

WRITTEN TESTIMONY BEFORE THE PRESIDENTIAL COMMISSION ON THE  
SUPREME COURT OF THE UNITED STATES

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It is an honor to present my views to this distinguished commission. The topic is ““The Contemporary Debate over Supreme Court Reform: Origins and Perspectives.” The charge to the commission, as I understand it, is to offer general background information and context rather than specific recommendations. I am not so limited; I have been given your ear and so I will tell you what I think.

In brief: Any attempt to increase the size of the Court would be widely, and correctly, regarded as a partisan interference with the independence of the Court. This would be a severe blow to the reputation of the Court as a legal institution, and would invite similar “reforms” whenever the same political party controls both Congress and the presidency and does not have a majority of its own choosing on the Supreme Court. It is no exaggeration to say that this would destroy one of the central features of our constitutional system, the independent judiciary. The reasons given for increasing the size of the Court—like those given by Franklin Delano Roosevelt 85 years ago for a similar attempt—do not hold up to scrutiny.

But that does not mean there are no genuine problems. (By “genuine” I mean problems that would be recognized as such behind the veil of ignorance, and are not mere pretexts for party advantage.) In my opinion, the commission would serve the nation well by focusing on these problems and helping to build the cross-partisan consensus needed to address them. I will be more specific below.

**What are the origins of the contemporary debate?**

In a narrow sense, the contemporary debate has its immediate origins in the presidential campaign of 2020, during which some members of his political party urged candidate Joe Biden commit to expanding the size of the Supreme Court. Mr. Biden understandably was reluctant to lend public support to such an idea, but not wishing to alienate a faction of his supporters, announced that he would name a bipartisan commission to consider it. This commission is the fulfillment of that promise. The function of the commission is to bring a non-partisan perspective to this highly-charged political issue.

In a broader sense, the “contemporary debate” arises from two sad recent events: the demise of Justice Antonin Scalia in 2016, a presidential election year in which the party opposite to that of the president controlled the Senate, and the demise of Justice Ruth Bader Ginsburg in 2020, a year in which the Senate and the presidency were controlled by the same party. Party

balance on the Supreme Court looked for a moment as if it would shift decisively to jurisprudential progressives—but instead shifted to jurisprudential conservatives. President Obama nominated Merrick Garland, a respected jurist, for the seat Scalia had occupied, but the Senate, which was controlled by Republicans, chose not to hold hearings or a vote until after the election. When to almost everyone’s surprise Donald Trump was elected president, he appointed a judge associated with his party for the seat. Four years later, on the death of Justice Ginsburg, President Trump nominated and the Senate confirmed his third Justice, bringing the division on the Court to six Justices named by Republicans and three named by Democrats.

There is nothing shocking in any of this. It was the inexorable result of elections. Had the Senate been under the control of the Democratic Party in 2016, and had Justice Ginsburg lived a few more months, into the Biden Administration, the partisan results would be exactly the opposite. Progressives would enjoy a 6-3 majority, and there would be no talk of Supreme Court “reform.” Even so, it would not be surprising if, by the end of President Biden’s first term, the Court reverts to a 5-4 split, and by the end of an eight-year Democratic Administration, the Court majority will likely flip to a progressive majority. To be blunt: the “contemporary debate” is not over Supreme Court reform in the abstract, but over the proper political response to the transitory consequence of the alignment of political majorities at the unpredictable moments of Supreme Court vacancies.

In a still broader sense, judicial nominations and confirmations have become increasingly bitter and partisan for the past thirty-five years. Long gone are the days when Thurgood Marshall could be confirmed 69-11 (with ten of the eleven “no” votes coming from his own party, the Democrats), and Antonin Scalia could be confirmed 98-0. Beginning with the unprecedented ideological assault on nominee Robert Bork in 1987, which Republicans still have not forgotten, with a respite during the statesmanlike Judiciary Committee leadership of Orrin Hatch, during which Justices Ruth Bader Ginsburg and Stephen Breyer were confirmed by overwhelming bipartisan majorities, but resuming under George W. Bush and never subsiding since that time, nominees with impeccable credentials from both parties have been subjected to relentless distortions of their beliefs and sometimes their character, with fewer and fewer Senators of the opposite party voting to confirm. The partisanship soon extended to appellate court nominees, and more recently even district court nominees. Democrats began filibustering nominees to the courts of appeal—even nominees of exemplary quality—when they lost their Senate majority in 2002. They then abolished the filibuster for lower courts when the Republicans used the tactic against nominees by President Obama. Both parties used the tactic of delay when they were in control of the Senate. In the final year of the presidency of the opposite party, delay was tantamount to defeat of the nominee without hearing or vote. Each of these new tactics could be seen as violating a long-standing norm of senatorial comity and civility.

There are two reasons for this escalating partisan aggressiveness. One is the remarkable polarization of American politics in the past two decades, which has infected almost every corner of American life. Obviously the commission can do nothing about this phenomenon, except to set an example of rising above it. Second is the increasing intrusion of the judiciary into matters that do not seem to be governed by constitutional or statutory law. If judges intrude into politics it is no wonder that politics bites back. Again, there is nothing the commission can do to cure this

problem. But the commissioners need to be aware of the deep roots of the “contemporary debate,” and avoid the easy conclusion that it is the misbehavior of the other side, whichever that may be, that is the source of the problem.

Because of these two long-term developments, the stakes for each Supreme Court vacancy have seemed extremely high. Each confirmation battle is portrayed as determining the direction of the Supreme Court, and therefore the nation, for a generation. This puts unseemly pressure on sitting Justices to time their retirement to permit a president of their political party to name the replacement, and the untimely deaths of Justices when the presidency is in the hands of the opposite party are greeted as once-in-a-lifetime opportunities to change the balance of the Court. This exacerbates the intensity of confirmation battles. As I discuss below, a regular process of retirements would likely lower the temperature of the debates and eliminate the elements of luck and manipulation that now make nominations to the Supreme Court so fraught.

### **The House Proposal to Expand the Size of the Court**

On April 15, 2021, the House Judiciary Committee introduced legislation called “The Judiciary Act of 2021,” which would add four new seats to the Supreme Court, presumably all of them to be appointed by President Biden. According to the committee’s press release, the “bill would restore balance to the nation’s highest court after four years of norm-breaking actions by Republicans led to its current composition and greatly damaged the Court’s standing in the eyes of the American people.” According to Senate co-sponsor Edward Markey, quoted in the same press release, “Republicans stole the Court’s majority, with Justice Amy Coney Barrett’s confirmation completing their crime spree.” Some context is in order:

- \$ The Senate’s decision not to hold hearings or a vote on the Garland nomination was permissible under both the Constitution and the Senate’s rules.
- \$ There was no established “norm” requiring Senate action on the Garland nomination. This was the first time in modern history that a Supreme Court nomination occurred in the final year of a presidency when the party opposite to the president controlled the Senate.
- \$ It has become standard practice in recent decades for the Senate to refuse to hold hearings or a vote on judicial nominees at some point in the final year of a presidency when the opposite party controls the Senate.
- \$ In 1992, in the final year of the George H. W. Bush presidency, when the Democrats controlled the Senate, Democratic leaders openly stated that no Bush nominee would be considered. Then-Senator Biden proclaimed that “once the political season is underway . . . action on a Supreme Court nomination must be put off until after the election campaign is over.”
- \$ President Obama’s White House Counsel Kathryn Ruemmler told an ABA panel in November 2016 that “I would have advised same McConnell strategy on denying hearing if tables were turned.”

In my personal opinion, judicial nominees of both parties should be given prompt hearings and a

vote. I set forward my reasons in Michael W. McConnell, *What Are The Judiciary's Politics?*, 45 Pepperdine L. Rev. 455, 473, 479-480 (2018). If that had occurred, Attorney General Garland would be Associate Justice Garland. But there is no such norm. The decision of the Republican majority in 2016 to block the Garland nomination was political hard-ball, but it provides no justification for violating the actual norm of a nine-Justice Supreme Court.

Nor is there any validity to the claim that the current Court is “extreme” or out of the mainstream. This is the Court that just reaffirmed the constitutionality of Obamacare by 7-2 vote, that decided a potentially-contentious free exercise challenge to exclusion of Catholic Social Services from the Philadelphia foster care program by unanimous vote, that struck down President Trump’s order reversing President Obama’s order giving legal protections to millions of persons here in violation of the immigration laws, and that interpreted Title VII as protecting against discrimination based on LGBTQ sexuality.

In short, the “contemporary debate over the Supreme Court” presents no special circumstances that warrant extraordinary response.

### **The Norm of a Nine-Justice Court**

The Constitution does not specify how many members the Supreme Court will have. This is up to Congress. In the first 80 years of the Republic, Congress adjusted the size of the Court several times. But the number of Justices has been fixed at nine for the last 150 years, since the Judiciary Act of 1869. Only once in that time was there a serious effort to alter the number for partisan gain. At the depth of the Depression, Franklin Roosevelt, who was elected by landslide majorities and thus undoubtedly represented the will of the democratic electorate, and whose party controlled both Houses of Congress, grew impatient with Supreme Court decisions that stood in the way of his agenda. His attempt to increase the size of the Court was widely denounced as an attack on the independence of the judiciary, even by members of his own party. The Judiciary Committee issued a blistering report calling the proposal “a needless, futile and utterly dangerous abandonment of constitutional principle.” Until the idea was floated in the 2020 election campaign, the issue seemed to be settled; the size of the Supreme Court should not be made a political football.

Perhaps recognizing that its one-sided narrative about Republican mischief is unlikely to be persuasive to anyone not already convinced, the House Judiciary press release also offered an ostensibly neutral justification for expanding the size of the Court. According to Chairman Nadler, “Nine justices may have made sense in the nineteenth century when there were only nine circuits, and many of our most important federal laws—covering everything from civil rights, to antitrust, the internet, financial regulation, health care, immigration, and white collar crime—simply did not exist, and did not require adjudication by the Supreme Court. But the logic behind having only nine justices is much weaker today, when there are 13 circuits. Thirteen justices for thirteen circuits is a sensible progression.” Representative Johnson similarly argued for adding four new associate justices on the ground that “[t]hirteen justices would mean one justice per circuit court of appeals, consistent with how the number of justices was originally determined, so each justice can oversee one circuit.” This argument is based on a historical misunderstanding.

When the size of the Court was adjusted to the number of circuit courts, the Supreme Court Justices had the onerous duty of riding circuit to sit on those courts. Today, the duties of a Circuit Justice are largely ceremonial. Nine Justices easily meet the needs of the thirteen circuits. In my years on the bench, I never heard a judge or justice suggest that there was any need for the numbers of justices and circuits to coincide.

As one who has sat on panels of three, eleven, and twelve judges, and argued before courts of one, three, seven, eight, and nine judges, it is my opinion that the ideal size of the Supreme Court is seven or nine. (An odd number is preferable for obvious reasons.) Five is too few to reflect a range of views, and makes each individual justice too powerful. More than nine makes oral argument chaotic and collegial deliberation more difficult. Many judges on the Courts of Appeal strenuously try to avoid en banc sittings because they are so much more time-consuming and divisive. In my time on the Tenth Circuit, when all twelve judges sat en banc, it was often not a good experience for judges or litigants.

Taking a leaf from Judge Jeff Sutton's excellent book, *Fifty-one Imperfect Solutions*, the commission might look to state courts as a natural experiment. No state supreme court is larger than nine. Most are smaller. Twenty-eight state supreme courts have seven justices; seventeen have five justices, and only seven have nine. It seems that constitutional drafters at different times, in different places, of different views, uniformly have rejected the idea of a supreme court with more than nine justices.

### **Staggered Eighteen Year Terms**

Just because expansion of the size of the Supreme Court is a bad idea does not mean that nothing should be done. It is true that the confirmation process has become ugly and dysfunctional. It is true that it is unseemly and unfair for the balance of the Court to depend on either the timing of Justices' retirements or the happenstance of their demise. It is wrong for qualified nominees like Merrick Garland to be defeated without hearing or vote.

Moreover, an even more serious problem looms on the horizon. As the partisan tendency to vote against nominees of the opposite party becomes entrenched, there is a serious possibility that when presidencies and senates are in opposite party hands no nominees (however qualified) will be confirmed. This would leave the courts understaffed, and would lead presidents to fill the vacancies through recess appointments. This would inflict serious damage on judicial independence. The framers adopted good behavior tenure for a reason: so that judges would not be tempted to tailor their decisions to the desires of those with power to hire or fire them. Recess appointees would know that the possibility of permanent appointment hinges on the reactions of presidents and senators to their decisions.

These phenomena are related and could be solved, or at least ameliorated, by the same reform: a constitutional amendment providing for staggered eighteen-year terms. Much of the intensity of political controversy over Supreme Court nominations stems from the fact that each one is the product either of a strategic retirement or an unexpected death or serious health problem, and therefore each has a potential to affect the overall balance of the Court. If every

president had a regular and predictable number of vacancies to fill, the stakes of each would seem less momentous.

Moreover—and I realize this is a delicate matter—eighteen years of service on the highest court in the land is enough for any human being. Age, infirmity, and close-mindedness tend to take their toll. Again, the experience of state supreme courts may be instructive. Only one state, Rhode Island, follows the federal model of a life-tenured supreme court. Most have terms ranging from six to fourteen years; three require mandatory retirement at age 70.

Imposing term limits on Supreme Court justices would require a constitutional amendment. There have been ingenious suggestions for how to accomplish this without an amendment, but in my opinion they do not work. However, influential individuals across the political spectrum have expressed support for some version of this reform and it is not by its nature partisan in theory or effect. In 2020, the National Constitution Center commissioned three groups of constitutional scholars—conservative, progressive, and libertarian—to draft new constitutions. Interestingly, both the conservative and the progressive constitutions called for eighteen-year terms for Supreme Court Justices. This shows the potential for cross-partisan agreement. I believe this commission could do a great national service by getting the ball rolling on a proposal along these lines. Here are the key elements, as I envision the reform:

- § Every two years, the President would nominate a new associate justice of the Supreme Court, who would serve an eighteen year term (subject to removal on impeachment).
- § The nominee would be deemed confirmed unless, within four months of the nomination, the Senate passes a resolution disapproving the nomination. (This was James Madison’s proposal at the Constitutional Convention.)
- § In the event that a justice dies, retires, or is removed before the eighteen-year term is complete, the President shall nominate a person to serve out the remainder of his or her term, but such nomination shall require a vote of two-thirds of the Senate for confirmation.
- § For purposes of transition, until all justices serving for good behavior have left the Court, the terms of new justices shall begin when the number of the justices on the Court falls below nine, but for purposes of the eighteen-year limit shall begin upon confirmation.
- § One associate justice shall serve as Chief Justice, for a period of five years, after which he or she shall serve as associate justice until the end of the eighteen-year term. Upon a vacancy in the office of Chief Justice, the President shall designate a sitting member of the Court for that position, with no need for senatorial approval.
- § At the completion of an eighteen-year term, each associate justice will retain the office of an Article III judge and be available for service on any of the lower courts by designation.

This proposal, if adopted, would have several salutary effects. It would make the power of the president to name Supreme Court justices regular, fair, and consistent, and thus likely would lower the political stakes of each nomination. The political balance of the Court would reflect the opinions of the people over time as expressed in their choice of presidents and senators, rather than the happenstance of health or accident or the strategic timing of the justices. It would guarantee to each nominee a prompt up-or-down vote, eliminating the tactic that defeated the nomination of Judge Garland—and make this new rule apply equally to nominees from either party. The office of Chief Justice, which is influential, would shift more frequently, and those powers and responsibilities would presumably be shared more equitably.

By flipping the burden of action from confirming to defeating a nominee, the proposal makes less likely the nightmare scenario that no nominee can be approved when the Senate and the presidency are in opposite hands, leading to short-term recess appointments. Surely at least a handful of senators will break from party loyalty and evaluate a nominee on the merits. But the commission might also consider the stronger medicine of requiring a supermajority—say, fifty-five senators—to disapprove a nominee.

The great weakness in this proposal is that it would require a constitutional amendment. But given its lack of partisan edge, I believe that an amendment is possible. It would require public education, and the support of respected persons on both sides of the aisle. This commission would perform a public service in bringing this idea to the attention of President Biden and the American public.

I am available for questions from the commissioners, either now or in the future. Thank you for your attention.