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Hearing on "Perspectives on Court Reform"

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Co-Chairs Bauer and Rodriguez, thank you for this opportunity to testify about possible Supreme Court reforms. The nonprofit organization that I head, the Committee for Justice, has been involved in each of the last seven Supreme Court confirmation battles—eight if you count Harriet Miers—as an advocacy group that promotes constitutionally limited government and judicial nominees who will strictly interpret constitutional and statutory text. But today, I speak for myself rather than for the Committee for Justice.

Going over the testimony from the Commission's June 30 meeting and the related literature, I was struck by how many progressive analysts of the Court now believe it to be "undemocratic" and too powerful, intruding into and deciding many issues that should be left to democracy via legislation, ballot initiatives, or constitutional amendments. It wasn't long ago that when one heard such characterizations of the Supreme Court, they typically came from conservatives.[1] A conservative majority on the Court would seem to be responsible for this new bipartisan consensus of sorts.

Professor Nikolas Bowie of Harvard Law School, who testified at the Commission's June 30 meeting, believes "proposals to disempower the federal courts would help 'democratize' the judiciary and bring the United States in line with other modern

[1] I use terms like "conservative" and "progressive" broadly. "Conservative" encompasses everything from a traditional social conservative to a libertarian or someone with a conservative judicial philosophy—typically a textualist or originalist, that is, someone who believes in adhering to original meaning when interpreting constitutional or statutory text. My use of "progressive" is similarly broad."

democracies around the world."[2] Professor Samuel Moyn of Yale Law School, who also testified at the June 30 meeting, described the problem as:

> It is one thing to insulate and protect interpreters of our Constitution and laws from certain kinds of short-term democratic control. It is quite another to cede the last word over large parts of our national political conversation—not to mention the power to edit and throw out major laws—to less accountable powers and, to add insult to injury, to pretend that doing so is either mandated by our Constitution or essential to democracy.[3]

Professor Moyn adds that "Albeit in different cases, judges themselves concur that the prior regime of judicial self-restraint except in the case of 'clear error' or serious violation has broken down."[4] These progressive voices describe the Court in language that could just as easily have come from conservatives, now or since the Warren Court. Those conservatives upset with the Court's abortion and same-sex marriage rulings couldn't say it any better.

Progressives have adopted even the common conservative concern that the Supreme Court represents elite values. Professor Bowie testified that it is "absurd now for a nation of 300 million to be perpetually governed by five Harvard and Yale alumni," adding that "when the Supreme Court claims to be the supreme interpreter of the Constitution, the implication is there is something about the justices that make their interpretive or ethical judgment superior to that of everyone else. This implication is difficult to justify" because "expertise can mean little when it comes to ethical judgments about justice or

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[2] Nikolas Bowie, Pres. Comm'n. on the Sup. Ct. of the U.S., The Contemporary Debate over Supreme Court Reform: Origins and Perspectives, Written Statement of Nikolas Bowie, https://www.whitehouse.gov/wp- content/uploads/2021/06/Bowie-SCOTUS-Testimony-1.pdf; *see also* Ian Millhiser, *9 ways to Reform the Supreme Court besides court-packing*, VOX (Oct. 21, 2020, 12:55 PM), https://www.vox.com/21514454/supreme-court-amy-coney-barrett-packing-voting-rights ("Many of these proposals seek to weaken the Supreme Court—and that might be the most important pro-democracy reform that America could enact. A party that wins a presidential race should get to govern for four years, not for 40.").

[3] Samuel Moyn, Pres. Comm'n. on the Sup. Ct. of the U.S., Hearing on "The Court's Role in Our Constitutional System," June 30, 2021, Written Statement of Samuel Moyn, https://www.whitehouse.gov/wp- content/uploads/2021/06/Moyn-Testimony.pdf (last accessed July 18, 2021).

[4] *Id.* at 2.

how to make tradeoffs between competing normative values."[5] That sounds remarkably like Justice Antonin Scalia's observation that "nine people picked at random from the Kansas City telephone directory" are no less moral authorities than the Justices of the Supreme Court.[6]

I think it's a positive development that progressives have come to despise judicial activism as much as conservatives (albeit identifying different cases as examples). After all, a Court that is unrestrained enough to invent the new constitutional rights progressives crave is also powerful enough to take away the constitutional rights they cherish.

For the first time in my memory, many court watchers on the left and right share an unease that the Supreme Court too often oversteps its bounds. Progressives typically point to relatively recent cases like *Citizens United v. FEC*[7], *Shelby County v. Holder*[8], and *Bush v. Gore*[9]. Conservatives' concerns about judicial activism go back to at least the Warren and Burger Courts, if not the Court that ultimately upheld many aspects of the New Deal.

For any Supreme Court reform to have a realistic chance of being enacted, it will need support from conservatives. Winning that support will require an understanding of what troubles conservatives about the Court, even with five or six conservatives on it.[10] As one of this Commission's handful of "conservative" witnesses—at least in the sense of supporting constitutionally limited government and a textualist approach to judicial interpretation—I feel that I can contribute something by helping to answer that question.

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[5] Bowie, *supra* note 2, at 17.

[6] Cruzan v. Dir., Missouri Dep't of Health, 497 U.S. 261, 293 (1990) (Scalia, J., concurring).

[7] 558 U.S. 310 (2010).

[8] 570 U.S. 529 (2013).

[9] 531 U.S. 98 (2000).

[10] It's difficult to know how to classify Chief Justice Roberts, who Democrats like more than Republicans, according to a 2020 survey. *See* RASMUSSEN REPORTS, *Supreme Court Update*, (July 7, 2020), https://www.rasmussenreports.com/public_content/politics/mood_of_america/supreme_court_update_jul07.

I believe the answer can be boiled down to the "living Constitution."[11] There may be a conservative majority on the Court. Yet American life continues to be governed by a significant number of important Supreme Court precedents—pertaining to issues ranging from religious liberty and the death penalty to abortion and same-sex marriage—that resulted from progressives' living Constitution approach to judicial interpretation, which saw its heyday in the Warren and Burger Courts but survives to this day.

Under the living Constitution approach, the Constitution is seen as an evolving document, rather than a fixed contract between the American people and their government that can be changed only with the democratic consent of the amendment process. It is the duty of the federal courts, particularly the Supreme Court, to use its decisions to update our founding document to better reflect society's evolving needs and values.

What best reflect our needs and values is highly subjective. Add to that the fact that the living Constitution approach is largely unconstrained by the words or intent of the text, and conservatives see the philosophy as having virtually no limiting principle and blurring the distinction between interpreting the law and legislating or otherwise engaging in policy making. I other words, they view it as a recipe for unrestrained judicial power.

Moreover, conservatives believe that unrestrained power is a one-way ratchet used to advance values reflective of the nation's elite in service of a decidedly progressive policy agenda that lacks the wide public support necessary for democratic enactment.

I understand that many progressives are distressed by Supreme Court decisions like *Citizens United* and *Shelby County*, which likely would have been decidedly differently by a less conservative Court. But my point is not to deny that judges across the ideological spectrum sometimes allow political and personal biases to cloud their judicial reasoning. Nonetheless, any biases held by judges with a conservative judicial philosophy are constrained, however imperfectly, by the constitutional and statutory text and its history. There are simply no comparable constraints when judges use the living Constitution approach.

[11] I use the term "living Constitution" broadly to encompass a philosophy of both constitutional and statutory interpretation.

That is how we wind up with a Court that often sees itself as a bunch of philosopher kings capable of discovering a constitutional "right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"[12] or finding in the Bill of Rights "penumbras, formed by emanations from those guarantees that help give them life and substance … creat[ing] zones of privacy."[13]

The contrast between the living Constitution and more conservative judicial philosophies is much like the difference between a baseball umpire who believes it is his duty to be objective, but occasionally lets his biases get in the way, and an umpire who believes his job is to strategically expand or contract the strike zone to achieve a more important end than objectivity—perhaps to help a player or team that is disadvantaged or for whom he has particular empathy. The latter view is exemplified by Barack Obama's stated goal of appointing a judge who will "bring in his or her own perspectives, his ethics, his or her moral bearings."[14] Objectivity just gets in the way.

While I don't personally feel strongly about abortion as a matter of policy, it's clear to me that *Roe* and its progeny are emblematic of the way in which the living Constitution begets overreaching judicial decisions that have a big impact on our society yet lack the legitimacy of both decisions firmly grounded in the Constitution and policy making enacted democratically. That, in turn, begets not just deep dents in the Supreme Court's legitimacy but also the societal polarization that has brought us here today.

Justice Scalia said it best in *Casey*. He observed that: "National politics were not plagued by abortion protests, national abortion lobbying, or abortion marches on Congress, before *Roe v. Wade* was decided. Profound disagreement existed … but that disagreement was being worked out at the state level."[15] Scalia compared the political aftermath of *Roe* to the tragic consequences of *Dred Scott*:[16] "[B]y banishing the issue [of abortion] from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing

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[12] Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 851 (1992).

[13] Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

[14] CNN (May 8, 2008), http://transcripts.cnn.com/TRANSCRIPTS/0805/08/sitroom.01.html

[15] *Casey*, 505 U.S. at 979 (Scalia, J., concurring in judgment in part and dissenting in part).

[16] Dred Scott v. Sandford, 60 U.S. 393 (1857).

and an honest fight …, the [*Casey*] Court merely prolongs and intensifies the anguish [wrought by *Roe*]."[17]

To folks on the pro-choice side of the abortion debate, perhaps a constitutional right to abortion has been worth all the anguish and polarization caused by the Court banishing the issue from the political forum. But as we gather today to figure out how to fix a court and a confirmation process that have become so politically divisive, let's not forget how we got here.

The transformation of the Supreme Court confirmation process into a political circus may have begun with the treatment of Judge Robert Bork in 1987, but that was a symptom rather than a cause. The cause was the Court's unwarranted intrusion into political and culture war issues, like abortion, that the Constitution—not the living Constitution but the written Constitution—leaves to the states and to the people. Having given nearly unlimited power to nine unelected judges, starting with the Warren Court, it would be very naïve to expect anything other than bitter, no-holds-barred fights over who will wield that power.

We have now had more than three decades of this political circus, which has spread to appeals court nominations and occasionally district court nominations as well. The politicization of the process got even more pronounced when filibustering of judicial nominees became common under President George W. Bush and a GOP-controlled Senate. Now we find ourselves in a place, summed up by Harvard Law Professor Noah Feldman, where "most close observers of whatever political persuasion would agree that today, it is increasingly unlikely that a Senate controlled by a majority from a different political party than the party of the president would be willing to confirm any nominee to the Court."[18] That promises deadlock in the future and is a bleak place to be.

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[17] *Casey*, 505 U.S. at 1002 (Scalia, J., concurring in judgment in part and dissenting in part).

[18] Noah Feldman, Pres. Comm'n. on the Sup. Ct. of the U.S., The Contemporary Debate over Supreme Court Reform: Origins and Perspectives, Written Statement of Noah Feldman, https://www.whitehouse.gov/wp-content/uploads/2021/06/Feldman-Presidential-Commission-6-25-21.pdf [hereinafter Feldman Testimony].

As the late Sen. John McCain (R-Ariz.) said, "The surest way to restore fairness to the confirmation process is to restore humility to the federal courts."[19] Well, discarding the living Constitution as a judicial philosophy would help to restore humility to the federal courts. But only a change of heart by progressives or dramatic reform could accomplish that. As to the latter, jurisdiction stripping, Congressional override, and requiring a supermajority of Justices for certain type of rulings have all been proposed. All of those present separation of powers issues and might require a constitutional amendment to enact.

Professor Steven Sachs, who will testify later today, has said that

> A Court that can do just anything is too powerful a superweapon to leave lying around in a democracy; sooner or later, someone is bound to pick it up. Rather than work to put "moderates" at the controls, perhaps we should start thinking about disarmament. [20]

Give my view that the Supreme Court's overreach is damaging our society, I'm sympathetic to the concept of disarmament. Nonetheless, even putting aside the constitutional concerns, I'm skeptical of dramatic reform. That's because I worry that, as Justice Stephen Breyer has said, "Structural alteration [of the Court] motivated by the perception of political influence can only feed that perception, further eroding that trust."[21] John Malcolm of the Heritage Foundation discussed this problem:

> I think this entire endeavor [reform] is misguided—indeed, potentially quite dangerous—because it will feed the misperception that the justices on the Supreme Court are just partisans and politicians in robes and that it is okay to manipulate the design and structure of the judiciary in the hopes that it will produce decisions that satisfy and fulfill a particular political agenda.[22]

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[19] Wake Forest University, *McCain Campaign Event*, C-SPAN (May 6, 2008), https://www.c-span.org/video/?205211-1/mccain-campaign-event-wake-forest-university.

[20] Stephen E. Sachs, *Supreme Court As Superweapon: A Response to Epps & Sitaraman*, 129 Yale L.J.F. 93, *supra* note 27 at 95 (2019).

[21] Harvard Law School, *Scalia Lecture | Justice Stephen G. Breyer, "The Authority of the Court and the Peril of Politics,"* YOUTUBE (Apr. 6, 2021), https://www.youtube.com/watch?v=bHxTQxDVTdU.

[22] John G. Malcom, Pres. Comm'n. on the Sup. Ct. of the U.S., The Contemporary Debate over Supreme Court Reform: Origins and Perspectives, Written Statement of John Malcom, https://www.whitehouse.gov/wp-content/uploads/2021/07/Malcolm-Testimony.pdf.

Moreover, even a first round of structural reform to the Supreme Court does not lead to any short-term damage to Americans' perception of the Court, there is still the problem of allowing the camel's nose under the tent after more than 150 years of stability in the Court's structure. Modest, non-partisan structural reform now would remove an enduring taboo and open the door to partisan or ideologically motivated "reform" later, such as court packing. The latter is the last thing we need if we value judicial independence and preserving the Court's legitimacy. In other words, any precedent for Congressional intervention when that body is unhappy with the Court's decisions or composition is a dangerous one.

Along those lines, I would support the one thing that could permanently prohibit court packing. That is a constitutional amendment to fix the number of Justices on the Court at nine. In fact, such an amendment (the "Keep Nine Amendment") has been introduced in both the House and Senate and now has the support of more than 180 members of the two houses.[23] I note that one of the two Representatives that first introduced the amendment last year was a Democrat, Rep. Collin Peterson of Minnesota.[24]

I should also point out that there is something just as dangerous as ideologically motivated changes to the Supreme Court's structure. That is threats of court packing or other structural changes to try to intimidate the Court into deciding a case one way or another or, more generally, moving to the left or right. That is why I was very concerned with a Supreme Court amicus brief filed in 2019 by Democrat senators led by Rhode Island's Sheldon Whitehouse. The brief urged the Court to dismiss as moot a case challenging a New York City gun law.[25] But the brief contained a chilling threat to the Justices. "The Supreme Court is not well. And the people know it," the brief said. "Perhaps the Court can heal itself before the public demands it be 'restructured.'"[26]

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[23] KEEP NINE, https://keepnine.org (last visited July 18, 2021).

[24] H.J.Res.95, 116th Cong. (2020).

[25] Brief of Senators Sheldon Whitehouse, Mazie Hirono, Richard Blumenthal, Richard Durbin, and Kirsten Gillibrand as Amici Curiae in Support of Respondents, New York State Rifle & Pistol Association, Inc. v. City of New York, New York, 2019 WL 3814388.

[26] Id.

Last year, I was equally shocked by what then-Senate Minority Leader Chuck Schumer (D-N.Y.) threatened while addressing a pro-abortion crowd rallying in front of the Supreme Court as the justices heard an important abortion case.[27] "I want to tell you, Gorsuch, I want to tell you, Kavanaugh, you have released the whirlwind and you will pay the price," he said. "You won't know what hit you if you go forward with these awful decisions."[28] Presumably, the "price" Schumer had in mind was court packing.

Threats like that are not only grossly inappropriate, especially coming from attorneys like Sens. Whithouse and Schumer, but they also stand in way of actually enacting reforms. That is because they threaten any chance of bipartisan agreement about reforms and alienate even the liberal Justices on the Court, whose tacit support for any reform is likely needed.

While I am skeptical of structural reform to the Court itself, I would support changes to the judicial confirmation process in the Senate. The public circus nature of that process could be diminished by scaling back the Supreme Court confirmation hearings that inevitably become the focal point of bitter confirmation fights. I don't want to entirely eliminate those hearings but, at very least, they do not need to drag on for four days like they do now. Similarly, I think a shorter confirmation timetable would be helpful. As I noted in a *Wall Street Journal* op-ed following the confirmation of Justice Amy Coney Barrett:

> The conventional wisdom … held that the necessity for a fast confirmation process would further complicate the confirmation. As it turned out, the speed—from nomination to confirmation in 30 days—likely helped ensure her smooth sailing by leaving less time for mischief. Recall that Sen. Dianne Feinstein received Christine Blasey Ford's sexual-assault accusation three weeks after Judge Kavanaugh's nomination, then sat on it for six weeks. [29]

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[27] Ian Price, *Schumer to Kavanaugh, Gorsuch: You Will "Pay The Price,"*, REALCLEARPOLITICS (Mar. 4, 2020), https://www.realclearpolitics.com/video/2020/03/04/schumer_to_kavanaugh_gorsuch_you_will_pay_the_price.html.

[28] Id.

[29] Curt Levey, *The Barrett Battle That Wasn't*, WALL STREET JOURNAL (Oct. 30, 2020, 4:58 PM), https://www.wsj.com/articles/the-barrett-battle-that-wasnt-11603989535.

Depending on the details, I could also support a Senate reform that made it more difficult to stop judicial nominees by denying them a hearing, committee vote, or vote on the floor. Professor Michael McConnell proposed something like that, albeit in combination with term limits, when he testified before this Commission last month. Under his proposal, a Supreme Court "nominee would be deemed confirmed unless, within four months of the nomination, the Senate passes a resolution disapproving the nomination. (This was James Madison's proposal at the Constitutional Convention.)"[30] McConnell adds that "By flipping the burden of action from confirming to defeating a nominee, the proposal makes less likely the nightmare scenario that no nominee can be approved when the Senate and the presidency are in opposite hands."[31] Like I implied, lowering that likelihood will be important going forward.

I cannot suggest such a reform without briefly discussing President Obama's nomination of Judge Merrick Garland to the Supreme Court in 2016, the last year of Barack Obama's presidency. Progressives' resentment that the GOP effectively rejected Garland by denying him a Senate vote is clearly a big part of the current impetus for court packing.

As Professor Feldman testified at the Commission's June 30 meeting, "Pursuant to [Article II, section 2 of the Constitution], the Senate acts within its authority when it rejects the presidential nominee for any reason at all, including reasons of judicial ideology or political partisanship."[32] Similarly, Professor McConnell testified that "There was no established 'norm' requiring Senate action on the Garland nomination. This was the first time in modern history that a Supreme Court nomination occurred in the final year of a presidency when the party opposite to the president controlled the Senate."[33]

To the contrary, in 1992, during President George H. W. Bush's last year in office, when the Democrats controlled the Senate, Democrat leaders made it clear that were a Supreme Court vacancy to occur that year, they would not consider any Bush nominee to fill the

[30] Michael W. McConnell, Pres. Comm'n. on the Sup. Ct. of the U.S., The Contemporary Debate over Supreme Court Reform: Origins and Perspectives, Written Statement of Michael McConnell, https://www.whitehouse.gov/wp-content/uploads/2021/06/McConnell-SCOTUS-Commission-Testimony.pdf [hereinafter McConnell Testimony].

[31] Id. at 7.

[32] Feldman Testimony at 1.

[33] McConnell testimony at 3.

seat. [34] Then-Senator Joe Biden proclaimed that "once the political season is underway . . . action on a Supreme Court nomination must be put off until after the election campaign is over."[35]

Not much notice was taken at the time, partly because no such vacancy occurred, but also because, in 1992, the Democrats' position on filling a Supreme Court vacancy arising during a presidential election year was consistent with historical norms:

> When the same party controls the White House and the Senate (e.g., now), the confirmation process proceeds as usual and the nominee is almost always confirmed. A new justice has been confirmed 8 out of 10 times this has happened. [However, when] different parties control the White House and the Senate (e.g., in 2016) the confirmation process either does not proceed, or proceeds and the nomination usually fails. In the handful of instances when such nominations proceeded (excluding one case in which there was a recess appointment), they failed 4 out of 6 times. [36]

As they say, elections have consequences and politics ain't beanbag.

At very least, many Democrats say, Senate Republicans were hypocritical for confirming Justice Amy Coney Barrett in a presidential election year after not confirming Merrick Garland. That would be true if the stated or historical norm were either that no Supreme Court nominee or any Supreme Court nominee should be confirmed during a presidential election year. But, instead, the norm is that such nominees will be confirmed if the Senate is controlled by the President's party. That is the rule as explained by then-Senate Majority Leader Mitch McConnell (R-Ky.) in 2016—though, admittedly, some of his GOP colleagues stated it incorrectly—and is the only rule that is enforceable in practice.

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[34] Arit John, *Use my words against me, What GOP Senators said about election-year SCOTUS picks in 2016 and now*, LOS ANGELES TIMES (Sept. 21, 2020, 4:58 PM), https://www.latimes.com/politics/story/2020-09-21/republicans-flip-flop-rbg-scotus-replacement.

[35] Id.

[36] JUDICIAL CRISIS NETWORK, https://judicialnetwork.com/in-the-news/scotus-vacancies-potus-election-years (last visited July 18, 2021).

A final point about Garland and Barrett is necessary because many leading Democrats and their allies repeat the claim that Senate Republicans have stolen *two* Supreme Court seats in the last five years.[37] In fact, the creation of *four* new Supreme Court seats in the Democrats' court packing bill, the Judiciary Act of 2021,[38] is based, at least in part, on needing four seats to remedy the alleged theft of two seats.[39]

However, no matter what you think the rule should be, it makes no sense to claim that two seats were stolen. If you follow the historical norm, then no Supreme Court seats were stolen. If you, instead, contend that Supreme Court nominees should always be considered for confirmation in a presidential election year, then a seat was "stolen" only when Garland was nominated in 2016. Finally, if your position is that no Supreme Court nominee should be confirmed during an election year, then Amy Coney Barrett's confirmation is the only "stolen" seat. Under none of these conditions were *two* Supreme Court seats "stolen."

It follows that this Commission should not support any Supreme Court reform, including the proposed Judiciary Act of 2021, that is inspired by the claim of two stolen seats.

I end by noting that none of this analysis means that the Senate cannot enact a rule which would reject the historical norm. In fact, I said that I could support a Senate rule that makes it more difficult to effectively deny consideration to judicial nominees.

Thank you for your considering my testimony. I am happy to answer questions from the commissioners, whether now or in the days ahead.

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[37] *See, e.g.*, Senator Elizabeth Warren, *Rachel Maddow Interview on the Supreme Court*, YOUTUBE (Sept. 21, 2020), https://www.youtube.com/watch?v=f5I8tVWqUvY; Morgan Lewis, *Schumer: If Republicans confirm new justice, they 'will have stolen' 2 SCOTUS seats*, FOX NEWS (Sept. 22, 2020), https://www.foxnews.com/politics/schumer-republicans-steal-scotus-seats.

[38] H.R. 2584, 117th Cong. (2021).

[39] *See* Kevin Freking, *Democrats begin long-shot push to expand the Supreme Court*, ASSOCIATED PRESS (Apr. 15, 2021), https://apnews.com/article/joe-biden-legislation-judiciary-us-supreme-court-courts-3d8bbbdcd2d682190c4b0ae9d1333a37 (Rep. Gerrold Nadler, chair of the House Judiciary Committee, said, "Some people say we're packing the court. We're not packing it. We're unpacking it.").