

## Supreme Court Practitioners' Committee

July 16, 2021

Commissioner Bob Bauer  
Commissioner Cristina M. Rodríguez  
Co-Chairs, Presidential Commission on the  
Supreme Court of the United States  
The White House  
Washington, DC 20500

Dear Commissioner Bauer and Commissioner Rodríguez:

We thank the Presidential Commission on the Supreme Court of the United States for this opportunity to advise the Commission regarding certain proposals to reform the structure or operation of the Supreme Court. We are the co-chairs of the Supreme Court Practitioners' Committee, composed of lawyers from different backgrounds who share a common experience of having practiced before the Supreme Court. The Practitioners' Committee has been invited to provide a written report regarding its views on a number of specific proposals for reform, as identified by the Commission and discussed in the report that follows. Consistent with the Commission's guidance, the Committee has sought to keep this report to a manageable length even though several of the topics addressed in the following report could individually fill volumes in their own right.

The following report reflects the considered views of the Committee's members on the proposals identified by the Commission following extensive research, deliberation, and discussion. The Committee sought to craft a report that reflected the consensus of its members. A few aspects of the proposals discussed in the attached report have given rise to disagreement among members of the Committee, but in most cases those differences are ones of degree or emphasis. Not every member of the Committee agrees with every aspect of the report, but the members agree that this report accurately captures the consensus views of the Committee.

The Committee is made up of Supreme Court and appellate lawyers from across the political spectrum, many of whom have served in different presidential administrations, and who have represented parties of all types—and on different sides—before the Supreme Court, including the United States, states and local governments, companies, and individuals. The Committee includes two former Solicitors General (who served under Presidents of both parties), a former Principal Deputy Solicitor General, three former Deputy Solicitors General, and six former Assistants to the Solicitor General—as well as a former state Solicitor

General. Members of the Committee have both prosecuted and defended criminal cases, and one member is a former federal appellate judge. The members of the Committee have collectively argued more than 400 cases before the Supreme Court and appeared in thousands more. More than a dozen have served as law clerks at the Court. That experience has given the Committee a first-hand, institutional view of the manner in which the Supreme Court operates, resolves disputes, and interprets the law.

We share a profound respect for the Court as an institution, and for its role in upholding equal justice under law. The Court is the crown jewel of the nation's judicial system, and a beacon for judicial systems across the world. The Supreme Court, like the other institutions of government, was built to last. But like all institutions, it is not unassailable. Every lawyer, the two of us included, can point to particular decisions or lines of precedent with which she disagrees. But when it comes to the process by which those decisions are rendered, we are acutely aware of the long-term strengths of our nation's federal courts, including the Supreme Court, in protecting the rule of law and individual rights. The Supreme Court has frequently found itself as the

target of political attacks. It has withstood numerous cross-pressures over the centuries, including a failed and roundly criticized “court packing” plan in the 1930s, and has duly earned the high esteem of the bar and of the general public. The institution and rules that have fostered such high professional and public esteem are not to be altered or amended lightly.

The Committee’s recommendations flow from a shared concern for the institutional integrity of the Supreme Court. While members of the Committee differ in some respects on the proposals before the Commission, the Committee is strongly united in the belief that judicial independence is vital to maintaining the integrity of the Supreme Court and rule of law in this country.

Generally speaking, we believe the Supreme Court itself is best situated to evaluate whether changes should be made to its internal rules or operations. Any changes imposed on the Court that would call into question or jeopardize the crucial protections of an independent judiciary, or subject the Court to an escalating or conflicting series of changes as

political parties changed power, could gravely damage the Court to the detriment not only of practitioners but the nation as a whole.\*

Respectfully,



Kenneth Geller, Co-Chair



Maureen Mahoney, Co-Chair

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\* We would like to thank Charles Dameron and Shannon Grammel for their valuable assistance in the preparation of the following report.

**Report of the Supreme Court Practitioners' Committee**  
**on**  
**Proposals Relating to the Supreme Court and Its Procedures**

**Submitted to the Presidential Commission on the Supreme  
Court of the United States**

**July 16, 2021**

# Supreme Court Practitioners' Committee

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## Executive Summary

The consideration of any changes to the Supreme Court must start with a recognition that the Court occupies a unique place in our government under Article III of the Constitution, which vests the “judicial Power . . . in one supreme Court” and such lower courts as Congress chooses to create. Even beyond Article III, the separation of powers protects the Court’s independent decisionmaking.<sup>1</sup> And legislation concerning the Court may not “impermissibly intrude on the province of the judiciary.”<sup>2</sup> Respect for a coequal branch of government also bears on the steps that other branches of government might take in attempting to implement changes to the Court’s structure or operations.

Consistent with these limits, Congress historically has respected the independence of the Court to formulate its own procedures.<sup>3</sup> The most well-known and striking attempt to regulate the Court—President

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<sup>1</sup> See *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1322-23 (2016) (citing, *inter alia*, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995)); see also *Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018).

<sup>2</sup> *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851-52 (1986).

<sup>3</sup> See 28 U.S.C. §§ 2071-2075, 2077 (Rules Enabling Act provides for congressional review of federal rules of practice, but not rules that apply exclusively to the Supreme Court).

Franklin Roosevelt’s so-called “court packing plan”—ultimately was rejected by Congress and the country.<sup>4</sup> As the late Justice Ruth Bader Ginsburg remarked, “it was a bad idea when President Franklin Roosevelt tried to pack the Court. . . . If anything would make the Court look partisan . . . it would be that—one side saying, ‘When we’re in power, we’re going to enlarge the number of judges, so we would have more people who would vote the way we want them to.’”<sup>5</sup> Such a plan, Justice Ginsburg warned, would threaten judicial independence.<sup>6</sup>

This chapter of our history and the constitutional limits imposed by the separation of powers underscore, as Justice Stephen Breyer has urged, that the other branches of government should “think long and hard” before intervening to change the Court or impose new procedures

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<sup>4</sup> As the Senate Judiciary Committee explained in rejecting President Roosevelt’s plan, it is “essential to the continuance of our constitutional democracy that the judiciary be completely independent of both the executive and legislative branches.” S. Rep. No. 75-711, at 14 (1937).

<sup>5</sup> Nina Totenberg, *Justice Ginsburg: ‘I Am Very Much Alive,’* NPR: Morning Edition (July 24, 2019), <https://n.pr/3BcZMMD>.

<sup>6</sup> *Id.*

on it from outside.<sup>7</sup> Just as Congress and the Executive Branch have a legitimate need for a degree of autonomy in governing themselves, the Supreme Court has a similar interest in governing itself. Respect for a coordinate branch’s independence—and the need for an independent judiciary more generally—counsel in favor of making recommendations to the Court for its consideration rather than imposing new legal strictures on the Court externally, with potentially unintended or deleterious consequences. That same regard for the Court and its role in our government leads us to listen carefully to recent calls to reform aspects of the Court’s processes and structure.

With that understanding, the Committee has carefully considered the proposals that the Commission has invited it to evaluate. These proposals may generally be divided into three categories. First, the Commission has invited the Practitioners’ Committee to assess proposals relating to the number, selection, and tenure of the Justices of the Supreme Court. Second, the Commission has invited the Practitioners’ Committee to analyze proposals relating to the jurisdiction of the

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<sup>7</sup> Robert Barnes & Ann E. Marimow, *Justice Breyer Warns Proponents of Packing Supreme Court to “Think Long and Hard” About The Risks*, Wash. Post, Apr. 7, 2021, <https://wapo.st/2ThuF1B>.

Supreme Court. Third, the Commission has invited the Practitioners' Committee to comment on proposals relating to the Supreme Court's internal administration, such as its handling of certain motions for emergency relief, its internal ethics procedures, its voting rules, and its procedures for appointing counsel in certain cases.

### *The Supreme Court's Composition And Tenure*

On the first set of questions, the Practitioners' Committee unanimously agrees that the current size of the Supreme Court—set at nine Justices by statute since the Judiciary Act of 1869—is appropriate. While there are legitimate concerns surrounding the operation and politicization of the current nomination and confirmation process for Supreme Court Justices, any effort to increase the number of Justices could jeopardize the independence of the Court. The public would surely view this as an effort to alter the outcome of the Court's jurisprudence or level political scores. In addition, increasing the size of the Court would result in functional drawbacks, especially if the addition of new seats now led to the addition of more seats later, in an effort to further counter-balance the makeup of the Court. The members of the Committee have

serious concerns about the unwieldy nature of oral argument and internal decisionmaking with more than nine Justices.

One proposed means of addressing the politicization of the nomination and confirmation process is through the adoption of 18-year terms for Justices, which could ensure greater regularity in the turnover of Justices and might ameliorate the political incentives surrounding the filling of vacancies on the Court. While a majority of the Practitioners' Committee believes that 18-year term limits, with each President getting two seats to fill during a four-year term, warrants serious consideration, the Committee recognizes that the potential effects of such a reform on the operations of the Court itself are speculative, and that its efficacy in reducing the politicization of Court appointments would depend on how such a change interacted with the Senate's exercise of its power of advice and consent regarding the nomination of Justices. A minority of the Committee strongly believes that life tenure itself has played a crucial role in insulating Justices from partisan politics and reprisal, and that replacing life tenure with 18-year terms would work to the detriment of the Court.

In all events, the Practitioners' Committee unanimously agrees that the proper process for any such tenure reform is through constitutional amendment, given that the Constitution grants federal judges life tenure, assuming good behavior.<sup>8</sup>

### *The Supreme Court's Jurisdiction*

The second set of proposals, regarding the Court's jurisdiction, range in scope from sweeping restrictions on the Court's power to decide certain legal questions ("jurisdiction stripping") to more fine-grained reforms concerning the Court's exercise of its power to grant review in certain cases by writ of certiorari. In addition, the Commission has asked the Practitioners' Committee to consider a proposal that the Court should have mandatory appellate review over all death penalty cases arising from the state and federal courts.

As explained below, the Practitioners' Committee does not believe that these proposals have merit. A broad legislative effort to restrict the Court's jurisdiction to consider certain legal questions, such as to deny the Court's ability to review the constitutionality of federal or state legislation, would itself raise serious constitutional questions, and would

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<sup>8</sup> U.S. Const. art. III, § 1.

fundamentally subvert the power of judicial review exercised by the federal courts since the early years of the Republic. The Practitioners' Committee views such jurisdiction stripping proposals as unwarranted. Equally unwarranted are proposals that would purport to give Congress the power to override the Court's judgments. While Congress may always amend federal statutes in response to statutory interpretations with which it disagrees, it cannot negate the Supreme Court's power to construe the Constitution absent constitutional amendment. In a similar vein, the Committee opposes the imposition of any supermajority voting requirement on the Court to hold federal or state laws unconstitutional. On balance, the Committee doubts the merits of adopting a supermajority voting requirement for the Court, which would break from centuries of established practice and raise weighty constitutional concerns.

The Practitioners' Committee has also addressed various proposals to guide the Supreme Court's exercise of jurisdiction through its power to grant writs of certiorari. Over time, and through experience, Congress has given the Supreme Court near-plenary control over its docket by reducing the category of cases that the Court must hear (its mandatory

appellate jurisdiction), leaving the Court to decide in its discretion what cases it might review by writ of certiorari. That structure has allowed the Supreme Court to perform a unique role in the federal judicial system by reserving its jurisdiction for important legal questions, particularly those that have divided lower courts. While members of the Committee accept that hearing more cases would have benefits, the Committee believes that the Court itself remains best placed to determine which cases it should hear. In the view of the Practitioners' Committee, none of the proposals to channel or guide the Court's exercise of certiorari is likely to improve the current process for deciding which cases will be heard by the Court.

For similar reasons, the Practitioners' Committee opposes any effort to give the Supreme Court mandatory appellate jurisdiction over death penalty appeals arising directly from state or federal judgments in capital criminal cases. Such an intervention would significantly change the Court's docket, and would not improve the Court's ability to review the many constitutional issues that arise in connection with capital cases only on collateral review. A majority of the Committee does, however, support consideration of a more limited proposal to heighten the

standard for the Supreme Court and other federal appellate courts to vacate a stay of execution issued by a lower court. Given the profound consequence of legal error in capital cases, these members believe that a stay of execution should be afforded greater deference by the Supreme Court and other federal appellate courts.

### *The Supreme Court's Internal Procedures*

The Practitioners' Committee has considered a great many proposals to reform the Supreme Court's administration of its own affairs. As a general matter, the Committee, consistent with the separation-of-powers principles discussed above, believes that the proper resolution of these proposals should ultimately be left to the Court itself. Indeed, Congress traditionally has reserved to the Court the authority to regulate its own internal affairs, rules, and decisionmaking.

The Practitioners' Committee was asked to evaluate numerous proposed reforms to the Court's emergency docket, referred to by some as the "shadow docket": for example, requiring the Court to hold oral argument on certain motions for emergency stays of lower court judgments, or requiring Justices to provide explanations of their orders on motions for stay. While these proposals arise from good-faith concerns

about the transparency of the Court's decisionmaking process, the proposals noted by the Commission do not afford practical solutions to those concerns. Due to the varied and exigent nature of the Court's emergency docket, the Court's processes with respect to such matters must be fast and flexible. Efforts to encumber those matters with new procedural requirements could prove imprudent, if not unconstitutional. That said, the Court may wish to consider allowing oral argument on certain emergency applications where cases present novel legal questions or factual uncertainty, and providing explanations for its orders, especially in cases where the Court issues an injunction in the first instance.

Likewise, any changes to the Court's existing procedures respecting its recusal and ethics policies are best left to the Court's discretion. The external imposition of a Code of Conduct for the Justices, or the imposition of external review of the Justices' recusal decisions, would implicate significant separation-of-powers concerns. And it would do so for no apparent benefit, since the Practitioners' Committee is not aware of any significant problems with the Justices' current practices, and since

it has been reported that the Chief Justice is already considering the adoption of a code of conduct for the Supreme Court.

The same concerns undergird the Committee's recommendations with respect to proposals to promote public engagement with the Court's work through live audio feeds of Court proceedings and through cameras in the courtroom. The Committee recognizes that live audio broadcasts of oral argument—an innovation that arose during the COVID-19 pandemic—have given the public a welcome window into the operations of the Court, and the Committee encourages continuation of that practice. Likewise, the Court should consider expanding live audio to include opinion announcements when they resume. Some members of the Committee believe that televised arguments would have a similarly positive effect. Other members of the Committee believe that televised arguments could change the tenor of argument in ways that would be unwelcome and might ultimately impair the Court's decisionmaking process. Despite these divergent views, however, the consensus of the Committee is that Congress should not enact legislation in this area. Not only would such legislation raise serious constitutional questions, but the

Court is the institution best placed to determine whether oral argument should be televised.

The Commission has also asked for the Practitioners' Committee's views regarding the appointment of advocates as amici curiae in certain cases where the Court has determined that the parties' arguments should be supplemented (for instance, where there is a significant question of jurisdiction despite the parties' agreement). The Committee believes that expanding the pool of attorneys from which the Court draws amicus appointments would be welcome, but otherwise does not endorse the prescription of a specific public standard for such appointments. Nor does the Committee support the proposal for an "Office of the Defender General" that would appear as amicus curiae, or as party counsel, in criminal defense cases. That proposal—rooted in important concerns regarding the disparate resources enjoyed by criminal defense lawyers and government lawyers—does not adequately account for potential conflicts of interest between differently situated groups of criminal defendants. The Committee recommends instead that increased federal resources should be directed at helping state and federal public defenders' offices to develop Supreme Court expertise.

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These proposals are sequentially discussed below in the body of the report, in the order that they were presented to the Committee. The Committee has identified its recommendation as to each proposal, and has provided a short discussion of the considerations in support of its recommendation, while taking note of any significant disagreement among Committee members. We are grateful for the opportunity to comment on these proposals.

## Emergency Docket

**Proposals:** Require the Court to hold oral arguments on applications for a stay where there is a likelihood it would alter the status quo; require Justices to provide a brief explanation of any order with respect to a stay; and require greater deference to district court fact-finding or a higher bar for overturning orders when a Court of Appeals has affirmed the lower court.

### I. Recommendation

We oppose these proposals.

First, oral argument would almost invariably complicate the streamlined and fast-moving procedure necessary to resolve emergency applications. While oral argument might enhance the decisional process in some cases, the Court itself is best positioned to identify which cases might qualify. A requirement to hold oral argument in any particular category of emergency applications would unduly hamper the Court's functioning. Second, explanation of emergency orders could be beneficial to the public, parties, and lower courts. But any rule requiring opinions—even brief ones—could delay the process or require the Court to achieve consensus on its rationale without the full deliberative process used in merits cases. Such a requirement would also be in tension with the purpose of the emergency process to preserve or protect important equities pending a more considered decision on the merits. Finally, the

Court's existing standards already build in deference to lower court rulings when parties apply for a stay or injunctive relief.

The Court may wish to consider how it can make its emergency docket more transparent, including by allowing oral argument on certain emergency applications where cases present novel legal questions or factual uncertainty, or by providing explanations for its orders, especially in cases where the Court issues an injunction in the first instance. But fashioning workable procedures for an inherently fluid process is difficult, and imposing procedures on the Court through legislation would depart from historic practice, intrude on the Court's independence, and raise constitutional concerns. Thus, we believe that any procedural reforms would best be developed within the Court itself.<sup>9</sup>

## **II. Discussion**

### **A. The Emergency Stay Docket**

The Supreme Court's emergency docket, sometimes referred to as

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<sup>9</sup> Commentators have also proposed reforms to the Court's processes surrounding other summary decisions made without full briefing and argument. See, e.g., Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 Harv. L. Rev. 123 (2019); William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & Liberty 1 (2015). Many of the observations we make here for the emergency docket would likely apply in those contexts as well.

part of the “shadow docket” in contrast to the more publicly visible merits docket, is a longstanding and necessary feature of Supreme Court practice. Recently, in response to an upsurge in the number and significance of such rulings, some observers have criticized its use to resolve important legal disputes without the procedures associated with the Court’s traditional merits rulings. Litigants, lower courts, and some Justices themselves have suggested that this use of the emergency docket compromises transparency, clarity, and accountability, and potential reforms have been proposed to respond to these concerns.

Criticisms of the Court’s handling of the emergency docket largely fall into three categories. First, some have criticized the Court for resolving important issues through a process that lacks the transparency characteristic of the merits docket. Briefing is expedited and truncated. The public does not see oral argument, arguments are not held even in chambers, and the Justices do not typically reveal their votes. All of these streamlined procedures contribute to a perception that the emergency docket is mysterious or even arbitrary. Second, some emergency rulings are unexplained, with no opinions issuing at all, or only highly summary

explanations.<sup>10</sup> Opaque or cryptic decisions may leave the public uncertain about the basis for the Court’s action. Summary action also can leave the parties and lower courts without guidance on how to apply the Court’s action to other cases presenting similar issues. Third, some orders are supported by opinions that may appear to resolve major unsettled issues of law.<sup>11</sup> Some have questioned the use of truncated processes for that purpose.

## **B. Reform Proposals And Responses**

As practitioners, we have serious reservations about the proposed procedural reforms to the emergency docket.

First, requiring the Court to hold oral arguments on emergency applications “that would likely alter the status quo” would not be sound. That standard would be difficult to apply because the Court typically would not know that its action would likely alter the status quo without considering the merits. And routinely inserting oral arguments into a

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<sup>10</sup> See *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021) (granting an injunction without a majority opinion explaining the Court’s reasoning).

<sup>11</sup> See *Tandon v. Newsom*, 141 S. Ct. 1294, 1296-98 (2021) (per curiam); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66-69 (2020) (per curiam).

process designed to be fast and streamlined may impose significant burdens, and may hamper quick relief in urgent situations, without producing measurable benefits in most cases.

Second, requiring Justices to provide a brief explanation of any emergency order would likely cause more problems than it solves. For the Court to say only that the applicable stay or injunction standards were met would not be informative. And requiring the Court to say more may be difficult. Given the abbreviated nature of emergency-application briefing, it may not always be feasible to achieve and express a consensus rationale. And requiring the Court to announce legal conclusions may appear to commit the Justices to particular views before merits briefing—which itself is a criticism of some emergency orders.

Third, the proposal to require greater deference to district court fact-finding or require a higher bar for overturning orders when a court of appeals has affirmed the lower court echoes established standards that reflect those principles. The traditional “clearly erroneous” standard for reviewing factual findings already incorporates substantial deference to the trier of fact. And when a reviewing court has affirmed a trial court’s findings, the Supreme Court’s traditional “two court rule” provides an

additional layer of deference.<sup>12</sup> Other established principles also counsel restraint and deference. These include that denial of a stay is the “norm” and relief should be granted only in “extraordinary cases”<sup>13</sup>; when the Court of Appeals has denied the government’s motion for a stay, the government bears “an especially heavy burden”<sup>14</sup>; and when the Court of Appeals sets an “expedited schedule” to address an important “constitutional issue,” the interest in ordinary process weighs against Supreme Court intervention.<sup>15</sup> That the Court may not always garner universal acclaim—even among the Justices themselves—for its adherence to these settled standards does not establish a need for new ones. As discussed below, however, a majority of the Committee recommends serious consideration of a proposal to heighten the standard of review with respect to stays of execution in capital cases.

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<sup>12</sup> See *Glossip v. Gross*, 576 U.S. 863, 882 (2015) (The Supreme Court does not review “concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.” (citation omitted)).

<sup>13</sup> *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (citation omitted).

<sup>14</sup> *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, C.J., in chambers).

<sup>15</sup> *Doe v. Gonzalez*, 546 U.S. 1301, 1303 (2005) (Ginsburg, J., in chambers).

Finally, any decision to impose new procedures on the Court would have to confront significant constitutional and prudential issues. The Court has a unique place under Article III of the Constitution, which vests the “judicial Power . . . in one supreme Court”<sup>16</sup> and such lower courts as Congress chooses to create. The separation of powers protects the Court’s independent decisionmaking.<sup>17</sup> And legislation may not “impermissibly intrude on the province of the judiciary.”<sup>18</sup> Legislation that dictates specific procedures to the Supreme Court about how to decide cases and what to say about its decisions therefore risks constitutional challenge. The boundaries of these principles have never been tested because Congress has respected the historic independence of the Court to formulate its own procedures.<sup>19</sup> But even apart from constitutional doubts, the other branches of government should hesitate

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<sup>16</sup> U.S. Const. art. III, § 1.

<sup>17</sup> See *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1322-23 (2016) (citing, *inter alia*, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995)); see also *Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018).

<sup>18</sup> *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851-52 (1986).

<sup>19</sup> See 28 U.S.C. §§ 2071-2075, 2077 (Rules Enabling Act provides for congressional review of federal rules of practice, but not rules that apply exclusively to the Supreme Court).

before imposing novel procedures on the Supreme Court. Just as Congress and the Executive Branch have a legitimate need for a degree of autonomy in governing themselves, the Supreme Court has a similar interest in governing itself. Respect for a coordinate branch's independence counsels in favor of making recommendations to the Court for its consideration rather than imposing new legal strictures, with potentially unintended or deleterious consequences. The area of emergency practice is a particularly poor candidate for legislation because of the Court's imperative to act quickly and in response to highly varied circumstances.

## Death Penalty Docket

**Proposals:** Provide the Supreme Court with mandatory appellate jurisdiction over direct appeals from capital verdicts; and specify a more rigorous or heightened standard of review for vacatur of stays of execution.

### I. Recommendation

The Committee opposes the proposal for mandatory direct review. Mandatory jurisdiction of direct appeals in capital cases could overwhelm the Court's merits docket with cases raising numerous issues which do not typically warrant the Court's intervention. And because the Court most frequently addresses emergency applications in capital cases *after* direct review, this proposal would not address the principal concerns raised about the Court's handling of such applications.

A majority of the Committee believes that the proposal to heighten the existing standard of review for federal courts' assessment of applications to vacate stays of execution warrants serious consideration. Requiring courts to meet a more demanding standard to vacate a stay of execution is supported by the profound consequence of error—the defendant's potentially unlawful execution. It may also help address some of the process concerns that can arise when courts confront difficult

issues in applications to vacate stays of execution through emergency proceedings.

## **II. Discussion**

### **A. Mandatory Direct Review**

In the United States over the past six years, between 31 and 49 persons have been executed annually.<sup>20</sup> It is reasonable to anticipate a similar number of direct appeals annually. Considering the Supreme Court's pace of 55 to 65 cases per Term, the proposed mandatory jurisdiction over all direct appeals from capital verdicts likely would lead to a docket dominated by capital cases.

Relatedly, direct review of capital verdicts involves consideration of many more issues, and more fact-intensive issues, than is the norm in the Court. If Supreme Court review were mandatory, state supreme courts could be motivated to craft opinions that sort and present the issues for the Supreme Court. The Court might also employ Special Masters in such cases. Nonetheless, the Court would be resolving numerous issues not otherwise certworthy.

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<sup>20</sup> See Death Penalty Information Center, *Facts About the Death Penalty* (July 1, 2021), <http://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf>.

Proponents of the proposal believe that mandating plenary direct review will “tak[e] pressure *off* of the shadow docket.”<sup>21</sup> Plenary review, of course, is not susceptible to the principal criticisms of emergency proceedings, including the limited briefing and the absence of opinions and oral argument. But stays of execution are “virtually automatic” while a capital defendant pursues direct review.<sup>22</sup> Thus, the Court most frequently confronts substantial legal issues in emergency applications in capital cases on collateral review. Indeed, such applications often involve “issues that *could not have been* litigated before the execution date was set,” such as a defendant’s competency, the execution protocol, and religious freedom.<sup>23</sup> Thus, this proposal would not respond to most

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<sup>21</sup> Testimony of Stephen I. Vladeck at 18, *The Supreme Court’s Shadow Docket: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 117th Cong. (Feb. 18, 2021) (“*Shadow Docket Hearing*”), <https://docs.house.gov/meetings/JU/JU03/20210218/111204/HHRG-117-JU03-Wstate-VladeckS-20210218-U1.pdf>.

<sup>22</sup> Stephen M. Shapiro et al., *Supreme Court Practice* § 18.3 (11th ed. 2019).

<sup>23</sup> Testimony of Amir H. Ali at 2, *Shadow Docket Hearing*, <https://docs.house.gov/meetings/JU/JU03/20210218/111204/HHRG-117-JU03-Wstate-AliA-20210218-U2.pdf>; *see also, e.g., Jones v. Texas*, \_\_ S. Ct. \_\_, 2021 WL 1997086 (2021); *United States v. Higgs*, 141 S. Ct. 645 (2021); *Montgomery v. Watson*, 141 S. Ct. 1232 (2021); *Barr v. Lee*, 140 S. Ct. 2590 (2020) (per curiam).

circumstances in which the Court faces “the difficulty of confronting novel legal questions on the literal eve of a scheduled execution.”<sup>24</sup> On balance, therefore, the Committee opposes this proposal.

## **B. Heightened Standard Of Review**

Practitioners representing capital defendants strongly support heightening the existing deferential standard of review for applications to vacate stays of execution. They point to the heightened deference in the standard of review under the Anti-Terrorism and Effective Death Penalty Amendment Act (“AEDPA”),<sup>25</sup> and argue that crafting a heightened standard for applications seeking to vacate stays of execution would also be appropriate. They contend that increasing the existing deference is justified when a lower federal court—which has generally had more time to consider the issues than reviewing courts—has already entered a stay in circumstances where the cost of erroneous reversal is so high. They contend that heightened deference, in combination with

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<sup>24</sup> Vladeck Test., *supra* note 21, at 18.

<sup>25</sup> See 28 U.S.C. § 2254(d) (requiring a party seeking review of certain criminal convictions to show either that the decision below “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States” or was “based on an unreasonable determination of the facts”).

concrete guidance about what fulfills the individual elements of the test for emergency relief, could make a significant difference in the review process, based on their experience that the heightened AEDPA standard has made a significant difference where it applies. Further, they observe that emergency reversals of stays of execution may create public concern and misunderstanding. For example, where a stay of execution is vacated without explanation, a defendant may be executed when the sole written judicial decision addressing his claim has found it likely the execution is unlawful. If the standard for vacatur of a stay of execution were more rigorous or concrete, they believe, summary vacatur might be less likely and/or more likely to be fully explained. Proponents also argue that raising the burden of proof may function as a pressure-relief measure, reducing reviewing courts' burden in emergency settings, because motions to vacate will both be less likely and require a more substantial showing.

Opponents believe that existing review standards for stays already incorporate the deference due to a lower court's fact-finding role and discretion while ensuring that stays comply with legal dictates, and thus appropriately balance capital defendants' interests in avoiding unlawful

or otherwise wrongful executions against societal interests in enforcing lawful sentences, securing justice for victims and society, and achieving finality. Opponents thus view a heightened standard for vacating stays of execution as unnecessary. To the extent that a new heightened standard would apply to appellate review of *any* stay in a capital case—not only by the Supreme Court but also by Courts of Appeals—opponents view such a change as undesirable as well, since it could frustrate the execution of a lawful penalty by effectively insulating the ruling of a single district judge from meaningful review.

Under existing law, appellate courts already provide significant deference to lower courts' stay decisions. The Supreme Court, for example, vacates a stay only after five Justices conclude that the lower court's decision to stay the execution was "demonstrably wrong in its application of accepted standards,"<sup>26</sup> providing a significant protection against wrongful execution. Further, opponents point out that motions to vacate stays generally come to appellate courts only on collateral review, meaning that there have been layers of review and years of

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<sup>26</sup> *E.g.*, *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, C.J., in chambers).

proceedings beforehand. Moreover, they note, the Courts of Appeals and the Supreme Court have procedures in place that allow them to act with appropriate deliberation on applications for stays of execution, including receiving notice of the filing of a stay application in the lower courts, together with the relevant briefs and arguments, in real time well before an application is formally filed in the appellate court. As a result, opponents believe that concerns arising from the limited time for appellate review are overstated. Finally, some opponents observe that the heightened deference afforded under AEDPA was based on state sovereignty, a consideration not present in this context, and that there is no analogous basis for heightened review here.

On balance, based on the Supreme Court's recognition that capital cases are different and on the potential beneficial effects of a heightened standard of review on the process for consideration of applications to vacate a stay of execution, a majority of the Committee believes that proposals for heightened standards of review for such applications warrant serious consideration. A significant number of members of the Committee oppose the proposal for the reasons stated by its opponents.

## Certiorari Docket And Caseload

**Proposals:** Statutorily delineate bases for certiorari; create a certiorari division of Article III judges to select cases for the Court to hear; require disclosure of all certiorari votes; and add a “lottery docket” of randomly selected cases from the Courts of Appeals to the Court’s caseload.

### I. Recommendation

We oppose these proposals relating to the Supreme Court’s certiorari docket or caseload. Practitioners love to debate whether the Court’s docket is too small, too big, or just right, and many would echo Chief Justice Roberts’s own observation before he joined the Court that there appears to be “room for the Court to take more cases.”<sup>27</sup> But the Court is best situated, exercising its longstanding certiorari criteria and the discretionary jurisdiction granted by Congress, to determine which cases, and how many, to hear each Term.

### II. Discussion

Deciding which cases to hear—and how many—lies at the core of the Court’s internal decisionmaking process in exercising the

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<sup>27</sup> *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 337 (2005), <https://www.govinfo.gov/content/pkg/GPO-CHRG-ROBERTS/pdf/GPO-CHRG-ROBERTS.pdf> (statement of John G. Roberts Jr.).

discretionary jurisdiction granted by Congress. Any change in that process, if warranted, should come from the Court itself.

### **A. Transition To A Discretionary Docket**

The number of cases in which the Court hears argument and issues decisions each term has declined dramatically over the past several decades. In its 1984 Term, the Court decided 151 cases on the merits.<sup>28</sup> In its 2019 Term, the Court decided just 59 cases on the merits.<sup>29</sup> In recent years, the Court’s merits docket has consistently hovered around 70 cases or so, which appears to be the new “norm.”

A number of theories have been advanced for this decline, ranging from the turnover in Justices to a reduction in the number of conflicts of authority generated by new statutes to a decline in the number of certiorari petitions filed by the Solicitor General. But perhaps more notably, the decline in the Court’s merits docket also has coincided with Congress’s decision to scale back the Court’s mandatory jurisdiction—appeals it must hear by law.

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<sup>28</sup> *The Supreme Court, 1984 Term—The Statistics*, 99 Harv. L. Rev. 322, 322 (1985).

<sup>29</sup> *The Supreme Court, 2019 Term—The Statistics*, 134 Harv. L. Rev. 610, 615 (2020).

For the first century of its existence, the Supreme Court had mandatory jurisdiction over appeals in many types of cases, generating scores of additional cases it was required to hear by statute. But beginning in 1891, Congress passed a series of laws withdrawing that mandatory jurisdiction, such that most of the Court's cases arose by discretionary writ of certiorari. And in 1988, Congress all but eliminated the remaining bases for the Supreme Court's mandatory appellate jurisdiction.

Today, the Court's docket is almost entirely discretionary, with the primary exception being election-related appeals from three-judge federal district courts. The Court exercises that discretion according to criteria set forth in its own Supreme Court Rule 10, such as the existence of a conflict of authority.

#### **B. Proposals To Direct The Court's Exercise Of Discretion**

Noting the decline in the Court's caseload, some commentators have urged the Court to expand its docket. These proposals do not appear to be targeted to any particular *types* of cases commentators believe that the Court should hear more of, but rather a perception that taking more cases would enhance the development of law more generally, give the

Court a better sense of what is happening on the ground, and increase the number of non-controversial cases on the docket.

Some commentators have proposed that Congress legislate criteria the Court must follow in deciding whether to hear cases. But, by definition, the point of a discretionary docket is to allow the Supreme Court itself to decide which cases to hear. Proposals seeking to override or rechannel that discretion not only would defeat the point of a discretionary docket, but also could raise constitutional concerns about interference with the Court's internal deliberations and procedures.<sup>30</sup> The same goes for proposals requiring the Justices to publicly announce their votes on certiorari petitions. And even setting aside these serious constitutional and comity concerns, congressional regulation of the Supreme Court's structure and internal processes would set a dangerous precedent that could be used in the future to undermine the Court's independence and the separation of powers.

The Court's discretion in deciding which cases—and how many—to hear also serves as a “passive virtue[]” that allows the Justices to focus

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<sup>30</sup> *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851-52 (1986) (Congress may “not impermissibly intrude on the province of the judiciary.”).

their scarce resources on the cases in which they determine their review is most appropriate or important.<sup>31</sup> The Supreme Court wields tremendous power to set binding precedent that applies nationwide, subject in the case of non-constitutional law to Congress’s lawmaking power. The Court is in the best position to evaluate these concerns and determine when the exercise of that power is most appropriate.

### **C. Other Proposals**

Just as it saw fit to winnow the Court’s mandatory jurisdiction, Congress could again expand that jurisdiction by statute, as some have proposed. While there may be sound reasons to retain the Court’s discretionary jurisdiction—including preserving the Court’s limited resources and ensuring that the power to set binding, nationwide precedent is exercised thoughtfully and sparingly—Congress generally has the authority to expand the Court’s jurisdiction by law.

Redirecting the certiorari decision from the Supreme Court to a “certiorari division” of judges from the Courts of Appeals, however, could raise constitutional questions in light of the Framers’ decision to vest the

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<sup>31</sup> Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 111, 172 (2d ed. 1986) (formatting altered).

judicial power “in *one* supreme Court.”<sup>32</sup> It also would simply redirect any concerns about the exercise of discretion in the certiorari process from one decisionmaker to another. And the selection of judges to serve on the certiorari division could extend the contentious nature of the current Supreme Court confirmation process to other judges.

A “lottery docket,” which would comprise cases chosen at random from decisions of the Courts of Appeals, would make things interesting and achieve its object of increasing the number of cases that the Court hears (to the benefit of a few lucky winners), but at no evident gain in terms of developing the law. The Court’s guidance is most needed in cases where there is a lack of clarity or a conflict among the courts. And deflecting the Court’s attention from such cases by increasing its docket of other, randomly selected cases may prove more harmful than helpful.

On the whole, the Court’s current process for selecting its caseload not only comes with the benefit of being time-tested but also has proven to be sound in practice. The Court is in the best position to decide whether there is room to take more cases—and which cases, among the

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<sup>32</sup> U.S. Const. art. III, § 1 (emphasis added).

thousands that reach its steps each year, warrant the expenditure of its scarce resources.

## Representation And Amicus Procedures

**Proposals:** Create public standards for selection of attorneys appointed as amicus counsel and increasing diversity in appointments; and create a permanent office or appointment of attorneys on a case-by-case basis to argue as amicus on criminal defense issues.

### I. Recommendation

The Committee does not believe formal adoption of public standards for appointing amicus counsel is necessary, but we recommend the continued expansion of the group of advocates considered for appointment. The Committee opposes the establishment of an office or Court committee process to appoint amicus counsel to argue criminal law issues.

### II. Discussion

#### A. Diversifying The Group Of Appointed Amicus Counsel

Since 1926, the Supreme Court has appointed counsel as amicus curiae approximately 70 times, with an average of one or two per year.<sup>33</sup> Unlike traditional amici, appointed amici are instructed by the Court to take a particular position and to present oral argument. Of the

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<sup>33</sup> See Katherine Shaw, *Friends of the Court: Evaluating the Supreme Court's Amicus Invitations*, 101 Cornell L. Rev. 1533, 1594-95 (2016) (listing the 59 appointments from 1926 through 2016).

approximately 70 amicus counsel appointments to date, it appears that only seven advocates have been women and only four have been people of color.<sup>34</sup> Appointments have been heavily skewed toward former law clerks.<sup>35</sup>

Commentators have suggested various means of broadening the group of attorneys considered for appointment by creating an application process, promulgating qualification criteria, or issuing general invitations for amicus briefing on issues and selecting one responding amicus to argue.

The Committee does not endorse prescribing a public standard for appointments, but we support continued expansion of the group to which the Court looks for appointments. In particular, greater diversity likely would result if consideration were given to more attorneys who are not former law clerks, especially advocates in the specialized appellate bars of state courts and other federal courts and law professors.

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<sup>34</sup> For a visual representation, see Alan Mygatt-Tauber (@AMTAppeals), Twitter (Jun 15, 2021 6:43 PM) <https://twitter.com/AMTAppeals/status/1404932622887768065>.

<sup>35</sup> Shaw, *supra* note 33, at 1556-57.

## B. Criminal Defense Cases

Some of the best advocates before the Supreme Court are criminal defense attorneys, especially in the specialized capital defense bar. But the attorneys in the criminal defense bar generally have fewer resources to support specialized Supreme Court litigation than do their prosecutor counterparts. Government prosecutors also have more strategic flexibility about which issues to litigate in a case, whereas criminal defense attorneys have an ethical duty to zealously represent the interests of their individual client whose personal liberty is at stake. And prosecutors collaborate extensively with each other through organizations like the National Association of Attorneys General, and often support each other as *amicus curiae*, but such resources are much more limited on the criminal defense side.<sup>36</sup>

Commentators have suggested a variety of means to address the imbalance, including Supreme Court appointment of new attorneys to represent criminal defendants at the Court, creating a standing committee within the Court's bar to select counsel to argue as *amicus*

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<sup>36</sup> See Andrew Manuel Crespo, *Regaining Perspective: Constitutional Criminal Adjudication in the U.S. Supreme Court*, 100 Minn. L. Rev. 1985, 2014-17 (2016).

curiae supporting criminal defendants, and the creation of a separate office of attorneys who would identify a position consistent with the collective interest of criminal defendants to advocate as amicus before the Court.<sup>37</sup>

We do not endorse these proposals, which do not adequately account for the attorney-client relationship, privileged communications, or conflicts of interest between differently situated groups of criminal defendants. Indeed, the proposal that an office of attorneys could argue as amicus against a criminal defendant based on a view that other criminal defendants would be better served by a different ruling would only exacerbate the imbalance identified.

The imbalance would be better addressed through federal and state legislative appropriation of increased resources to develop more Supreme Court specialization within the criminal defense bar in state and federal public defender offices and through greater collaboration with Supreme Court specialists in clinics and pro bono partnerships.

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<sup>37</sup> See *id.* at 2022-28; Daniel Epps & William Ortman, *The Defender General*, 168 U. Pa. L. Rev. 1469 (2020).

## Ethics, Recusal, And Transparency Procedures

**Proposals:** Impose a code of conduct on the Justices; institute recusal enforcement procedures and transparency requirements; and ban owning stocks, and impose further restrictions on gifts and outside income.

### I. Recommendation

We acknowledge the importance of ethical behavior among the Justices. But we oppose mandatory measures of the kinds under consideration because we do not see evidence of a problem in the Court's current practices that would warrant raising the serious separation-of-powers concerns these proposals would implicate.

### II. Discussion

#### A. Code Of Conduct

One widely discussed proposal for Supreme Court reform is to impose a code of conduct on the Justices. We oppose such measures.

The Supreme Court is the head of a coequal branch of government.<sup>38</sup> Our constitutional structure leaves each branch to order its own internal workings to ensure “[t]he respect due to coequal and independent departments.”<sup>39</sup> The Justices have long recognized the need to permit

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<sup>38</sup> See U.S. Const. art. III.

<sup>39</sup> *Marshall Field & Co. v. Clark*, 143 U.S. 649, 672 (1892).

Congress,<sup>40</sup> and the Executive Branch,<sup>41</sup> to regulate their own internal affairs and decisionmaking. Legislatively imposing a code of ethics would raise significant and unresolved separation-of-powers concerns, because it would risk “impermissibly intrud[ing] on the province of the judiciary” to direct its own internal affairs.<sup>42</sup>

To be sure, Congress has long legislated to forbid behavior by lower court judges that historically was understood as unethical, *e.g.*, requiring recusal in limited cases.<sup>43</sup> Beyond that, the Constitution provides minimal standards of impartial justice applicable in all courts.<sup>44</sup> And Congress has also passed statutes in more modern times prohibiting the Justices from, for example, engaging in the practice of law<sup>45</sup> and

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<sup>40</sup> *Id.*; see also *NLRB v. Noel Canning*, 573 U.S. 513, 552 (2014); *Nixon v. United States*, 506 U.S. 224, 238 (1993).

<sup>41</sup> *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2032 (2020); *United States v. Nixon*, 418 U.S. 683, 706 (1974).

<sup>42</sup> *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851-52 (1986); see also Kevin M. Lewis, Cong. Res. Serv., *A Code of Conduct for the Supreme Court? Legal Questions and Considerations* 3 (Feb. 6, 2019), <https://fas.org/sgp/crs/misc/LSB10255.pdf>.

<sup>43</sup> See *Liteky v. United States*, 510 U.S. 540, 544 (1994) (describing early recusal statutes).

<sup>44</sup> *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876-77, 887-90 (2009); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

<sup>45</sup> 28 U.S.C. § 454.

nepotism.<sup>46</sup> But, as Chief Justice Roberts noted in 2011, “[t]he Court has never addressed whether Congress may impose” ethical requirements on the Justices.<sup>47</sup>

Given these serious concerns, we believe imposing such measures would be ill-advised, particularly because we do not see evidence of any significant problem in the Justices’ current practices. “All Members of the Court” already “consult the Code of Conduct” used by lower court judges “in assessing their ethical obligations.”<sup>48</sup> That Code has its roots in the ABA’s 1924 Canons of Judicial Ethics, reflects nearly 100 years of judicial and practitioner experience, and already provides “a key source of guidance” for the Justices.<sup>49</sup> It is unlikely that compulsory legislative measures could be sufficiently surgical to significantly improve on the guidance provided by the Code of Conduct. Particularly in light of recent reports that the Chief Justice is considering building on this accumulated

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<sup>46</sup> *Id.* § 458.

<sup>47</sup> Chief Justice John G. Roberts, Jr., 2011 Year-End Report on the Federal Judiciary 6 (Dec. 31, 2011) (“Roberts Report”), <https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>.

<sup>48</sup> *Id.* at 4.

<sup>49</sup> *Id.* at 2, 5.

experience and having the Court create its own code of conduct,<sup>50</sup> and in light of the serious separation-of-powers issues raised by legislative intervention, we recommend against this proposal.

## **B. Recusal Procedures**

Some commentators have proposed reforming the Court's recusal procedures by, for instance, having the Judicial Conference or other Justices review individual Justices' recusal decisions and/or requiring the Justices to publish and explain their recusal decisions. We oppose these measures.

Congress legislatively required recusal for district court judges beginning in 1792 in cases where the judge had an interest in the outcome of the case or had acted as counsel.<sup>51</sup> And over time, Congress expanded the bases of recusal under that statute.<sup>52</sup> But the legislation was still limited to lower court judges until the mid-twentieth century

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<sup>50</sup> Kimberly Strawbridge Robinson, *Roberts Mulls Ethics Code for Supreme Court Justices*, Bloomberg (Mar. 7. 2019), <https://news.bloomberglaw.com/us-law-week/roberts-mulls-ethics-code-for-supreme-court-justices-1>.

<sup>51</sup> *See Liteky*, 510 U.S. at 544.

<sup>52</sup> 28 U.S.C. § 455.

when Congress first extended it to the Justices.<sup>53</sup> Moreover, some standards may well already be inherent in the notion of the judicial power,<sup>54</sup> so it is not clear that these statutes offer strong precedent for further regulation. As the Chief Justice has observed, “the limits of Congress’s power to require recusal” of the Justices “have never been tested.”<sup>55</sup>

Imposing a procedure whereby bodies of lower court judges review the Justices’ recusal decisions, for example, may well upset the judicial hierarchy of Article III—with *one* Supreme Court at the apex.<sup>56</sup> Legislation requiring the Justices (individually or as body) to publish and explain their recusal decisions may also impermissibly impinge on the internal working of a coordinate branch.<sup>57</sup> It is possible that the Court could choose, by rule, to vet all recusal decisions by individual Justices without raising the same constitutional problems,<sup>58</sup> but we do not believe

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<sup>53</sup> Act of June 25, 1948, ch. 646, § 455, 62 Stat. 869, 908.

<sup>54</sup> *Caperton*, 556 U.S. at 876-77.

<sup>55</sup> Roberts Report, *supra* note 47, at 7.

<sup>56</sup> Lewis, *supra* note 42, at 3.

<sup>57</sup> *Cf. Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1322 (2016).

<sup>58</sup> *Cf. Sup. Ct. R. 22.5.*

that such a practice would likely lead to increased public confidence in such decisions, particularly in high-profile or controversial cases where a divided vote on such questions could well have the opposite effect.

Under current practice, recusal applications are addressed to individual Justices, and each Justice determines whether her decision not to recuse in a particular case merits a published explanation. We see no urgent need to change the Court’s practice in this respect, statutorily or by rule. At the very least, given that the Justices already comply with the recusal statute—while acknowledging that “the application of” the statute “can differ due to the unique circumstances of the Supreme Court”<sup>59</sup>—the sensitive separation-of-powers concerns raised by a legislative solution, and the paucity of evidence that there is a meaningful problem with the Court’s current practices, we oppose the legislative adoption of additional measures.

### **C. Stock Ownership And Gift Restrictions**

Some reform proposals have suggested banning the Justices from owning or trading individual stocks, as well as increasing restrictions and

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<sup>59</sup> Roberts Report, *supra* note 47, at 7.

reporting requirements related to the receipt of gifts and speaking engagements. We oppose these measures.

Individual stock ownership can interfere with the Court’s discharge of its duties, such as by creating a 4-4 split among the Justices when one Justice must recuse based on stock ownership, but such interference is relatively rare. And there is no basis to believe that any of the handful of recent reports of Justices unwittingly sitting on cases where they owned stock in a party were anything but isolated instances of good-faith lapses in Justices’ individual conflict-of-interest vetting procedures. Moreover, mandating that Justices dispose of all individual stocks—a rule that presumably would apply to spouses and dependent children as well—could have large and immediate tax consequences on the Justices<sup>60</sup> while depriving them of an investment vehicle that is generally available to the public. Given the sacrifices already required from public servants,

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<sup>60</sup> In 2006, Congress amended 26 U.S.C. § 1043(b)(2)(A) to allow federal judges to mitigate the tax consequences of certain stock divestitures “reasonably necessary” to comply with federal conflict-of-interest statutes or judicial canons. It is not obvious that sales compelled by a blanket ownership ban unconnected to a real-world conflict would be eligible for favorable treatment; but, in any event, the law prescribes investment restrictions on the proceeds that may cause greater financial hardship if imposed on a wider basis than any actual conflict of interest and that do not seem warranted by any current problem.

this additional measure is insufficiently justified either to increase public confidence in the Court or to reduce a handful of occasional recusals. Even absent constitutional concerns, we do not believe that such isolated recusals as may result from stock ownership warrant prohibiting Justices' individual stock ownership.

As for the imposition of additional reporting, gift, and income restrictions, the Justices already comply with existing statutes,<sup>61</sup> the Chief Justice has noted that the constitutionality of such restrictions is unsettled,<sup>62</sup> and additional restrictions could make it more difficult for the Justices to engage in speaking, teaching, or other such activities that benefit the public and add to the public's understanding of the Court's role. We therefore oppose further measures on these issues as well.

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<sup>61</sup> Roberts Report, *supra* note 47, at 6. The statute mandating the filing of financial disclosure forms already purports to apply to the Justices. 5 U.S.C. app. §§ 101(f)(11), 109(10). The statutes governing outside earned income apply broadly to “any officer or employee of the Government,” *id.* §§ 501, 505(2).

<sup>62</sup> Roberts Report, *supra* note 47, at 6.

## **Public Engagement**

**Proposals:** Require the Court to televise oral arguments; and make live audio feeds of oral arguments available.

### **I. Recommendation**

We oppose legislation requiring the Court to televise its proceedings. Even setting aside the serious constitutional concerns, Congress has historically deferred to the Court to manage its own proceedings. We believe Congress should maintain that approach. That said, we hope the Court will make permanent its pandemic-era practice of livestreaming oral arguments. Likewise, the Court should seriously consider expanding live audio to include opinion announcements when they resume. A substantial majority of the Committee, for varying reasons, is unwilling to recommend a change in the Court's policy prohibiting televised proceedings. Committee members do not have a uniform view on this subject, and there are strong arguments on both sides.

### **II. Discussion**

#### **A. Current Public Engagement**

The public can currently engage with the Court's work in various ways. In non-pandemic times, oral arguments and opinion

announcements are open to the public, although only a few hundred seats are available, and spectators often line up hours (or days) in advance and may then watch proceedings for only a limited time. For those who cannot attend, the Court has since 2006 posted online a transcript of each argument within hours of the argument's end (and those transcripts now identify which Justices asked which questions, contrary to the Court's earlier practice of identifying every questioner as "THE COURT"). And since 2010, the Court has posted online audio recordings of every argument on the Friday of each argument week. Before then, the recordings from one Term were unavailable until the start of the next Term. During the COVID-19 pandemic, the Court has also provided a live audio stream of oral arguments to ABC News, the Associated Press, and C-SPAN, which in turn provide a simultaneous feed to various media platforms for public access. Finally, the Court publishes its opinions online immediately upon issuance.

### **B. We Oppose Legislation Requiring The Court To Televisе Proceedings**

In recent years, Congress has repeatedly considered legislation that would require the Court to televise oral arguments. The current version of the Cameras in the Courtroom Act, introduced in March 2021, would

require the Court to permit television coverage of all open sessions of the Court unless it decides, by a majority vote, that doing so would violate a party's due-process rights.<sup>63</sup>

We oppose this legislation. First, as explained below, the committee members hold differing views on the difficult issue of televising oral arguments. Second, and more importantly, we do not believe legislation is the proper way to address this issue. Such legislation raises serious constitutional concerns. Article III of the Constitution vests “[t]he judicial Power of the United States” in “one supreme Court.”<sup>64</sup> The Court has long held that this power includes the authority to manage its own proceedings,<sup>65</sup> and some commentators and practitioners (including on this committee) have argued that it either may or does include the power to exclude television cameras.<sup>66</sup> Given these unsettled issues, we do not recommend legislation that may provoke a separation-of-powers dispute.

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<sup>63</sup> Press Release, S. Comm. on the Judiciary, *Grassley, Durbin Introduce Bill to Put Cameras in the Supreme Court* (Mar. 18, 2021), <https://www.judiciary.senate.gov/press/rep/releases/grassley-durbin-introduce-bill-to-put-cameras-in-the-supreme-court>.

<sup>64</sup> U.S. Const. art. III, § 1.

<sup>65</sup> See *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 227 (1821).

<sup>66</sup> See Statement of Maureen Mahoney at 1-5, *Access to the Court: Televising the Supreme Court: Hearing Before the Subcomm. on*

Constitutionality aside, the better course is for the Court itself to decide these matters. Congress has historically deferred to the Court—a coordinate branch of government—to manage its own affairs. The contested case for televising argument does not justify departing from that wise practice. Nor has the Court been unwilling to expand public access so that Congress must intervene; rather, the Court has steadily become more open to the public. The COVID-19 pandemic has accelerated that trend by prompting live oral argument audio. We think the Court’s evolution on this front shows that the Justices are best situated to manage the Court’s public engagement.

**C. The Court Should Make Live Audio Of Oral Arguments Permanent, And Expand It To Include Opinion Announcements**

We believe the Court’s pandemic-era experiment with livestreaming oral argument audio has been a success, and we hope the Court will make this practice permanent. Live audio has helped the legal

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*Administrative Oversight and the Courts of the S. Comm. on the Judiciary*, 112th Cong. (Dec. 6, 2011), <https://www.judiciary.senate.gov/imo/media/doc/11-12-6MahoneyTestimony.pdf> (Legislation “would raise serious constitutional questions.”); Brandon Smith, *The Least Televised Branch: A Separation of Powers Analysis of Legislation to Televis the Supreme Court*, 97 *Geo. L.J.* 1409, 1411 (2009) (Legislation would “violate the separation of powers.”).

profession and the public engage with the Court's work. The concerns expressed by opponents of televising oral argument—in particular, that advocates may grandstand or that Justices may censor themselves—do not appear to have materialized in response to livestreaming audio alone. And while telephonic arguments may be different in some respects from in-person proceedings, we do not think those differences counsel against continuing the practice of providing real-time audio access once in-person proceedings resume.

A majority of the Committee also hopes the Court will seriously consider expanding live audio to include opinion announcements, a question that has not yet arisen because the Court has not conducted opinion announcements during the COVID-19 pandemic. Opinion announcements are already recorded and made available after a lag of several months, and a majority of the Committee's members believe the public would benefit from the ability to hear the Justices announce their decisions in real time, without having to either rely on media interpretation or digest the Court's written opinions. And because opinion announcements are fully within the Justices' control and scripted in advance, the argument for live audio is even stronger than for oral

arguments. The minority of Committee members who do not endorse this view are not necessarily opposed to real-time access to opinion announcements, but would defer to the Court's judgment on the merits of this proposal.

**D. A Substantial Majority Of The Committee, For Varying Reasons, Is Unwilling To Recommend A Change In The Court's Policy Prohibiting Televised Proceedings**

The question of televising arguments has long been the subject of public debate, and there are strong arguments on both sides. On the one hand, the workings of a democratic government presumptively should be widely accessible; video would be a valuable part of the historical record; and oral arguments reflect well on the Court, showing a branch of government working studiously and civilly to address hard issues. On the other hand, several Justices have expressed concerns that televising oral argument could diminish its utility to the Court's decisionmaking in at least two respects: advocates (and through them, their clients) might be tempted to grandstand, and the Justices themselves, in order to avoid fostering public confusion, might withhold questions that would have been valuable to their deliberations (such as those in which they play "devil's advocate" or pose extreme hypotheticals).

Many members of the Committee have argued in televised proceedings in other courts, and none of us behaved differently because of the presence of cameras. We believe that the vast majority of advocates before the Supreme Court—those arguing for the first time as well as those who appear repeatedly—conduct themselves professionally, that they did so both before and after the Court in 2010 began making audio recordings available within a few days of argument (including when audio has been livestreamed), and that this would continue to be the case if arguments were televised. We cannot foreclose the possibility that there are a small number of advocates who would be outliers in this respect, however, and Committee members vary in their predictive judgments about whether and to what extent such grandstanding at the margins would occur. Nor are we in a position to doubt the observation of those Justices who predict that their own participation would be subtly inhibited and that arguments would therefore become less useful to the Court.

Committee members differ in how they balance these competing considerations. A substantial majority of the committee is unwilling to recommend a change in the Court's policy prohibiting televised

proceedings. Most members of this majority—including some who themselves would be inclined to either favor or oppose televising proceedings—believe that the Court is best equipped to resolve this issue because it is in a superior position to evaluate the impact of television on its deliberative processes, and they would therefore defer to the Court’s judgment on the merits. Minorities of the Committee would have gone further to support a recommendation either urging or opposing the televising of proceedings.

## **Jurisdiction Stripping**

**Proposal:** Limit the jurisdiction of the Supreme Court so as to deny it the ability to invalidate federal and state legislation, and perhaps executive action, as unconstitutional.

### **I. Recommendation**

We oppose the proposal. It is unwise and likely unconstitutional.

We see no compelling need or benefit.

### **II. Discussion**

Assessing the constitutionality of legislation and other governmental action has been an accepted judicial function for most, if not all, of the country's history. Debate over the foundations for such judicial review, and its counter-majoritarian nature, has become academic. "Jurisdiction stripping" has primarily been supported not as a neutral principle but by those critical of how the Court resolved a constitutional challenge to a particular law or by legislators seeking in advance to discourage or cripple challenges to a new law. After more than 200 years, few voices identify judicial review more generally as one of the problems facing the country. Instead, it is viewed by most as a distinct strength of a constitutional democracy.

Article III, Section 2, of the Constitution provides that the "judicial Power shall extend to all Cases . . . arising under this Constitution," but

it does provide that the Supreme Court’s appellate jurisdiction is subject to “such Exceptions, and . . . such Regulations as the Congress shall make.”<sup>67</sup> The extent of that congressional authority has not been fully delineated, but a limitation on the Court’s jurisdiction to apply the Constitution would raise serious constitutional issues of its own. We have discussed issues as to the Court’s role and the separation of powers with respect to a number of the other proposals, particularly those relating to a supermajority voting requirement or congressional override.<sup>68</sup> It is perhaps enough here to note that this proposal would be even more intrusive than those and would implicate premises fundamental to the country’s vision of itself. As the Court notes on its website, judicial review “stems, in large part, from the deep commitment of the American people to the Rule of Law and to constitutional government.”<sup>69</sup> *Marbury v. Madison*,<sup>70</sup> the Supreme Court’s first explanation and application of this authority, is one of the Court’s most

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<sup>67</sup> U.S. Const. art. III, § 2.

<sup>68</sup> *See infra* at 61-73.

<sup>69</sup> Supreme Court of the United States, *About the Court: The Court and Constitutional Interpretation*, <https://www.supremecourt.gov/about/constitutional.aspx> (last visited July 13, 2021).

<sup>70</sup> 5 U.S. (1 Cranch) 137 (1803).

famous decisions, and the decision's author, Chief Justice Marshall, is one of the most revered Justices and Framers of the Constitution.

The proposal would not eliminate all judicial review but, paradoxically, only the critical role of the Supreme Court in attaining nationwide uniformity and finality. Stripping jurisdiction from the Supreme Court would leave state and lower federal court decisions in place and result in an unacceptable long-term situation in which statutes would be invalid in some parts of the country while still being enforced in others. The proposal would raise questions as to whether a district court could enter a nationwide injunction and whether district courts in different circuits or different state courts could enter conflicting remedies. If not the Supreme Court itself, what court would resolve tensions between the Court's own precedents? We believe the loss of uniformity would undercut personal and commercial activities and erode understanding of and respect for the law.

Although the proposal might be modified to address some issues, not everything can be foreseen, and we believe that the proposal still would create unnecessary litigation, acrimony, and uncertainties in practice. Would the Supreme Court no longer consider whether a

proposed construction of a statute would likely render the statute constitutionally infirm? Could the Court address specific applications of a statute so long as it did not reach the statute's facial validity or enjoin it? Would the Court consider constitutional defenses to statutory claims? Could the Court award compensation for unconstitutional takings? Would reversing a criminal conviction due to a constitutional flaw in a statute be allowed? Could the Supreme Court accept review of a decision that found a statute unconstitutional only if the Court decided at the same time that it would only reverse? Or would it wait until it heard argument and then dismiss the case for lack of jurisdiction if it were inclined to affirm the decision invalidating a statute? Would the Court have jurisdiction to review a case that affirmed the constitutionality of a statute or would such review not present a case or controversy under Article III if the Court could not alter the result below? If the proposal itself was accomplished through a statute, could a lower court enjoin the statute without review by the Supreme Court?

Narrowing the proposal to a particular subject matter would not help. Indeed, it would necessarily involve the Commission in a debate over the constitutional and broader merits of specific legislation. And

such narrowing would raise new constitutional concerns as to treatment of the people and alleged rights affected by the legislation.

The proposal is so likely unconstitutional, and in any event is so radical, that we believe any such change should be fully vetted as a possible constitutional amendment—but only if there were a compelling problem to address. There is none. To the contrary, the proposal would create new problems, foreseeable and unforeseeable, and is unwise.

## **Supermajority Voting Requirement**

**Proposal:** Impose a supermajority voting requirement on the Supreme Court for it to strike down a federal (or state) statute on constitutional grounds.

### **I. Recommendation**

We oppose this proposal. On balance, we doubt the merits of adopting a supermajority voting requirement for the Supreme Court, which would break from centuries of historical practice. Moreover, we believe the adoption of this proposal would raise weighty constitutional concerns, as well as a host of intractable administrability issues.

### **II. Discussion**

#### **A. The Merits Of The Proposal Are Doubtful**

Advocates of a supermajority voting requirement for invalidating federal (and state) statutes maintain that this rule would achieve several virtuous results. In their view, it would promote consensus, deliberation, and cross-ideological coalition building at the Supreme Court. They add that it would give practical force to the presumption of constitutionality—and would reflect the deference that unelected judges should display when reviewing legislation enacted through democratic processes. Some have argued that a supermajority voting rule is supported by principles of the separation of powers (for federal laws) and federalism (for state

laws), and that it would enhance the legitimacy of the Supreme Court's decisions in contexts especially likely to spark public controversy.

Opponents of this position have raised numerous objections.

For starters, they emphasize that it would be irregular to allow a minority of the Court to control the outcome of a case against the will of the majority. This risks creating inefficiency, since a simple majority voting rule is easy to apply and has fewer administrability issues than alternative voting rules. It also risks undermining the force of the Court's judgments, since the American people—and the bench and bar—may struggle to accept outcomes where a majority holds a law invalid but the law is nonetheless upheld. Opponents have further noted that the Court appears to engage in substantial consensus-building and deliberation even in the absence of a supermajority voting rule. And it is at best speculative to assert that the legitimacy of the Supreme Court's decisions on controversial issues would be enhanced by a supermajority rule.

Turning to history, opponents have argued that this proposal is inconsistent with original public understanding and longstanding legal traditions. When the Constitution was ratified, majority rule was firmly established as the default practice for legislative and judicial institutions.

Where the Framers varied from that rule to require supermajority votes for the exercise of government power, they did so expressly in the text of the Constitution—and they did not do so in Article III. Moreover, since the federal courts were first created, it has been their unbroken practice to decide cases and controversies by simple majority vote. In the view of some scholars, these considerations cut against novel voting rules.

Finally, opponents have warned that this proposal may skew the overall development of constitutional law in a manner that empowers government and fails to protect individual rights. To be sure, that is partly by design: A supermajority voting rule favors the government over those challenging its enactments. But these effects may be amplified in troubling ways if individuals become reluctant to even file constitutional challenges in the first place, or if the Court grows wary of granting cases that may implicate the supermajority voting rule, or if lower courts see the imposition of this rule as cause for hesitation in judicial review.

In our view, these considerations offer compelling reason to doubt the wisdom of the proposed supermajority voting rule.

## **B. The Proposal Raises Separation-Of-Powers Concerns**

Article III vests the Supreme Court, as well as the inferior federal courts established by Congress, with “[t]he judicial Power of the United States.” This has long been understood to include the power to review legislation for conformity with the Constitution. And it has always been understood that the Supreme Court may exercise the “judicial Power” by simple majority vote. Adopting the proposed supermajority voting rule would raise questions about Congress’s authority to control the internal processes through which the Supreme Court exercises the “judicial Power.” It would also raise questions about Congress’s authority to limit or evade judicial review of its enactments (or those of state governments). In our view, these weighty separation-of-powers issues—and others that would surely arise—cut against imposing a supermajority voting rule.

## **C. The Proposal Raises Grave Administrability Issues**

Turning to more practical considerations, we have four significant reservations about the administrability of this proposal.

First, the proposal risks creating confusion about constitutional precedent. Imagine a decision in which five Justices conclude that a law is unconstitutional, but four Justices disagree. What precedent—if any—

results? There is no satisfactory answer. If the five-Justice opinion is precedential as to the constitutional issue, then when somebody else later challenges the exact same law, they should prevail based on stare decisis (assuming that the original dissenters would now adhere to the new precedent). If the four-Justice opinion is precedential, then a minority of the Court would be empowered to define the meaning of the Constitution in a manner that prospectively binds the majority, which is both highly counterintuitive and likely to cause incoherence in the development of the law. Finally, if neither opinion is precedential, then the power of the Supreme Court to state the law will be undermined—giving lower courts undue primacy and defeating the Supreme Court’s role in ensuring the uniformity of constitutional law. None of these options is desirable.

Second, adopting this proposal would inevitably give rise to conflict over when the supermajority voting requirement applies. Would it apply only to facial challenges, or would it also reach as-applied challenges—and, if not, what happens if the Court disagrees on the scope of its own ruling? Would it apply where the Court holds that avoidance principles require it to adopt one interpretation of a statute over another that would render the statute constitutionally infirm? Would it reach only statutes,

or also cover other official actions or promulgations with the force of law (including actions that assertedly follow or implement a statute)? And what happens if the Court disagrees on where and how the rule should apply: Is that decision itself subject to a supermajority determination? These and other practical difficulties seem unavoidable and could give rise to a host of technical, divisive disputes in Supreme Court litigation.

Third, and related to the points raised above, it is unclear how this proposal would operate if lower courts were split on the constitutionality of a statute. Consider a case in which a divided First Circuit panel invalidates a law and a divided Second Circuit panel upholds that same law. The Supreme Court grants review of the Second Circuit decision and splits 5-4, with the majority concluding that the challenged law is unconstitutional. What happens next in the First Circuit? Has the law been upheld (by a minority) as constitutional, such that the First Circuit's decision is abrogated? Has the law been deemed unconstitutional but not subject to judicial invalidation, such that it can once again be enforced—perhaps even while analogous statutes in the First Circuit remain likely to be struck down? Or does the First Circuit decision stand undisturbed,

since the Supreme Court's 5-4 constitutional ruling means only that the Supreme Court itself cannot invalidate the law?

Finally, this proposal could give rise to incongruous results in judicial review at the Supreme Court. For example, if the proposed voting rule were adopted only as to federal statutes, then identical state and federal laws (alleged to suffer from identical constitutional defects) could meet different fates if the Supreme Court were divided 5-4 on the underlying constitutional issue. Similarly, if the proposed voting rule applied to all state and federal statutes, then a constitutional challenge might fail to invalidate a statute but succeed in invalidating materially identical local enactments, administrative actions, or executive orders. These inconsistent results would make little practical sense. They would also sow confusion and create gamesmanship in the process of identifying vehicles through which to address questions of constitutional law.

## **Congressional Override**

**Proposal:** Enact a congressional override provision authorizing Congress to supersede Supreme Court holdings interpreting the Constitution and/or federal statutes and regulations.

### **I. Recommendation**

We oppose this proposal because it raises serious separation-of-powers concerns. Moreover, Congress can already effectively override the Court's statutory and regulatory interpretation decisions by amending the underlying laws.

### **II. Discussion**

Our understanding is that this proposal would empower Congress to override Supreme Court decisions interpreting the Constitution and/or federal statutes and regulations. While some democratic countries have legislative override mechanisms for superseding judicial decisions,<sup>71</sup> the adoption of such a proposal in the United States would raise serious separation-of-powers concerns under our Constitution. It is also

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<sup>71</sup> See, e.g., Can. Dep't of Justice, Canadian Charter of Rights and Freedoms, Section 33 – Notwithstanding Clause, <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccd1/check/art33.html> (last visited July 13, 2021); Victorian Current Acts, Charter of Human Rights and Responsibilities Act, Section 31: Override by Parliament, (2006) (Austl.), [http://www5.austlii.edu.au/au/legis/vic/consol\\_act/cohrara2006433/s31.html](http://www5.austlii.edu.au/au/legis/vic/consol_act/cohrara2006433/s31.html) (last visited July 13, 2021).

unnecessary with respect to the Court’s statutory and regulatory decisions because Congress already has legislative authority to amend the underlying law if it disagrees with how the Court has interpreted it.

### **A. Congressional Override Of Constitutional Holdings**

The Committee opposes any proposal purporting to authorize Congress to override the Supreme Court’s constitutional interpretation decisions. The conferral of such authority on Congress would violate the separation of powers enshrined in the Constitution.

The Supreme Court most famously asserted its inviolable authority to interpret the Constitution in *Marbury v. Madison*,<sup>72</sup> but there is a wealth of Supreme Court precedent expounding on the Framers’ decision to reserve this power to the Judicial Branch. As the Court explained in *Plaut v. Spendthrift Farm, Inc.*, the Framers believed that the system of intermingled legislative and judicial powers in the colonies had “produced factional strife and partisan oppression,” evincing “a sharp necessity to separate the legislative from the judicial power.”<sup>73</sup> From this

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<sup>72</sup> 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>73</sup> 514 U.S. 211, 219, 221 (1995); *see also* The Federalist No. 48 (James Madison), [https://avalon.law.yale.edu/18th\\_century/fed48.asp](https://avalon.law.yale.edu/18th_century/fed48.asp) (warning that proponents of conferring judicial power on the legislature failed to “recollect[] the danger from legislative usurpations, which, by assembling

first-hand experience, “the need for separation of legislative from judicial power was plain” to the Framers.<sup>74</sup>

The Constitutional Convention thus “made the critical decision to establish a judicial department independent of the Legislative Branch”<sup>75</sup>: Article III vests “[t]he judicial Power of the United States . . . in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”<sup>76</sup> As Alexander Hamilton explained, Article III reserves the power of “[t]he interpretation of the laws” to “the proper and peculiar province of the courts.”<sup>77</sup>

Although Congress and the states could amend the Constitution to permit Congress to sit in review of Supreme Court decisions, the Committee agrees with the Framers that conferring this authority on

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all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations”); The Federalist No. 81 (Alexander Hamilton), [https://avalon.law.yale.edu/18th\\_century/fed81.asp](https://avalon.law.yale.edu/18th_century/fed81.asp) (applauding “the wisdom of those States who have committed the judicial power, in the last resort, not to a part of the legislature, but to distinct and independent bodies of men”).

<sup>74</sup> *Plaut*, 514 U.S. at 222.

<sup>75</sup> *Id.* at 221.

<sup>76</sup> U.S. Const. art. III, § 1.

<sup>77</sup> The Federalist No. 78 (Alexander Hamilton), [https://avalon.law.yale.edu/18th\\_century/fed78.asp](https://avalon.law.yale.edu/18th_century/fed78.asp).

Congress would dangerously imbalance the separation of powers that forms the foundation of our system of government. Allowing Congress to override the Court’s constitutional holdings would also weaken legal protection for unpopular constitutional rights, and disfavor individual rights for those who lack full access to the political process. Finally, retaining the Supreme Court as a body with final constitutional authority reinforces the stature of the Court—a valuable attribute for stabilizing the law and encouraging respect for the rule of law.

**B. Congressional Override Of Statutory And Regulatory Holdings**

For the reasons outlined above, Article III also gives the Supreme Court final authority to resolve questions of statutory and regulatory interpretation that arise in the context of cases and controversies. As a practical matter, however, Congress’s legislative authority under Article I empowers it to effectively override the Court’s statutory and regulatory decisions by amending the underlying laws. Although legislative amendment in response to a Supreme Court decision does not alter the Court’s final judgment in the particular case that produced the decision,<sup>78</sup>

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<sup>78</sup> See *Plaut*, 514 U.S. at 225-28.

it is well within Congress’s authority to render the Court’s interpretation of a statute or regulation outdated with respect to pending and future cases by amending the underlying law. A well-known example of Congress invoking its legislative power in this way is the Lilly Ledbetter Fair Pay Act of 2009, which amended Title VII’s statute of limitations in response to the Supreme Court’s decision in *Ledbetter v. Goodyear Tire & Rubber Company*.<sup>79</sup>

At least one commentator has suggested that Congress enact legislation to “fast-track” its consideration of whether to amend a law in response to a Supreme Court decision.<sup>80</sup> The constitutionality of such a mechanism would depend on its contours, but putting that issue aside, the Committee is not aware of any evidence of inherent problems with the current legislative process justifying the extraordinary reform suggested here. Congress amends laws in response to Supreme Court decisions quite frequently; indeed, legal scholars have identified 286

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<sup>79</sup> 550 U.S. 618, 632 (2007); see Pub. L. No. 111-2, 123 Stat. 5 (2009), <https://www.govinfo.gov/content/pkg/PLAW-111publ2/html/PLAW-111publ2.htm>.

<sup>80</sup> Ganesh Sitaraman, *How to Rein In an All-Too-Powerful Supreme Court*, The Atlantic, Nov. 16, 2019, <https://www.theatlantic.com/ideas/archive/2019/11/congressional-review-act-court/601924/>.

instances between 1967 and 2011 in which Congress abrogated the Court's interpretation of a statutory provision by enacting legislation amending the statute.<sup>81</sup> Given that Congress already can and does exercise its legislative authority to effectively override the Supreme Court's statutory and regulatory decisions by amending the underlying laws, the Committee does not see any need for reform in that respect.

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<sup>81</sup> Matthew R. Christiansen & William N. Eskridge, *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 Tex. L. Rev. 1317, 1329 (2014).

## Term Limits

**Proposal:** Impose 18-year term limits on Justices (after which they might continue to serve as Article III judges on the lower courts).

### I. Recommendation

The unanimous view of the Committee is that this proposal could be effected only through constitutional amendment, given the serious constitutional questions that would arise in connection with any effort to restrict judicial tenure by statute.

Committee members have differing views on the proposal itself and its likely effect on the Court and proceedings before the Court. A majority of the Committee believes that a constitutional amendment to impose term limits warrants serious consideration. Several members of the Committee support the proposal on the ground that a predictable and regularized system of appointments could ameliorate the high-stakes political battles that currently accompany vacancies and nominations to the Court. And others support the proposal on the ground that limited terms are good in themselves. Yet several members of the Committee strongly oppose the proposal because of the unique ability of life tenure to insulate Justices from political forces and concerns about how term limits might destabilize legal doctrine. Others are not opposed to the

proposal, but are reluctant to recommend such a sweeping change to the federal judiciary absent a clear articulation of the need for change and a clear understanding of how the proposal would be implemented.

Committee members also have differing views regarding the likely effects of such a change on the Court itself, and on practitioner behavior. Some who support the proposal believe that this change would have only minimal effects on the development of federal law and on the operation of the Court. Other members of the Committee—including those who support and those who oppose the proposal—believe that this change would likely have a significant effect on the way the Court decides cases and on the way that parties (and lower courts) present cases to the Court.

All members of the Committee recognize that the Committee does not necessarily have special expertise into the political or other predictive considerations involved here. Moreover, there is already a robust literature addressing these considerations. Accordingly, after summarizing that literature, we will address two topics: (1) the means of potential reform and (2) the effects the proposed reform might have on the Court's decisionmaking and its interactions with the bar.

## II. Discussion

### A. Background And Political Arguments

Over the past few decades, multiple voices from across the ideological spectrum have endorsed the imposition of nonrenewable term limits on Supreme Court Justices. Prominent academics to endorse the basic concept include Henry Monaghan, Steven Calabresi, Akhil Amar, Bruce Ackerman, Roger Cramton, Paul Carrington, Erwin Chemerinsky, Harold Pollack, Ian Ayres, and (just last month) Michael McConnell and Maya Sen.<sup>82</sup> Various think tanks or their leaders—from Norm Ornstein

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<sup>82</sup> See, e.g., Henry Paul Monaghan, *The Confirmation Process: Law or Politics*, 101 Harv. L. Rev. 1202 (1988); Akhil Reed Amar & Steven G. Calabresi, *Term Limits for the High Court*. Wash. Post, Aug. 9, 2002, <https://www.washingtonpost.com/archive/opinions/2002/08/09/term-limits-for-the-high-court/646134cd-8e13-4166-9474-5f53be633d7c/>; Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 Harv. J.L. & Pub. Pol’y 769 (2005); Erwin Chemerinsky, *The Case Against the Supreme Court* 310-12 (Penguin Books 2015); Michael McConnell, Written Testimony Before the Presidential Commission on the Supreme Court of the United States at 5-7 (June 30, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/McConnell-SCOTUS-Commission-Testimony.pdf>; Maya Sen, Written Testimony Before the Presidential Commission on the Supreme Court of the United States at 2-7 (June 30, 2021), <https://scholar.harvard.edu/files/msen/files/sen-testimony-scotuscomission.pdf>; Fix the Court, *Who’s Talking Terms?*, <https://scotusermlimits.org/whos-talking-terms/> (last visited July 13, 2021) (collecting other commentary on the issue). For an influential student note on the issue, see also James E. DiTullio & John

of the American Enterprise Institute to Ilya Shapiro of the Cato Institute to the Center for American Progress—have endorsed the concept.<sup>83</sup> And three sitting Justices of the Supreme Court—Chief Justice Roberts and Justices Breyer and Kagan—have suggested at various points in their careers that they see potential benefits in the idea.<sup>84</sup> The most common version of this proposal posits 18-year term limits, staggered so that one term ends every two years—often with the addendum that, after their terms expire, Justices could continue to serve as Article III judges, somewhat like retired Justices do today. When the National Constitution Center held an exercise for drafting new constitutions, both the

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B. Schochet, *Saving this Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Term Limits*, 90 Va. L. Rev. 1093 (2004).

<sup>83</sup> See Norm Ornstein, *Why the Supreme Court Needs Term Limits*, The Atlantic, May 22, 2014, <https://www.theatlantic.com/politics/archive/2014/05/its-time-for-term-limits-for-the-supreme-court/371415/>; Ilya Shapiro, *Term Limits Won't Fix the Court*, The Atlantic, Sept. 22, 2020, <https://www.theatlantic.com/ideas/archive/2020/09/term-limits-wont-fix-court/616402/>; Maggie Jo Buchanan, *The Need for Supreme Court Term Limits*, Ctr. for American Progress (Aug. 3, 2020), <https://www.americanprogress.org/issues/courts/reports/2020/08/03/488518/need-supreme-court-term-limits/>.

<sup>84</sup> See *Who's Talking Terms*, *supra* note 82 (recounting these quotations and gathering other supportive commentary).

conservative and progressive teams adopted 18-year limits, and that is what currently pending H.R. 8424 proposes.

Two main empirical facts undergird these calls for reform. First, Justices now generally serve for longer periods of time than in the past. Throughout the first two hundred years of our history, Justices served an average of roughly 15 years on the Court. Since the early 1970s, the average tenure has almost doubled. Justices appointed today who are in their 40s or early 50s may serve between 30 and 40 years, or even more. Accordingly, some argue, the proposed “reform” of 18-year term limits is “ultimately a Burkean” and “conservative call for reform” because all it would do is “move the Justices back toward an average tenure that is similar to what the average tenure of Justices has been over the totality of American history.”<sup>85</sup> Second, term limits are almost universally imposed in peer jurisdictions and in every state except Rhode Island.

Supporters of reform maintain on a normative level that term limits would reduce the political incentives and rancor surrounding retirements, appointments, and the confirmation process. Many also suggest that Supreme Court appointments should be less random and

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<sup>85</sup> See, e.g., Calabresi & Lindgren, *supra* note 82, at 775.

more closely tied to election outcomes. Commentators also argue that term limits would reduce incentives to put forth ever younger nominees, while also guarding against Justices serving longer than their health and mental capacities might reasonably allow. Finally, some believe that 18 years is simply a long enough time to exercise the power of a Supreme Court Justice.

Scholarly opponents of term limits include Ward Farnsworth, current Dean of the University of Texas Law School, and former professor, Judge David Stras.<sup>86</sup> Such opponents question the empirical underpinnings of the proposal for term limits. In particular, they view the data as reflecting not a sudden recent jump in tenure length, but rather a steady gradual climb—with certain short-term fluctuations both up and down.

On the normative front, opponents of term limits raise several objections related to the rule of law and the independence of the Court. They argue that increased turnover on the Court will lead to less stable

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<sup>86</sup> See Ward Farnsworth, *The Case for Life Tenure, in Reforming the Court: Term Limits for Supreme Court Justices* 251 (Roger C. Cramton & Paul D. Carrington eds., 2006); David R. Stras & Ryan W. Scott, *An Empirical Analysis of Life Tenure: A Response to Professors Calabresi & Lindgren*, 30 Harv. J.L. & Pub. Pol'y 791 (2007).

law. Opponents also express the concern that Justices might become (or at least appear) less independent during their service on the Court. Some Justices may perform their duties knowing that they would have a professional career beyond their service on the Supreme Court, and others may feel more beholden to the President their seat is tied to by design. Skeptics of term limits also believe that the proposal would exacerbate rather than ameliorate the politicization of the nomination and confirmation process and the public's perception of the Court as a political body, as it would directly tie two seats on the Court to the outcome of every presidential election. Opponents of term limits worry about the law of unintended consequences, should the system of life tenure designed by the Framers and adhered to for centuries be abandoned.

Opponents also emphasize that life tenure has historically given the Republic a corps of jurists from across the political spectrum who are highly intelligent, dedicated, and independent. An 18-year term limit, they observe, would have nearly halved the tenures of many distinguished jurists: Chief Justice John Marshall and Justices Hugo Black and John Paul Stevens each served for 34 years. Chief Justice

Rehnquist and Justices Joseph Story and John Marshall Harlan each served for 33 years. Justices Oliver Wendell Holmes and Antonin Scalia each served for 29 years. And Justice Ruth Bader Ginsburg served for 27 years.

Finally, opponents of term limits argue that, to the extent an amendment to the Justices' tenure is designed to provide regularity in the appointment of Justices, such reform must also be considered in light of the Senate's duty of advice and consent regarding judicial nominations. And modification of the Senate's advice-and-consent role is no small matter. The Senate's power of advice and consent "is a critical 'structural safeguard [] of the constitutional scheme,'"<sup>87</sup> and was designed to serve as "an excellent check upon a spirit of favoritism in the President, and . . . tend greatly to prevent the appointment of unfit characters."<sup>88</sup> Streamlining or neutering that feature of the appointment process could risk precisely the "manipulation of appointments" the Framers had

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<sup>87</sup> *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 935 (2017) (alteration in original) (quoting *Edmond v. United States*, 520 U.S. 651, 659 (1997)).

<sup>88</sup> The Federalist No. 76 (Alexander Hamilton), [https://avalon.law.yale.edu/18th\\_century/fed76.asp](https://avalon.law.yale.edu/18th_century/fed76.asp).

experienced before the Revolution and sought to prevent in the Constitution.<sup>89</sup>

## **B. Means Of Reform**

If term limits are to be implemented, we unanimously believe it should be done by constitutional amendment. Some of us who have studied the issue believe that any statutory version of the reform would violate the Good Behavior Clause, the Appointments Clause, or both. Others are not sure that versions of the proposal allowing Justices to continue serving as Article III judges after 18 years would require a constitutional amendment. But we all agree, for at least two reasons, that any reform should be executed in the Constitution itself. First, any statutory reform would raise serious constitutional issues—creating, at the very least, a period of deep uncertainty regarding the legitimacy of the Court’s membership and decisions. Second, a statutory solution would be inherently unstable. Any imposition of term limits should not be subject to reversal by a subsequent Congress and President.

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<sup>89</sup> *Financial Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1656-57 (2020) (citing *Freytag v. Commissioner*, 501 U.S. 868, 883 (1991)).

The need to amend Article III to effectuate this change is itself a reason that some members of the Committee oppose term limits. To the extent adopting this proposal would involve modifying Article III—presumably by amending the Constitution in a manner that modified the rules and standards set forth in Article III—several members of the Committee object on the grounds that Article III is the foundation of our independent judiciary, and the risks of any alteration are too great to justify such a change. These members further note the potential oddity of modifying the rules applicable to the Supreme Court while leaving undisturbed rules applicable to judges on inferior courts.

The effective implementation of any system of term limits also implicates other issues that the Committee has not endeavored to resolve here. Some supporters of term limits—including some members of this Committee—believe that term limits would be beneficial in their own right, regardless of how any such reform interacts with the Senate’s advice-and-consent power. But others who support term limits have suggested that the best way for this reform to depoliticize the Court’s nomination process would be to couple it with some reform to the Senate’s

power of advice and consent.<sup>90</sup> Were the Senate to retain its current role, the Senate could frustrate the ability of Presidents of a different party to nominate their two Justices by simply refusing to vote on the nominees. Requiring a prompt vote might not solve this problem, as the Senate would still have the power to vote no on confirmation, leaving the seat open to the same practical effect.

The method of transition to term limits would also need to be addressed. Would one currently sitting Justice be removed from the Court every two years so that their replacements could start 18-year terms? Would nominees be confirmed to the Court as “shadow Justices,” on the theory that they would be seated (and would complete pre-determined 18-year terms) after Justices step down?<sup>91</sup> Several members of the Committee raised doubts as to the wisdom of the term limits

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<sup>90</sup> *E.g.*, McConnell, *supra* note 82, at 6 (describing a system whereby the President’s nominees to the Court would “be deemed confirmed unless, within four months of the nomination, the Senate passes a resolution disapproving the nomination”).

<sup>91</sup> While the method of phase-in would be very important, those on the Committee who support the reform do not recommend any particular phase-in plan. As practitioners, we do not have special expertise in that regard.

proposal on the ground that they did not see a reasonable way to implement it when the Court is already constituted.

### **C. Practitioners' Perspective**

The Committee has differing views on the practical impacts of term limits. A more rapid rate of turnover might lead to more fluctuation in the Court's case law. There is also a concern that Justices knowingly serving for a finite period might be tempted to decide cases more broadly—or might otherwise behave more opportunistically. Lastly, those Committee members opposed to the proposal worry that Justices eyeing careers beyond the bench would be less independent and more concerned with currying favor with potential future employers or voters.

On the other hand, some members of the Committee believe that a steady stream of Justices who are fresh to the institution might generate more deference to the institution itself. New Justices, for example, may be more willing to take the law as they find it, instead of engaging in what Justice Souter once called “perpetual dissent.”<sup>92</sup> And if the reform indeed produced new Justices who were somewhat older than those in

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<sup>92</sup> *Gall v. United States*, 552 U.S. 38, 60-61 (2007) (Souter, J., concurring).

recent years, the greater seasoning that often comes with age might bring with it more measured views.

To the extent the proposal would result in speedier confirmations, and perhaps even eliminate gaps between retirements and replacements, that development would be beneficial. An even number of Justices can limit the Court's ability to resolve cases or other matters, particularly emergency applications that cannot be put off. Keeping the periods of vacancy to a minimum would reduce the odds of prolonged stalemates.

It is hard to predict how the reform would affect practitioner behavior. The predictability of turnover at the Court might fuel greater efforts to manipulate the timing of cases or issues reaching the Justices. Both the parties litigating cases in the lower courts and the judges deciding them could engage in delay or other strategic tactics in the hopes of ending up with a more favorable Court after the next seat change. Yet orchestrating timing within two-year windows would still often prove difficult, and the outcomes of presidential elections can be unpredictable. The fact that more Justices would have shorter track records at any given time might also limit the ability of practitioners, even more than is

already the case, to foretell outcomes based on shifts in the Court's membership.

## **Size And Composition Of The Court**

**Proposals:** Expand the size of the Court; establish that each President receive two appointments per term, with the Court expanding and contracting in size accordingly; and establish a panel system whereby the Court would be staffed by appellate judges who rotate onto the Court in some sort of organized fashion.

### **I. Recommendation**

We oppose these proposals. The Court should remain at nine Justices, as it has since the Judiciary Act of 1869.

### **II. Discussion**

#### **A. Expanding The Size Of The Court**

The Constitution does not specify the number of seats on the Supreme Court. It is therefore within the constitutional power of Congress to increase or reduce that number (so long as reductions are effectuated by attrition). For the first 80 years of the Republic, Congress altered the size of the Court each time a new circuit court was created, and increased or decreased the number of Justices twice for more political reasons; both of the latter changes were quickly reversed. For the past 150 years, the number has been stable, at nine. President Franklin Roosevelt proposed court expansion (“court packing”) after his landslide reelection in 1936, but many even of his own party regarded the

suggestion as an illegitimate interference with the independence of the Supreme Court. Defeat of the proposal has generally been regarded as establishing a norm against adjusting the size of the Court for political purposes.

In April, consistent with several public proposals, members of the House introduced a proposed Judiciary Act of 2021, which would add four new seats to the Supreme Court, presumably to be filled by President Biden with senatorial advice and consent. The press release offered two justifications. First, it “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.”<sup>93</sup> This is in reference to the refusal of the Republican-controlled Senate in 2016, a presidential election year, to give nominee Judge Merrick Garland a hearing or vote, coupled with its prompt confirmation of then-Judge Amy Coney Barrett in 2020, also an

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<sup>93</sup> Press Release, Jerrold Nadler, Chairman, H. Comm. on the Judiciary, *Expand the Supreme Court: Reps. Nadler, Johnson, and Jones and Senator Markey Introduce Legislation to Restore Justice and Democracy to Judicial System* (Apr. 15, 2021), <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=4508>.

election year. The combination of these events increased the Republican-nominated majority on the Court from five to six, whereas the Court may otherwise have come to see a Democratic-nominated majority. The second justification for the proposal is to return to the early nineteenth-century practice of having one Justice for each appellate circuit.

Members of our Committee all believe that it would be a salutary practice for the Senate to give judicial nominees of both parties a prompt hearing and vote, but we are divided as to whether such a practice was established as a “norm” in 2016, an election year when the Senate was controlled by the party opposite to the President. The Committee is unanimous, however, that the drastic remedy of expanding the Court would likely do more long-run harm than good.

First, the independence of the Court and its standing with the public would be gravely compromised if Congresses were to add seats for the purpose of affecting the Court’s jurisprudence—something that has not been done since the crisis over Reconstruction following the Civil War. If Democrats were to do so now, Republicans would surely adopt the same tactic when they next have the opportunity. This would exacerbate the public perception that the Court is a mere political body.

The Commission should seek ways to minimize, not increase, the political character of the Court.

Second, we can see no institutional benefit to raising the number of Justices above nine. Indeed, based on our experience as practitioners (and some of us as judges), most of us believe that increasing the size of the Court above nine would be counterproductive. For example, it would make oral argument less orderly, would likely harm deliberation within the Court, and might lead to more fragmented rulings with multiple rationales and less clarity in the law. No state supreme court has more than nine justices, and 43 of them have fewer than nine. When that many diverse jurisdictions reject the idea of a supreme court of more than nine, it likely reflects best practice.

The proponents' second justification for the proposal is to return to the early nineteenth-century practice of having one Justice for each appellate circuit. This is based on a historical misunderstanding. Before 1911, the Justices had the onerous duty of "riding circuit" on each of the circuit courts. Today, the duty of the Circuit Justice is largely to deal with emergency stay applications, and there is no practical reason that the number of Justices should correspond to the number of appellate

courts. Nor are we aware of any other practical reason for expanding the size of the Court that would justify such action.

**B. Two Appointments Per Presidential Term, Expanding Or Contracting The Size Of The Court**

Vacancies on the Court currently result from either accident (death or serious health problems) or the timing of retirements. The effects are uneven, and can affect the jurisprudential balance on the Court in unpredictable ways. For example, Presidents Clinton, Bush, and Obama each appointed two Justices during their eight-year terms, while President Trump named three in four years. Some members of our Committee would like to see opportunities for appointments evened out, if this could be done without damage to the Court. In particular, when vacancies are uneven and unpredictable, this raises the stakes for each appointment. Each appointment affects the jurisprudential composition of the Court, perhaps for a considerable period of time, exacerbating partisan acrimony. An alternative proposal would allow every President to make the same number of nominations: one every two years.

Despite these virtues, the proposal has practical drawbacks. First, in the short or medium term, which is where politics takes place, the proposal is the same as the Court-expansion scheme: It gives the then-

current President two, and perhaps four, new nominations, thus shifting the balance of the Court. It will thus be subject to much of the criticism the Court-expansion plan has received.

More seriously in the longer run, unless coupled with term limits, the proposal would have the effect of greatly increasing the size of the Court.<sup>94</sup> In recent times, Justices have served an average of 26 to 28 years.<sup>95</sup> This means that after it has fully kicked in, the proposal would produce, on average, a Court of 13 to 14 Justices, which we regard as too large. We also worry that a Court of fluctuating size would be unstable, especially when the number of Justices is even. There is also the uncertainty of what would happen if the Senate is controlled by the opposite party, and refuses to confirm a President's nominees for two years. Finally, since the proposal would be a mere statute, there is no guarantee that the party in control of Congress at any given time would

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<sup>94</sup> See *supra* at 74-87 (detailing the Committee's views on term limits).

<sup>95</sup> Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 Harv. J.L. & Pub. Pol'y 769, 778 (2006); Fix The Court, *Term Limits*, <https://fixthecourt.com/fix/term-limits> (last visited July 13, 2021).

be content. Once the nine-Justice norm is breached, further breaches can be expected.

**C. Establishing A Panel System Whereby The Court Would Be Staffed By Appellate Judges Who Rotate Onto The Court In Some Sort Of Organized Fashion**

Unlike the two prior proposals, this might require a constitutional amendment, since the Constitution calls for creation of a Supreme Court separate from the inferior courts. In any event, we see little advantage in this proposal. Assuming that the temporary Justices are drawn randomly from the 179 authorized appellate judges, and that their terms of service on the High Court would be no more than one year (and perhaps less), the proposal would generate confusion and inconsistency, undermine the force of precedent, and preclude the building of internal comity and trust that is necessary for the institution. We also worry that the mode of choosing the temporary Justices could be gamed. (For example, will seniority be considered, or regional balance?) The system would also present difficulties when a case comes from the temporary Justice's home court. In short, the proposal would be a radical break from our longstanding system, with unpredictable consequences, few evident benefits, and a host of practical difficulties.

## **Conclusion**

The Committee is grateful for the opportunity to weigh in on the various proposals being considered by the Commission. The Committee's consideration of these proposals has led to a wide-ranging debate both on the ways in which the Supreme Court is a model for other judiciaries and the ways in which it may be able to improve its own operations.

On the whole, the Committee believes that those proposals that could be implemented without a constitutional amendment are best considered by the Court itself. Not only is the Court in the best position to evaluate the potential positive and negative effects of the proposals, but the separation of powers and respect for coordinate branches counsels strongly in favor of allowing the Court itself to determine whether and what changes would be salutary. Great care must be taken in legislating changes to the Court's procedures, even where Congress has leeway to act. Imposing changes on the Supreme Court could threaten the Court's judicial independence, which is critical to the constitutional role of the Court in our government and vital to the rule of law in this country. The Court's recent decision to allow livestreaming of oral arguments, which

the Committee urges the Court to continue when it returns to the Bench, illustrates that the Court is open to changing its practices.

Although the Committee has reached different views on a minority of the proposals we have considered, and like many Americans have good-faith disagreements about the political disputes surrounding the recent confirmation battles involving the Court, we are firmly united in our respect for the Supreme Court and our belief that it is one of the true treasures of our government.