives you the ability to put yourself in somebody else's shoes, and what is the role of empathy for a judge?

**STEPHEN BREYER:** I wouldn't go beyond what I said. It's very helpful to be able to understand how your opinions will affect people who have a lot of different lives than you. When you are on a raft with Huck Finn and Jim, I mean, my God, there is sympathy and in a period when it was hard to have, hard to have at that time, and you suddenly see this tremendous, tremendous warm emotion between people and in a very different style of life, and a very tough one for Jim and you find that in *Uncle Tom's Cabin*. Remember

what Lincoln said when he met Harriet Beecher Stowe, he said, “Oh, you’re the little lady who started this great war,” well, there was something to that, because when you read that, it’s a good novel in my opinion, it is not a tract, and what she is doing is trying to show you how slavery cannot work, and she does that by showing you the people involved, and once you see the people involved, and what’s involved in separating families, people who were previously indifferent or said “it isn’t my problem,” could suddenly say “oh my goodness, maybe it is my problem.” So those are the kinds of things that books can do and why we read and why we try to understand other people, that’s what I was trying to explain this evening.

**PAUL HOLDENGRÄBER:** What is the importance—it’s pretty obvious in some ways—but if you had to say, what is the importance of actually learning a foreign language, what does that grant you more?

**STEPHEN BREYER:** Years ago when I was a student, my friend and I were traveling around Europe in this beat-up little car, and we stayed with a woman called Maria Converdi who lived behind an alley somewhere in a Florence, in our student days, and she said to me at one point, for every language you learn—she spoke about six—you become another person, you learn how to be somebody different, you learn insight into something, and I don’t care if it’s French or Spanish or Chinese or whatever, but it’s a window, it’s a window into a civilization that is different, and yet there are people who are—and I can’t go beyond that, but I think it’s a very valuable thing for anyone to know a language that isn’t just theirs. And that’s a similarity I see with literature. And I’m not an expert on this subject.

**JEFFREY ROSEN:** Paul is going to get you into trouble for reaffirming President Obama's empathy standard. You were sharing with Paul some of your favorite books and one jumped out, there are many exciting ones on the list, Adams, the Education of Adams, so Adams is struggling with this idea that his eighteenth-century education failed to prepare him for life in twentieth-century America, in light of the change in technologies, he's wandering between two worlds, one dead, the other powerless to be born. He's moderately optimistic. Are you moderately optimistic?

**STEPHEN BREYER:** I like this book, but the reason these came up is Joe Weiler is a professor at NYU Law School, and I have a friend named Norman Dorsey, and Norman Dorsey is reaching a certain birthday which I will not tell you what it is, but anyway, Wyler had the idea that ten of his friends should write down ten books which influenced their professional career, books they think were great literature, so we did, and write a few words on each. So he unfortunately finds this list and that's why he's asking me these questions.

**PAUL HOLDENGRÄBER:** Nothing to be ashamed of, they're great books. And even though you may not be a specialist, people want to know what has touched you.

**STEPHEN BREYER:** So five of these were pretty legal, so we'll stay away from those, so he's got the one that isn't totally legal, which is *The Education of Henry Adams*, which I put down because I found it absolutely terrific. Why? Because a person is living across the nineteenth century, or quite a lot of it, and he is born into a world where people

thought there would be some kind of elite that would in fact guide us, though elected, but we'd sort of know who were the right people here, and he's told the real elite lives in the South, so he goes down there and looks at these people, they're a bunch of ruffians—I'm not saying they are, I'm saying Henry Adams said that. **(laughter)**

So but you get to slavery, and then he goes and lives in Washington for a while and becomes in essence a pundit, and the best political observer I can remember reading and he looks at what's going on. Some of you remember the Nast cartoons, seeing them when we were in high school, Big Tobacco here, and there's Bribery over there, and this is really happening, and it's terrible, there is no reason to favor democracy, it just isn't working, and then he says, "well, what's the choice? What's the choice?" Before Churchill he said that, and you read across how he is both worried but ultimately has faith in the process, and that goes across a period of time which I think—I heard Ken Galbraith say this years ago, he said, "We get upset about various things that are happening. There was real bribery, and it wasn't very subtle, either," and there were a lot of things wrong with democracy and there always have been, it hasn't worked for everything, but Adams eventually brings us around to the point where we understand the reasons for his faith, and I liked that.

**PAUL HOLDENGRÄBER:** Among the books you enjoyed, one of them is of monumental importance, it's *À la recherche du temps perdu*, Marcel Proust, and I have a question here that comes to you all the way from California. An old tutor of yours who's an old friend of mine, who you studied with in 1959, a man named Herbert Morris. He sends you regards. I knew him when I was out in Los Angeles, it might have been Jeff's

article where you mentioned Herbert Morris or Jeffrey Toobin mentioned Herbert Morris, and I wrote to Herbert Morris and said, “is this the same Herbert Morris I know who taught Justice Breyer?” And he said, “yes, remember me kindly to him.” I said, “no, do better than that, you love literature, I think Justice Breyer does, too, ask him a question that I can ask from the stage,” and he has this question to ask you about Proust. What does he think, Justice Breyer, about Marcel Proust’s observation in *Of Search of Lost Time* when he writes with regard to the Mademoiselle Vinteuil one of the sadistic artists of evil, “that perhaps she would not have thought of evil as a state so rare, so abnormal, so exotic, one in which it was so refreshing to sojourn, had she been able to discern in herself, as in everyone else, that indifference to the suffering one causes, which whatever what other name one gives it is the most terrible and lasting form of cruelty.”

**STEPHEN BREYER:** Well, I could say this is a good thing he didn’t give me a final examination. **(laughter)** Alright, I am stumped. It sounds to me as if it’s right, but it was a long quotation. **(laughter)** I think the theme of this is what we’ve been talking about. I think the meaning of it is to understand what effect you have on other people, and it’s very hard for someone to be determinedly wrong when they know that they’re hurting some other person. It is lack of imagination that is really the problem, so much more often.

I’ll give you another example, and you tell me if this is one. One of the things I really liked in Tocqueville, he says, he’s talking about a very well-known French writer, a seventeenth-century a woman, Madame de Sevigne, that wrote some letters, and she was the kindest woman, you could have thought. She adored her daughter, and she wrote to



her daughter who was far on the other side of France, every day, in the most beautiful form, and she really did adore her, and in one of her letters which Tocqueville quotes, she said, “Well, nothing much is happening here, but this morning we had a slight disruption. Some of the peasants from nearby came into the garden and were trying to steal some fruit, but we hanged them, so nothing much has happened this afternoon,” and then she goes on, and he says, “How could this woman who was such really a sympathetic person say such a thing and pass it off in this way?” And he says the answer is she’s not seeing these other people as people, at least not people like us, and it’s the breakdown of that barrier, they are people like us, and Tocqueville finds this happening. At his time it hadn’t happened completely in the United States, but comparatively speaking it had, and that’s what he sees as the strain of the American republic, which is the direction that he thinks that Europe will go too so that’s what suggests.

**JEFFREY ROSEN:** Can and should judges show empathy?

**STEPHEN BREYER:** Judges, as I’ve said, the way I put it, is the words that I use, which I think is that you have to be able—imaginatively—my wife is English, and that’s the word she uses, which means you have to try to understand the impact that your decision will actually have upon other people. That’s part of the law, that is not something separate from law, I think. The laws that are enacted by Congress and the Constitution are meant to allow people to live together in this community, whichever community it is that the law governs, that’s basic, that’s basic.

**PAUL HOLDENGRÄBER:** You're particularly interested also in the idea of rereading, how certain books that affected us in early years, might still affect us now, how our taste may evolve through aging, and I think that one of the books that comes to mind to you often is a book by Albert Camus, *The Plague*, and you said to me that you found *The Plague* in some way quite close to the very work you do as a judge and the last pages of *The Plague* speak to you in a particularly strong way. Why is that so?

**STEPHEN BREYER:** Well, I read it in college, and I reread it not too long ago and suddenly it did speak to me for this reason into this story that ostensibly takes place in Oran in Algeria, and it's infested with a plague, and they have to close it off, and it's really about the Nazi occupation of France. And some people act very well and some act very badly and you have all kinds of range of human nature there. And he goes through this and you see what do I think he's thinking of the occupation, which was pretty awful, the occupation, and he ends up by saying why did I write this book? Well he means is not in, he puts these words in his main character, Rieux, who's a doctor. And he says, "one reason I did, I wanted people to know the story of these people, their bravery and their cowardice, everything," and he says "the second reason is that I'm a doctor, and I think a doctor's a pretty good model for how you should behave in the world, not necessarily in thinking through all these complicated things, but acting in ways that help others," and the third reason, which may be most important, he says, the bacillus, the pestilence, the germ, the germ of the plague, he said it never dies, it doesn't disappear, he says it goes into remission and it lurks there, and it lurks in the hallways or it lurks in the cupboards, or it lurks in the clothes, and it lurks in the file cabinets, only perhaps to reawaken one day and then for the misfortune, perhaps the education of mankind it will once again send

forth its rats, to die in a happy city. Why do we have our institutions? Why is the court there, it's there in part as a kind of dike, but it's a weak dike, but it's still an effort, it's an effort to guard against that day when those rats might come forth. Look around the world, you can see that bacillus or whatever—it's there, and so more and more institutions throughout the world have tried here, and one of the reasons for having an independent judiciary is a small dike that may be a little bit of a help should those rats reemerge. Anyway, that's what rereading that book told me, and that's why I liked it.

**PAUL HOLDENGRÄBER:** You have a question, a final question for Justice Breyer?

**JEFFREY ROSEN:** Justice, you've talked about these issues for years. You are an optimistic, temperate person, you have a positive, sunny view of government that emerged from working in San Francisco, working in Congress on all sorts of reforms, you've been at the center of one of the most polarized courts during the most polarized time in government, and there are many who are not optimistic about the future of our democracy. How optimistic are you and why?

**STEPHEN BREYER:** I don't have a privileged version here, I have—think of the Churchill comment, there are lots of them who say the same thing. What's the basis for Adams's optimism? What's the basis for Churchill's optimism? Churchill said that the United States always does the right thing after having exhausted every other possible alternative. **(laughter)** Well, there's something to that.

**PAUL HOLDENGRÄBER:** Upon entering this venerable institution here you told me that you had a couple of poems.

**STEPHEN BREYER:** You told me to bring a couple of poems, and I did!

**(laughter)**

**PAUL HOLDENGRÄBER:** And you also told me that these are poems that matter to you greatly. I would like you to read them.

**STEPHEN BREYER:** I'll read one, because what I think, what I think is what matters to me is what I happen to be reading recently and it could be anything, it could be anything, so I think it's getting late, so I think we have time for one. I was going to read two, but I want to show you this one, and I'll tell you why. It isn't an...it's an okay poem, it's a good poem, it's by Billy Collins, whom I like, and I heard him say this poem and it's stuck in my mind. It's called "The Lanyard," would you like to hear it?

The other day I was ricocheting slowly  
off the blue walls of this room,  
moving as if underwater from typewriter to piano,  
from bookshelf to an envelope lying on the floor,  
when I found myself in the L section of the dictionary  
where my eyes fell upon the word lanyard.

No cookie nibbled by a French novelist  
could send one into the past more suddenly—  
a past where I sat at a workbench at a camp  
by a deep Adirondack lake  
learning how to braid long thin plastic strips  
into a lanyard, a gift for my mother.

I had never seen anyone use a lanyard  
or wear one, if that's what you did with them,  
but that did not keep me from crossing  
strand over strand again and again  
until I had made a boxy  
red and white lanyard for my mother.

She gave me life and milk from her breasts,  
and I gave her a lanyard.

**(laughter)**

She nursed me in many a sick room,  
lifted spoons of medicine to my lips,  
laid cold face-cloths on my forehead,  
and then led me out into the airy light

and taught me to walk and swim,  
and I, in turn, presented her with a lanyard.

Here are thousands of meals, she said,  
and here is clothing and a good education.

And here is your lanyard, I replied,  
which I made with a little help from a counselor.

Here is a breathing body and a beating heart,  
strong legs, bones and teeth,  
and two clear eyes to read the world, she whispered,  
and here, I said, is the lanyard I made at camp.

And here, I wish to say to her now,  
is a smaller gift—not the worn truth

that you can never repay your mother,  
but the rueful admission that when she

Where did it go? Where is the end of this poem? **(laughter)** Did I give it to you on that piece of paper? I gave you two pieces of paper. You will never know the end of this poem. **(applause)** I can tell you why, I can tell you why I selected that poem, and the reason is because my granddaughter, Clara, who is seven, made me this lanyard.

**PAUL HOLDENGRÄBER:** Justice Breyer, thank you very much.

**(applause)**