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Written Testimony before the Presidential Commission on the
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Co-Chairs Bauer and Rodriguez and distinguished members of the Presidential Commission on the Supreme Court of the United States:

I am the Vice President of the Institute for Constitutional Government and Director and Ed Gilbertson and Sherry Lindberg Gilbertson Senior Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation.¹ I appreciate the opportunity to appear before you today to offer my perspective on the task you have been assigned to perform, specifically to “provide an analysis of the principal arguments in the contemporary public debate for and against Supreme Court reform.”²

I congratulate you all on being appointed to this prestigious Commission, a place each of you has earned through your professional achievements. I know a few of you personally and hold you all in high regard. I hope, then, that you will not take it personally when I say at the outset that I think this entire endeavor 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.³

There is no crisis that needs to be addressed. Let’s face it: The reason this Commission was established is because former President Donald Trump appointed three justices to the Supreme Court of the United States during his one term, and that prompted President Joe Biden to declare when he was on the campaign trail that the Supreme Court “is getting out of whack.”⁴ Does anyone believe that those now insisting on “reforming” the Court would still be saying that the Court is “out of whack” if the Senate had confirmed Merrick Garland in 2016 and a President Hillary Clinton had named the replacements for Justices Anthony Kennedy and Ruth Bader Ginsburg—thereby resulting in a six-to-three split in favor of Democrat-appointed justices? I don’t think so.

Moreover, while you all have distinguished yourselves throughout your careers, this is hardly an ideologically balanced group. By my estimation (and it is just that), those with strongly liberal leanings outnumber those with conservative leanings by roughly four-to-one, with a few centrists in the mix. While this may pass as acceptable (or even generous) for a law school faculty these days, it is hardly ideal for a Commission exploring and potentially recommending fundamental changes to the one branch of the federal government that is supposed to be above and immune to politics. But even this skewed ratio is too much for some liberal groups that have expressed their disgust that there are *any* members with conservative leanings serving on this Commission.⁵ This does not bode well for broad public acceptance of the Commission’s analysis or the recommendations you may care to offer in your final report.

Saying that I do not agree that the Supreme Court is “out of whack” does not mean that I agree with everything the Supreme Court—even the current Supreme Court—does. Far from it. As Justice Robert Jackson once quipped, “We are not final because we are infallible, but we are infallible only because we are final.”⁶ For anybody who wants proof that the Supreme Court is not infallible and is capable of erring—badly—all one needs to do is say the words *Dred Scott*,⁷ *Plessy*,⁸ or *Korematsu*.⁹ While these cases are universally reviled—and rightly so—we all could name cases in which a majority of the Court wrote an opinion reaching a result that we liked and

others that we didn't like. I am quite sure that there would be robust disagreement among some of you as to which cases fall into each of these categories.

This is just one of the reasons why it is important that any reform effort focus on the needs of the Supreme Court and the lower federal courts, not on any decisions that the Supreme Court has rendered or that it might render in the future. Reforms focusing on the needs of the court system would enhance the judiciary's ability to function more effectively and efficiently. Doing so would also likely strengthen the credibility of the Supreme Court and the lower courts as institutions that protect our individual liberties and help to ensure that all branches of government, including the judiciary itself, adhere to their proper roles based on time-honored separation-of-powers principles.

Engaging in open-ended discussions about "reform" and "judicial accountability" without first identifying the defects that must be remedied, on the other hand, will invariably lead to the charge that this Commission as a body is acting in a purely political fashion with a distinct ideological bent. Such an approach could easily foster doubt and dissatisfaction with the courts, further eroding the public's confidence in the courts as a trustworthy, apolitical, and independent branch of government that can be relied upon to interpret and apply the law fairly and faithfully.

Justice Sandra Day O'Connor put this quite well:

Put simply, judges must be accountable to the public for their constitutional role of applying the law fairly and impartially. Judicial accountability, however, is a concept that is frequently misunderstood at best and abused at worst. It has become a rallying cry for those who want in reality to dictate substantive judicial outcomes.¹⁰

The reform proposals that have been offered by the witnesses who have appeared before you and who have submitted written testimony are, to my mind, on a spectrum in the sense that some would do greater damage to the independence and credibility of the Court, while others would do little to no harm. I will focus on three of them—Court-packing, jurisdiction limitations, and term limits—while offering a couple of proposals of my own for your consideration.

Court-Packing

The biggest threat to the independence of the judiciary is the proposal to pack the Court. Back in 1983, then-Senator Joe Biden referred to Court-packing as a "bonehead idea."¹¹ He was right.

There are currently six justices on the Court who were appointed by Republican Presidents, three of them by President Trump. Not surprisingly, legislation has been introduced in the House and Senate¹², sponsored by Democrats who agree that the Court is "out of whack," that would add four justices to the Court—one more than President Trump got to appoint and just enough to ensure, at least for the time being, that the majority of the justices on the Court are appointed by a Democratic President. That is, of course, their right since the number of Supreme

Court justices is established by legislation and is not enshrined in the Constitution.¹³ But while it may be their right, it is a bad idea.

While ignoring the fact that many, if not most, of the cases that reach the high court result in unanimous or nearly unanimous decisions,¹⁴ even though the issues involved sharply divided judges on the lower courts, the motives behind those calling for an increase in the number of justices are obvious and transparent. Displeased with some of the opinions issued by the Court, they are clamoring for the current Supreme Court to be replaced by a larger, more reliably liberal body that will be more likely to issue rulings in future cases that they like, regardless of the legal reasoning employed to reach those results.

The group Take Back the Court, for example, insists that Congress must add seats to the Supreme Court in order to “restore the right to vote, ensure reproductive freedom, protect workers, halt our climate emergency, and save democracy.”¹⁵ Immediately after the Supreme Court issued its opinion on the last day of the term in *Brnovich v. Democratic National Committee*, rejecting a challenge to two provisions in Arizona’s election laws, the Democratic Senator sponsoring legislation to pack the Court, stated that “we must expand the Supreme Court,” and a Democratic co-sponsor of the companion bill in the House stated, “And still some people have the nerve to question whether Court expansion is necessary. Expand the damn court.”¹⁶

Harvard Law School Professor Michael Klarman went so far as to say that with an expanded Court, the Democrats could make sure that Republicans “will never win another election.”¹⁷ In fact, many autocrats, including Hugo Chavez of Venezuela, Recep Erdogan of Turkey, Viktor Orban of Hungary, and Daniel Ortega of Nicaragua, have used court-packing as a tool to disempower courts, thereby destroying their independence so that they could no longer serve as an effective impediment to whatever the “elected” rulers of those countries wanted to do. Is this the company we wish to keep?

Disagreement with this or that decision or even a series of decisions is the worst and most dangerous reason to “restructure” or “reform” the Court. I am sure, for example, that every member of this Commission would have objected had the Senate given in to the demands of the “Impeach Earl Warren” movement that arose after the Warren Court issued a series of decisions ordering school desegregation and expanding the rights of criminal defendants that rankled many conservatives, predominantly in the South.¹⁸ Significantly, although not surprisingly, those who claim that the Court is “out of whack” have failed to explain exactly how either the Supreme Court or the federal judiciary in general is “out of whack.”

If “out of whack” is defined by the number of judges appointed by a President, it is worth noting that although President Trump had great success appointing judges during his one term in office, he still appointed fewer judges than President Barack Obama appointed, albeit over two terms. While President Trump appointed one more Supreme Court justice than President Obama appointed, President Obama appointed 329 Article III judges compared to Trump’s 234.¹⁹ In terms of the appellate courts, during his time in office, President Obama “flipped” eight of the 13 circuit courts with judges that were either an equal number of Democrat and Republican appointees or majority Republican appointees to majority Democrat appointees; Trump managed

to “flip” two of them back. Today, a majority of the circuit courts have more Democrat-appointed active judges than Republican-appointed active judges on them.²⁰ Yet no conservatives have proclaimed that the circuit courts are “out of whack.”

If “out of whack” is defined as an imbalance between justices appointed by different parties, then surely we should take into account the fact that there have been various times in our nation’s history when the balance was far greater than the current six-to-three split.

By the time Thomas Jefferson, a member of the Democratic-Republican Party, became President in 1801, every member of the federal judiciary, including all six members of the Supreme Court, had been appointed by Presidents George Washington and John Adams, members of the Federalist Party. There was a call at that time by some in Congress to pack the Court. That effort failed, as I shall discuss in greater detail below. But while Jefferson did not pack the Court, he and his Democratic-Republican allies in Congress did restore the number of justices to six to undo the effects of recently passed legislation that reduced the number of justices from six to five upon the next vacancy—a blatant last-minute attempt by President Adams and the Federalists to prevent Jefferson from naming a new justice to the Court the next time a vacancy occurred. The number of justices was not increased to seven until 1807, although even after this change, the majority of justices were still Federalist appointees.

After President Franklin Roosevelt’s Court-packing plan failed, he went on to appoint eight out of the nine justices on the Court (Hugo Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, James Byrnes, Robert Jackson, and Wiley Rutledge),²¹ and when Justice Owen Roberts, a Hoover appointee, retired in 1945, President Harry Truman appointed Justice Harold Burton. So all nine justices were Democrat appointees, and it stayed that way for a decade until 1955 when President Dwight Eisenhower appointed Justice John Marshall Harlan. When Eisenhower took office in 1953, there were no calls to “Pack the Court.”

More recently, from October 1991 until August 1993, from the time that Justice Thurgood Marshall retired until Justice Ruth Bader Ginsburg was appointed, there were eight Republican appointees on the Court (William Rehnquist, Harry Blackmun, John Paul Stevens, Sandra Day O’Connor, Antonin Scalia, Anthony Kennedy, David Souter, and Clarence Thomas) and only one Democrat appointee (Byron White). Again, there were no calls from the Clinton Administration to “Pack the Court.”

As I previously mentioned, there have been two efforts in our nation’s history to pack the Court, both of which, fortunately, failed.

Although the Democratic-Republicans in Congress thwarted John Adams’ attempt to deprive Jefferson of the opportunity to fill a future vacancy on the Court by restoring the number of justices to six, there were those in Jefferson’s party who wanted to go further. Representative John Bacon of Massachusetts said that he “wish[ed] to add two or three more judges to the Supreme Court.”²²

The Federalists, as expected, objected to this proposal,²³ but none of Bacon’s fellow Democratic-Republicans went along either. To the contrary, Representative John Randolph of

Virginia argued forcefully: “Will not the history of all Governments warrant the assertion, that the creation of new and unnecessary offices, as a provision for political partisans, is an evil more to be dreaded than the abolition of useless ones?”²⁴ Senator John Ewing Colhoun of South Carolina stated:

Shall the Legislature with a strong arm, and by an assumed power, destroy their independence, and thereby their existence as one of the pillars of the Constitution? In this situation of your Judiciary, will the streams of justice flow equally to the habitation of the rich and cottage of the poor? No man who knows human nature will answer in the affirmative.²⁵

And Senator John Breckinridge of Kentucky added: “No increase of courts or judges could be necessary or justifiable, unless the existing courts and judges were incompetent to the prompt and proper discharge of the duties consigned to them.”²⁶

Frustrated with some adverse rulings by the Supreme Court and fresh from his landslide re-election in 1936, President Franklin Roosevelt attempted to pack the Court by introducing a plan that would have added up to six more Supreme Court justices, one for each current justice over the age of seventy²⁷ who decided not to retire within 30 days after the law went into effect. He offered two reasons for this, both problematic. Roosevelt said that he wanted to appoint justices who would “enlarge constitutional power” so that he and Congress could address “extraordinary conditions” without interference from the Court.²⁸ He also suggested that several of the justices were simply too old to carry out their duties on the Court, stating in his official message to Congress that he was concerned about “the question of aged or infirm judges” and expressing his belief that “lowered mental or physical vigor leads men to avoid an examination of complicated and changed conditions.”²⁹

Roosevelt had reason to be optimistic that his Court-packing plan would succeed: The Democrats outnumbered Republicans 76 to 16 in the Senate and 334 to 88 in the House, with four Senators and 13 Congressmen from other parties usually voting with the Democrats.³⁰ But it did not succeed.

On June 7, 1937, the Senate Judiciary Committee issued a report stating that Roosevelt’s plan “in its initial and ultimate effect would undermine the independence of the courts” and would tend “to expand political control over the judicial department.” The report continued:

Even if every charge brought against the so-called “reactionary” members of this Court be true, it is far better that we await orderly but inevitable change of personnel than that we impatiently overwhelm them with new members. Exhibiting this restraint, thus demonstrating our faith in the American system, we shall set an example that will protect the independent American judiciary from attack as long as this Government stands.³¹

Quite so. The following month, 53 Democratic Senators joined 17 Republicans in voting to send the bill back to the Judiciary Committee, effectively killing it.³²

Any attempt to pack the Court would undoubtedly be met with tit-for-tat retaliation in the future. In 2017, Republicans had control of the White House and both Houses of Congress and could have packed the Supreme Court then, utilizing the same procedures that some Democrats now are contemplating using, but they didn't. If the Democrats pack the Court now, it is highly likely that the Republicans would not show such forbearance the next time they are in control, and who could blame them? That is, after all, exactly what happened with the removal of the filibuster for judicial nominations.³³

As Alexander Hamilton stated in Federalist No. 78:

[T]hough individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree, that “there is no liberty, if the power of judging be not separated from the legislative and executive powers.” And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments....³⁴

Packing the Supreme Court would do incalculable damage to its independence and credibility and would dramatically weaken the Court's ability to serve as an effective check on the executive and legislative branches of government.

Jurisdictional Limitations

Another reform proposal that has occasionally been offered to try to curb some of the Court's counter-majoritarian instincts and to enhance democratic authority over the law is jurisdiction-stripping,³⁵ which is designed to insulate certain laws from a statutory or constitutional challenge.³⁶ Congressional authority to do this would derive from the Exceptions Clause in Article III, Section 2, Clause 2 of the Constitution, which provides:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.³⁷

Some legal scholars have argued that the Exceptions Clause gives Congress plenary authority to decide what cases the Court can consider,³⁸ and other scholars have argued that Congress could not deprive the Court of the opportunity to consider a constitutional challenge to a law.³⁹ I will not attempt to resolve this dispute, which has been going on for decades. From my perspective, the important point is that we have been fortunate in not having to resolve this knotty constitutional issue—at least not yet.

The threat of imposing jurisdictional limitations, especially in cases involving interpretations of the Constitution, has a lamentable history in our country. During the era of the

Warren Court, there was virulent hostility to many of the Court's rulings and subsequent attempts to strip the Court of jurisdiction to decide cases involving racial desegregation, religious freedom, reapportionment, and the rights of political subversives and those accused of committing a criminal offense. Some of these efforts came close to succeeding.⁴⁰

While some on the left might favor, for example, stripping the Court of jurisdiction to consider a case seeking to overturn *Roe v. Wade*, there are some on the right who might favor stripping the Court of jurisdiction to consider a constitutional challenge to a state or federal statute that would effectively overturn *Roe v. Wade*. What's sauce for the goose is sauce for the gander. Or, as Alexander Hamilton more elegantly put it: "Considerate men, of every description, ought to prize whatever will tend to beget or fortify that temper in the courts: as no man can be sure that he may not be to-morrow the victim of a spirit of injustice, by which he may be a gainer to-day."⁴¹

Where this would lead is anybody's guess, but one could surmise that it would most likely be used to insulate laws that are politically popular but that implicate the rights of minorities, religious dissenters, and the like. Jurisdiction-stripping would radically alter the separation of powers by enhancing executive and legislative power at the expense of the judiciary. Most alarmingly, denying the Court the ability to decide whether a particular law violates the Constitution would effectively end the judiciary's ability to serve as the guardian of the rule of law and to ensure that the Constitution remains "the supreme Law of the Land."⁴²

Term Limits

Of the three proposals that I will discuss, term limits for Supreme Court justices has the benefit of being the least objectionable. Because Article III, Section 1 of the Constitution provides that "Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour,"⁴³ it will most likely require a constitutional amendment to impose term limits.⁴⁴ This is a virtue, not a vice, since it would take some time, would apply to all future appointees to the Court regardless of which party's candidate occupies the White House, and would require broad bipartisan acceptance by both the legislature and the general public.

Many respected scholars across the political spectrum have supported term limits, usually in the form of staggered, non-renewable, 18-year terms for future Supreme Court justices, which would result in a vacancy every two years.⁴⁵ Such a proposal, at least in theory, would permit every President to name two justices during a four-year term.⁴⁶ Term limits might also lessen the incentives for Presidents to nominate comparatively young nominees because of their projected length of service on the Court. Those who favor term limits also believe that the regularity of appointments would help to tone down harsh rhetoric surrounding Supreme Court vacancies and de-escalate the bitterness of the judicial confirmation process.⁴⁷

While I certainly do not dismiss these potential benefits out of hand, I am skeptical that term limits would be the panacea its proponents hope it would be. Each of the justices would still wield considerable power, and 18 years is still a significant period of time. Moreover, tying future vacancies and the Court's personnel to the results of each presidential election might cause the partisan rhetoric to be intensified and lead to confirmation hearings that are even more

contentious than they are now. Would further cementing the Supreme Court as an election issue be a net positive in terms of increasing the credibility and independence of the Court? I suspect the answer is “probably not.” As long as our country remains so politically polarized, I doubt that term limits would depoliticize the process, especially if the White House and the Senate are controlled by different parties, since there is no guarantee that the Senate would act on a nomination (unless some mechanism was built into the amendment itself that would force the Senate to act) until after the next election.

There are other problems too. Since the current justices “hold their offices during good behavior” (meaning they have life tenure unless impeached and removed from office), the term limits presumably would apply only to those who are appointed to fill future vacancies. It is unclear how such a disequilibrium among the current and future justices would be received in today’s political environment. Hypothetically speaking, if Justice Stephen Breyer were to retire at the end of the next term, would the Democrats be satisfied to replace him with a term-limited justice knowing that the six current Republican appointees to the Court would still enjoy life tenure?⁴⁸ I doubt it.

Further, while staggered term limits might lessen the likelihood of a strategic retirement because a replacement justice presumably would only fill the unexpired term of the retiring justice, this would not do anything to address a situation in which a justice appointed by a President from one political party dies while a President of the opposite political party is in office. Even if the person appointed to fill that vacancy only served for the remainder of the deceased justice’s term, that President would still get to fill three vacancies during that term.⁴⁹

Moreover, if term limits are so compelling, why not extend them to all federal judges? If this is being done because critics believe that the Supreme Court is too anti-democratic⁵⁰ and too disconnected from current mores, why not have shorter terms? Why not switch to a system in which federal judges are elected, which is how state court judges are chosen in roughly half the states in this country?⁵¹ Is this the path we want to go down?

The Constitution has never been amended to regulate the institution of the Supreme Court, and we should be cautious about amending it for that reason now. In Federalist No. 49, James Madison acknowledged that “a constitutional road to the decision of the people, ought to be marked out, and kept open, for certain great and extraordinary occasions.” He cautioned, however, that:

[I]t may be considered as an objection inherent in the principle, that as every appeal to the people would carry an implication of some defect in the government, frequent appeals would, in a great measure, deprive the government of that veneration which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability.⁵²

Other Reforms

Although I am not sure there is much that you can do about this, there is one proposal that I would offer that, if adopted by the Senate, would help to improve the function and independence of the federal courts in this country. As you are all well aware, the Senate has an informal tradition, sometimes referred to as a “courtesy,” called the “blue slip” process, whereby the Chairman of the Senate Judiciary Committee will send a blue-colored form to the two Senators from the state where a judicial nominee will serve, soliciting their views about the nominee.⁵³ Each Senator can then either return the blue slip, indicating his or her support for or disapproval of the nominee, or withhold the blue slip, which is usually interpreted as indicating disapproval. Although the practice has varied from time to time about how the Chairman treats a withheld blue slip for circuit court nominees, since such nominees, if confirmed, would sit on a court that has jurisdiction over several states, the practice has always been to treat a “negative” blue slip as a one-person veto of district court nominees.

The results are what you would expect. Democratic Senators make robust use of the blue slip process during Republican Administrations, and Republican Senators make robust use of the process during Democratic Administrations. This has frequently resulted in “judicial emergencies.”⁵⁴ When President Barack Obama left office, 36 district court vacancies had been declared “judicial emergencies,” 29 of them in states with at least one Republican Senator. When President Donald Trump left office, 33 district court vacancies had been declared “judicial emergencies,” 32 of them in states with at least one Democratic Senator. This practice has an obvious impact on the ability of parties, especially in civil cases,⁵⁵ to get their cases heard in anything approaching a timely manner.

Persuading Senators who are from the opposite political party from the President to be less circumspect and more sparing in their use of the blue slip process would go a long way toward improving the administration of justice and would likely improve the diversity of the federal judiciary within districts and ultimately within circuits. I recognize that there is not much that this Commission or, for that matter, the President can do to “reform” this practice, but it is something I would urge you to highlight in your report.

All of this having been said, there is one reform I would urge you to consider: We should amend the Constitution to keep the number of Justices at nine. With the exception of a brief period from 1863 to 1869, the Court has had nine members since 1837.⁵⁶ This has brought stability to the Court and to the nation, and that number should be fixed in the Constitution and not subject to the direction in which the political winds happen to be blowing at any particular moment. On that score, I stand with Justice Ruth Bader Ginsburg, who said shortly before she passed away, “Nine seems to be a good number.”⁵⁷

Conclusion

Those individuals who are demanding reform may be upset by the current composition of the Court, and they can certainly cite decisions that have been issued that they do not like. In part, this is an inevitable byproduct of the fact that the Supreme Court and the judiciary in general have claimed for themselves the authority to decide controversial issues that I believe (and I am certainly not alone in this view) are not covered by the Constitution and were properly left to the people and their elected representatives to resolve for themselves – for good or ill.

Mind you, a cogent, if not compelling, argument can be made that, on balance, those with liberal views have gained more from this judicial intrusion than those with a conservative bent have gained.⁵⁸ But even though it is possible that conservatives might benefit more in the long run from some of the proposals that you are considering, I think it is bad for the country to have the Supreme Court treated like a political football and am content to rely on Congress to correct the Court when it errs in a case involving statutory interpretation and on the Court itself (or the Article V amendment process) to correct any errors it makes in cases interpreting the Constitution.

During a recent speech at Harvard Law School, Justice Breyer said that the Court's "authority, like the rule of law, depends on trust, a trust that the Court is guided by legal principles, not politics.... Structural alteration motivated by the perception of political influence can only feed that perception, further eroding that trust."⁵⁹

There have been times when the Court's credibility has proven to be invaluable, such as the time when the Court proved to be an insistent yet stabilizing influence during the whole school desegregation effort following the Court's decision in *Brown v. Board of Education*. The Court spoke. Some agreed, and some didn't, but they all ultimately accepted the decision, obeyed the ruling, and did not respond with massive displays of violence, primarily because the public had confidence in the Supreme Court and in our judicial system. The Court's credibility has helped us through other tense times too. We should not take this for granted. Politicizing the Court, thereby creating the impression that the justices are just partisans in robes, risks undermining that credibility so that it won't be there the next time we need it—and we will.

The Constitution is not a self-executing document, nor does it fully define the rights and responsibilities contained in it. At least since the time of *Marbury v. Madison*, in which the Court declared that "[i]t is emphatically the duty of the Judicial Department to say what the law is,"⁶⁰ if not before, the Supreme Court has played a vital if not essential role in our society as the final arbiter of how our laws are to be interpreted and applied.

Although the President, Members of Congress, and state legislators are important constitutional players, they are popularly elected and therefore often cater to what the voters want, not what the Constitution requires. Although there certainly have been times in our nation's history when our elected representatives have done a better job of protecting our rights, I do not believe that this has been true overall. And although it is likely, if not inevitable, that the justices on the Supreme Court will occasionally fall prey to partisan concerns that cloud their judgment, as an institution the Supreme Court and the lower courts are far better situated than elected officials or the public via the referendum process to resolve questions of law dispassionately and without resorting to self-interest or partisan considerations, especially in cases where the law favors somebody whose views may not be in vogue with the current zeitgeist.⁶¹

Supreme Court justices take an oath to "support and defend the Constitution of the United States" and to "administer justice without respect to persons and to do equal right to the poor and to the rich and [to] faithfully and impartially discharge and perform all duties...to the best of

[their] abilities.”⁶² We may not always like what the justices do, but I, for one, am prepared to give them the benefit of the doubt that they are honoring their oaths and interpreting our laws and the Constitution with fidelity to justice as each one sees it.

In his majority opinion in the seminal case of *West Virginia State Board of Education v. Barnett*, Justice Robert Jackson stated:

The very purpose of a bill of rights is to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the Courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote, they depend on the outcome of no elections.⁶³

He was absolutely right. Judges should decide cases based on the law, not based on what is popular at any given moment in time. Any “reform” that diminishes the independence of the Supreme Court and its capacity to dispense “Equal Justice Under Law”—the very words emblazoned over the doors of the Supreme Court building—should be rejected.

Thank you for inviting me to testify before you today, and I look forward to answering any questions you may have.

Endnotes

¹ The title and affiliation are for identification purposes. Members of The Heritage Foundation staff testify as individuals discussing their own independent research. The views expressed here are my own and do not reflect an institutional position for The Heritage Foundation or its board of trustees. The Heritage Foundation is a public policy, research, and educational organization recognized as exempt under section 501(c)(3) of the Internal Revenue Code. It is privately supported and receives no funds from any government at any level, nor does it perform any government or other contract work. The Heritage Foundation is the most broadly supported think tank in the United States. During 2020, it had hundreds of thousands of individual, foundation, and corporate supporters representing every state in the U.S. Its 2020 operating income came from the following sources: Individuals 66%, Foundations 18%, Corporations 2%, Program revenue and other income 14%. The top five corporate givers provided The Heritage Foundation with 1% of its 2020 income. The Heritage Foundation’s books are audited annually by the national accounting firm of RSM US, LLP.

² Exec. Order No. 14023, 86 Fed. Reg. 19569 (Apr. 9, 2021), 2021-07756.pdf (govinfo.gov) (last accessed July 13, 2021).

³ This is hardly a new problem. Indeed, manipulating the courts was among the list of grievances against King George III that was catalogued in the Declaration of Independence (“He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”). See THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776), <https://www.archives.gov/founding-docs/declaration-transcript>.

⁴ 60 Minutes, *Biden on “60 Minutes”*: Supreme Court System “Is Getting Out of Whack,” WASH. POST (Oct. 22, 2020), https://www.washingtonpost.com/video/politics/biden-on-60-minutes-supreme-court-system-is-getting-out-of-whack/2020/10/22/caadeca1-6c35-4c36-a7b1-d70c32500d32_video.html.

⁵ See, e.g., Susan Rinkunas, *Why Is Biden Letting Anti-Choice Lawyers Have a Say in Court Reform?* (May 5, 2021), <https://rewirenewsgroup.com/article/2021/05/05/meet-the-anti-choice-lawyers-on-bidens-courts-commission/>; Press Release, Demand Just., Demand Just. Statement on Form. of Biden Ct. Reform Comm’n (April

9, 2021), <https://demandjustice.org/demand-justice-statement-on-formation-of-biden-court-reform-commission/>; Stephanie Kirchgaessner, *Biden Pick for Supreme Court Reform Panel Is a Conservative Kavanaugh Defender*, THE GUARDIAN (April 23, 2021), <https://www.theguardian.com/law/2021/apr/23/supreme-court-reform-commission-adam-white-joe-biden>; Elie Mystal, *Biden's Supreme Court Commission Is Designed to Fail*, THE NATION (April 13, 2021), <https://www.thenation.com/article/politics/supreme-court-commission/>; Ian Millhiser, *Biden's Supreme Court Reform Commission Won't Fix Anything*, VOX (April 10, 2021), <https://www.vox.com/2021/4/10/22375792/supreme-court-biden-commission-reform-court-packing-federalist-society>.

⁶ *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result).

⁷ *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857) (holding that “a negro, whose ancestors were imported into [the United States], and sold as slaves,” regardless of whether enslaved or free, could not be an American citizen and that, therefore, the rights and privileges conferred upon American citizens by the Constitution did not apply to them).

⁸ *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding that “separate but equal” state-imposed racial segregation did not constitute unlawful discrimination under the Constitution).

⁹ *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the constitutionality of an executive order interning American citizens of Japanese descent following the attack on Pearl Harbor).

¹⁰ Sandra Day O'Connor, *Judicial Accountability Must Safeguard, Not Threaten, Judicial Independence: An Introduction*, 86 DENV. U. L. REV. 1, 1 (2008).

¹¹ *Video Surfaces of Biden in 1983: FDR's Court-Packing Proposal Was a “Bonehead Idea,”* WIBC (Oct. 13, 2020), <https://www.wibc.com/blogs/chicks/video-surfaces-of-biden-in-1983-fdrs-court-packing-proposal-was-a-bonehead-idea/> (last accessed July 12, 2021).

¹² Judiciary Act of 2021, H.R. 2584, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/2584/text?q=%7B%22search%22%3A%5B%22Judiciary+Act+of+2021%22%5D%7D&r=1&s=1>, and Judiciary Act of 2021, S. 1141, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/senate-bill/1141?s=1&r=1>.

¹³ The proposal certainly cannot be based on the Court's administrative needs since the number of justices has not changed since 1869 and the justices are hearing and deciding significantly fewer cases than they did just a few years ago. *See Journal*, SUPREME COURT, <https://www.supremecourt.gov/orders/journal.aspx> (last accessed July 12, 2021).

¹⁴ During the recently completed term, for instance, 64% of the merits cases were decided by 6–2 majorities or higher, while only 36% of the cases were decided by votes of 5–4, 6–3, or 5–3. *See Statistics*, SCOTUSBLOG, <https://www.scotusblog.com/statistics/> (last accessed July 12, 2021).

¹⁵ TAKE BACK THE COURT, <https://www.takebackthecourtfoundation.org/> (last accessed July 12, 2021).

¹⁶ Rob Crilly and Megan Sheets, *Democrats DEMAND Biden Pack the Supreme Court with Liberal Justices After President Decried “Deeply Disappointing” Ruling Upholding Arizona's New Election Rules, Saying It “Undermines Voting Rights,”* DAILY MAIL (July 2, 2021), <https://www.dailymail.co.uk/news/article-9748431/Democrats-demand-Biden-pack-Supreme-Court-liberal-justices-Arizona-ruling.html>.

¹⁷ Jonathan Turley, *Supreme Court Confounding Its Partisan Critics*, THE HILL (June 12, 2021), <https://thehill.com/opinion/judiciary/558050-supreme-court-confounding-its-partisan-critics>.

¹⁸ David Savage, *Reagan's Liberal Justice*, TAMPA BAY TIMES (August 25, 2008), <https://www.tampabay.com/archive/2005/03/20/reagan-s-liberal-justice/>; ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 389–91 (1997); BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 281–82, 627 (1983).

¹⁹ *List of Presidents of the United States by Judicial Appointments*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_presidents_of_the_United_States_by_judicial_appointments (last accessed July 12, 2021). President Obama also made five appointments to Article I courts, and Trump made 10 such appointments. *See U.S. COURTS, JUDGESHIP APPOINTMENTS BY PRESIDENT* (n.d.), <https://www.uscourts.gov/sites/default/files/apptsbypres.pdf>. Article I courts, sometimes referred to as legislative

courts, are organized under Article I of the Constitution. Article I judges do not receive the same protections that Article III judges have, such as life tenure, and their jurisdiction is far more limited. Examples of Article I courts would include territorial courts (Guam, U.S. Virgin Islands, Northern Mariana Islands); the U.S. Court of Federal Claims; the U.S. Court of Appeals for the Armed Forces; the U.S. Tax Court; and U.S. Bankruptcy Courts.

²⁰ Max Rust, *How Trump Reset the Federal Judiciary*, WASH. POST (Oct. 15, 2020), <https://www.wsj.com/articles/how-trump-reset-the-federal-judiciary-11602785250>.

²¹ *Justices 1789 to Present*, SUPREME COURT, https://www.supremecourt.gov/about/members_text.aspx (last accessed July 6, 2021).

²² 11 ANNALS OF CONG. 564 (1802), <https://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=011/llac011.db&recNum=0>.

²³ For example, Senator Williams Wells of Delaware said, “But how much more ought this measure to fail, when... it is to destroy the independence of the judges, and prepare the way for the subversion of our Constitution!” *Id.* at 137, available at <https://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=011/llac011.db&recNum=0>.

²⁴ *Id.* at 659, available at <https://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=011/llac011.db&recNum=0>.

²⁵ *Id.* at 143, available at <https://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=011/llac011.db&recNum=0>.

²⁶ *Id.* at 25, available at <https://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=011/llac011.db&recNum=0>.

²⁷ The group consisted of George Sutherland, Willis Van Devanter, Pierce Butler, and James McReynolds, who frequently sided against the Administration; Chief Justice Charles Evans Hughes, who occasionally sided against the Administration; and Louis Brandeis, a celebrated progressive justice who usually, but not always, sided with the Administration.

²⁸ Franklin D. Roosevelt, Press Conference 317 (May 31, 1935) (transcript available in the FDR Library’s Digital Collections at http://www.fdrlibrary.marist.edu/_resources/images/pc/pc0022.pdf).

²⁹ Franklin D. Roosevelt, To the Congress (Feb. 6, 1937), in FRANKLIN D. ROOSEVELT, THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: 1937 VOLUME: THE CONSTITUTION PREVAILS 53, 55 (Macmillan, 1941) (Samuel I. Rosenman comp. and coll.).

³⁰ *Party Division*, U.S. SENATE, <https://www.senate.gov/history/partydiv.htm> (last accessed July 12, 2021); *Party Divisions of the House of Representatives, 1789 to Present*, U.S. HOUSE: HIST., ART & ARCHS., <https://history.house.gov/Institution/Party-Divisions/Party-Divisions/> (last accessed July 12, 2021).

³¹ S. REP. NO. 711, at 3, 14 (1937), <https://reason.com/wp-content/uploads/2020/10/Senate-Judiciary-Committee-Report-on-1937-Court-Packing-Legislation.pdf> (last accessed July 12, 2021).

³² *Senate Vote #42 in 1937 (75th Congress), To Recommit to the Committee on the Judicial Branch of Government. S. 1392, A Bill to Reorganize the Judiciary Branch*, GOVTRACK, <https://www.govtrack.us/congress/votes/75-1/s42> (last accessed July 12, 2021). Following this defeat, Justice Owen Roberts unexpectedly began to side more often with the Roosevelt Administration, voting to uphold parts of Roosevelt’s New Deal legislative package. This sudden jurisprudential change inspired the phrase “a switch in time that saved nine.” Whether Roosevelt’s Court-packing plan influenced Roberts’s decisions remains a mystery, but after leaving the Court, Roberts himself acknowledged having been “fully conscious” of “the tremendous strain and threat to the existing Court” that Roosevelt’s Court-packing plan posed. BURT SOLOMON, *FDR V. THE CONSTITUTION: THE COURT-PACKING FIGHT AND THE TRIUMPH OF DEMOCRACY* 216 (Bloomsbury Pub. 2009).

³³ In November 2013, when President Obama was in office, the Democrats, who were in the majority in the Senate, exercised the so-called nuclear option to change long-standing rules to lower the cloture threshold for lower-court judicial nominees from 60 votes to a simple majority. See Paul Kane, *Reid, Democrats Trigger “Nuclear” Option; Eliminate Most Filibusters on Nominees*, WASH. POST (Nov. 21, 2013), https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html. In April 2017, when President Trump was in office, the Republicans, who were in the majority in the Senate, extended this rules change to cover Supreme Court justices. See Matt Flegenheimer, *Senate Republicans Deploy “Nuclear Option” to Clear*

Path for Gorsuch, N.Y. TIMES (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html>.

³⁴ THE FEDERALIST NO.78 (Alexander Hamilton).

³⁵ At least one of the witnesses who has appeared before you, Professor Samuel Moyn, supports stripping the Court of jurisdiction in certain cases involving topics such as abortion or affirmative action. See Samuel Moyn, *Resisting the Juristocracy*, BOST. REV. (Oct. 5, 2018), <http://bostonreview.net/law-justice/samuel-moyn-resisting-juristocracy>; 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 12, 2021). He is not alone. See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 154–76 (2000); Sean Illing, *The Case for Stripping the Supreme Court of Its Power*, VOX (Oct. 27, 2020), <https://www.vox.com/2018/10/12/17950896/supreme-court-amy-coney-barrett-mark-tushnet>.

³⁶ Examples of cases in which a congressional limitation on the Court’s jurisdiction was upheld by the Court include *Ex parte McCardle*, 74 U.S. (7 Wall) 506 (1869) (in a case involving a writ of habeas corpus filed by an individual who had been arrested by military authorities after publishing articles criticizing Reconstruction, the Court validated a congressional withdrawal of the Court’s jurisdiction that occurred after oral argument but before a decision was announced); *Patchak v. Zinke*, 138 S.Ct. 897, 583 U.S. ____ (2018) (plurality holds that the Gun Lake Act which clarified the status of a particular tract of land that had been placed in trust for a tribe and provided that any legal action challenging this designation “shall not be filed or maintained in a Federal court and shall be promptly dismissed” did not violate Article III because, while the act changed the substantive statutory law applicable to pending lawsuits, it did not compel a particular result under old law). There are also examples in which the Court has read the jurisdictional provision of a statute narrowly to avoid the constitutional question of whether it is permissible to cut off the Court’s authority to review a constitutional challenge. See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 314 (2001) (concluding that habeas-corpus jurisdiction was not repealed by the Antiterrorism and Effective Death Penalty Act of 1996 or the Illegal Immigration Reform and Immigrant Responsibility Act of 1996); *Felker v. Turpin*, 518 U.S. 651, 654 (1996) (holding that the Antiterrorism and Effective Death Penalty Act of 1996 “does not preclude this Court from entertaining an application for habeas corpus relief”); *Webster v. Doe*, 486 U.S. 592, 603 (1988) (reading the National Security Act of 1947 to apply only to statutory, not constitutional, claims so as “to avoid the ‘serious constitutional question’ that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim”); *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2141, 579 U.S. ____ (2016) (reserving the question of whether a statute banning judicial review of certain administrative decisions applies to constitutional questions).

³⁷ U.S. CONST. art. III, § 2, cl. 2.

³⁸ See, e.g., Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005 (1965) (footnote omitted) (“There is, to be sure, a school of thought that argues that ‘exceptions’ has a narrow meaning, not including cases that have constitutional dimension; or that the supremacy clause or the due process clause of the fifth amendment would be violated by an alteration of the jurisdiction motivated by hostility to the decisions of the Court. I see no basis for this view and think it antithetical to the plan of the Constitution for the courts...”); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 919-20 (1984); Charles L. Black, Jr., *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841, 846 (1975); Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1038 (1982); Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 915 (1982); William W. Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 ARIZ. L. REV. 229, 257–60, 269 (1973); Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 517–38 (2018); Aziz Z. Huq, *The Constitutional Law of Agenda Control*, 104 CALIF. L. REV. 1401, 1435–36 (2016) (“[I]n the absence of a definitive statement to the contrary from the Court it would seem that the text of Article III...vests the legislature with tolerably broad authority to determine which constitutional questions of national import end up on the judiciary’s agenda.”).

³⁹ See, e.g., Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953) (the Constitution does not contemplate that Congress would have the ability “to destroy the essential role of the Supreme Court in the constitutional plan.”); Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What the Dialogue (Still) Has to Teach Us*, 69 DUKE L.J. 1, 17–18 (2019) (“the

Exceptions Clause, which as a textual matter seems to connote something of relatively minor importance, is a strikingly oblique way to endow legislators with the expansive authority to eviscerate completely a central responsibility of another constitutionally ordained branch of government!”). Proponents of this view may draw considerable support from the Court’s controversial decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), in which a 5–4 majority held that a jurisdiction-stripping provision in the Military Commissions Act violated the Suspension Clause of the Constitution (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”) and that the writ was available to non-citizen detainees being held at Guantanamo Bay, Cuba. It should be noted, however, that of the five justices in the majority of that (decidedly non-Originalist) decision, only one—Justice Breyer—remains on the Court and three of the four dissenters are still on the Court. Moreover, as Professor Richard Fallon has noted, “[b]ecause the Court’s ruling in *Boumediene* relied wholly on the Suspension Clause, its pertinence to jurisdiction-stripping cases that do not implicate that provision remains uncertain.” Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1056–57 (2010).

⁴⁰ See, e.g., William G. Ross, *Attacks on the Warren Court by State Officials: A Case Study of Why Court-Curbing Movements Fail*, 50 BUFF. L. REV. 483, 484, 497–99, 502–07, 528–36, 583, 590 (2002); *Limitation of Appellate Jurisdiction of the U. S. Supreme Court: Hearing on S. 2646 Before the Subcomm. to Investigate the Admin. of the Internal Sec. Act and Other Internal Sec. Laws of the Comm. on the Judiciary*, 93rd Cong. 148 (1958). See also Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 895–97 (1984) (listing examples of jurisdiction-stripping measures that have been proposed by Congress).

⁴¹ THE FEDERALIST NO.78 (Alexander Hamilton).

⁴² See, e.g., Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1500–01 (1990) (“[T]he issues implicated by the jurisdiction-stripping debate go to the very heart of the role of the federal courts in our constitutional order.”).

⁴³ U.S. CONST. art. III, § 1. In Federalist No. 78, Alexander Hamilton stated: “The standard of good behavior for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.” THE FEDERALIST NO.78 (Alexander Hamilton).

⁴⁴ Although some have argued that term limits could be imposed by statute, see, e.g., Roger C. Cramton, *Constitutionality of Reforming the Supreme Court by Statute*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 345, 359–60 (Roger C. Cramton & Paul D. Carrington eds., 2006), I believe those who argue that this would require a constitutional amendment have the stronger argument. See, e.g., Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL’Y 769, 859–68 (2006); Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72, 90 (2006); David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a Golden Parachute*, 83 WASH. U. L.Q. 1397, 1404–08 (2005). If term limits could be imposed by statute, what would prevent Congress from passing a statute imposing a short term for the current justices or for Republican appointees and a longer term for future justices?

⁴⁵ Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL’Y 769 (2006), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=701121; Sanford Levinson, *Supreme Court Prognosis*, THE GUARDIAN (Feb. 9, 2009), <https://www.theguardian.com/commentisfree/cifamerica/2009/feb/09/supreme-court-ruth-bader-ginsburg>; Roger C. Cramton, *Reforming the Supreme Court*, 95 CALIF. L. REV. 1313, 1323–24 (2007); Roger C. Cramton & Paul D. Carrington, *The Supreme Court Renewal Act: A Return to Basic Principles*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 467, 467 (Roger C. Cramton & Paul D. Carrington eds., 2006); James E. DiTullio & John B. Schochet, *Note, Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms*, 90 VA. L. REV. 1093, 1093 (2004); Philip D. Oliver, *Assessing and Addressing the Problems Caused by Life Tenure on the Supreme Court*, 13 J. APP. PRAC. & PROCESS 11 (2012). Moreover, many other countries and the vast majority of states in this country have term limits for the judges on their highest courts. Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL’Y 769, 819–22 (2006).

⁴⁶ This would prevent anomalies from occurring, such as the fact that President Trump got to appoint three Supreme Court justices during his single term in office while President Jimmy Carter did not get to name any.

⁴⁷ There are also some commentators who have espoused term limits as a way to minimize the likelihood that, as Roosevelt put it, there would be an aged or infirmed justice still on the Court suffering from “lowered mental or physical vigor.” See Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL’Y 769, 815–18 (2006). While this has happened from time to time over the course of the Supreme Court’s history, see David J. Garrow, *Mental Decrepitude on the US Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995 (2000), there is no reason to believe that any current member of the Court is suffering from any incapacitating or disqualifying physical or mental infirmities, and in practically every case throughout the Court’s history, a justice who was incapacitated was persuaded to retire by his colleagues, although sometimes not quite as quickly as they might have wished.

⁴⁸ While some have suggested that current justices could simply be rotated off the Supreme Court and appointed to serve on lower federal courts, I believe that this would be unconstitutional for the reasons that others have adequately explained. See Thomas Jipping, “Rotating” Supreme Court Justices Would Be Unconstitutional, HERITAGE (July 2, 2019), <https://www.heritage.org/courts/commentary/rotating-supreme-court-justices-would-be-unconstitutional>; Anthony Marcum, *Supreme Court Term Limits Would Increase Political Tensions Around Justices, not Ease Them*, USA TODAY (Oct. 13, 2020), <https://www.usatoday.com/story/opinion/2020/10/13/scotus-term-limits-political-temperature-even-higher-column/5873219002/>.

⁴⁹ Commissioner Will Baude has raised another potential problem: “If Supreme Court Justices will no longer hold their jobs for as long as they are healthy and interested, then they will probably start holding other jobs after they are Supreme Court Justices. This risks changing their behavior. There will be a natural tendency to start auditioning for one’s next job.” Will Baude, *One Cheer for Supreme Court Term Limits*, THE VOLOKH CONSPIRACY (Oct. 26, 2020), <https://reason.com/volokh/2020/10/26/one-cheer-for-supreme-court-term-limits/>. This point has also been raised by others. See David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a Golden Parachute*, 83 WASH. U. L.Q. 1397, 1425 (2005) (“[F]ixed, nonrenewable terms...introduce incentives for Supreme Court Justices to cast votes in a way that improves their prospects for future employment outside the judiciary.”). I tend to believe, perhaps naively, that judges who are appointed to the Court, even if only for an 18-year term, would not violate the standard ethical norms that govern the conduct of all federal judges in such a brazen manner.

⁵⁰ 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>; Ganesh Sitaraman and Daniel Epps, *Supreme Court Reform and American Democracy*, 130 YALE L.J. 821 (Mar. 8, 2021), <https://www.yalelawjournal.org/forum/supreme-court-reform-and-american-democracy>; Samuel Moyn, *Resisting the Juristocracy*, BOST. REV. (Oct. 5, 2018), <http://bostonreview.net/law-justice/samuel-moyn-resisting-juristocracy>; 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>; Rosalind Dixon, Pres. Comm’n. on the Sup. Ct. of the U.S., *The Court’s Role in Our Constitutional System*, Written Statement of Rosalind Dixon, <https://www.whitehouse.gov/wp-content/uploads/2021/06/Dixon-Letter-SC-commission-June-25-final.pdf>.

⁵¹ *How Many States Elect Judges? With More Than 20 Different Selection Systems, That’s a Very Complicated Question*, NAT’L CTR. FOR STATE CTS. (Nov. 2, 2020), <https://www.ncsc.org/information-and-resources/trending-topics/trending-topics-landing-pg/how-many-states-elect-judges-with-more-than-20-different-selection-systems,-thats-a-very-complicated-question>.

⁵² THE FEDERALIST NO. 49 (James Madison).

⁵³ MITCHEL A. SOLLENBERGER, CONG. RSCH. SERV., RL32013, *THE HISTORY OF THE BLUE SLIP IN THE SENATE COMMITTEE ON THE JUDICIARY, 1917–PRESENT* (Oct. 22, 2003), <http://congressionalresearch.com/RL32013/document.php>.

⁵⁴ For district court judges, a “judicial emergency” has been defined by the Administrative Office of the U.S. Courts as (1) any vacancy where weighted filings are in excess of 600 per judgeship; (2) any vacancy in existence more than 18 months where weighted filings are between 430 to 600 per judgeship; (3) any vacancy where weighted filings exceed 800 per active judge; or (4) any court with more than one authorized judgeship and only one active

judge. *See Judicial Emergency Definition*, U.S. COURTS, <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies/judicial-emergency-definition> (last accessed July 12, 2021).

⁵⁵ Criminal cases are generally given priority and are subject to the Speedy Trial Act of 1974 (18 U.S.C. §§ 3161–3174), which establishes time limits for completing the different stages of a federal criminal prosecution. Further, the Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy...trial.” The Speedy Trial Act and the Sixth Amendment do not apply to civil cases.

⁵⁶ In 1863, Congress passed legislation increasing the number of justices to 10, enabling President Abraham Lincoln to name another justice (Stephen Field). In 1866, Congress passed the Judicial Circuits Act, reducing the number of justices to seven in order to prevent President Andrew Johnson from appointing to the Court. Three years later, in 1869, after President Ulysses Grant succeeded Johnson, Congress raised the number of justices back to nine, where it has remained.

⁵⁷ Nina Totenberg, *Justice Ginsburg: “I Am Very Much Alive,”* NAT’L PUB. RADIO (July 24, 2019), <https://www.npr.org/2019/07/24/744633713/justice-ginsburg-i-am-very-much-alive>.

⁵⁸ *See, e.g., Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that the Commerce Clause gives Congress the right to regulate activity within a single state even if each individual activity would have a trivial effect on interstate commerce as long as such intrastate activity would have a substantial effect on interstate commerce when viewed in the aggregate); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (enforcement of racially restrictive covenants in state court violates the Equal Protection Clause); *Engel v. Vitale*, 370 U.S. 421 (1962) (official recitation of a non-denominational prayer at a public school violates the Establishment Clause); *Mapp v. Ohio*, 367 U.S. 643 (1963) (evidence seized in violation of the Fourth Amendment is inadmissible in a state court proceeding); *Baker v. Carr*, 369 U.S. 186 (1961) (holding that legislative apportionment is a justiciable issue); *Reynolds v. Sims*, 377 U.S. 533 (1964) (holding that the Equal Protection Clause requires that state legislative districts be comprised of roughly equal populations; establishing the “one person, one vote” principle); *Miranda v. Arizona*, 384 U.S. 436 (1966) (Fifth Amendment requires law enforcement authorities to advise suspects of their rights prior to custodial interrogation); *Roe v. Wade*, 410 U.S. 113 (1973) (constitutional right to have an abortion); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) (holding that regulatory taking did not violate the Fifth Amendment as long as the regulation does not interfere with reasonable investment-backed expectations); *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that desecration of the American flag is protected expression under the First Amendment); *Kelo v. New London*, 545 U.S. 469 (2005) (holding that city does not violate the Fifth Amendment when it takes private property to sell for private development); *Roper v. Simmons*, 543 U.S. 551 (2005) (executing those who were minors when they committed their offense constitutes cruel and unusual punishment under the Eighth Amendment according to “evolving standards of decency that mark the progress of a maturing society”); *NFIB v. Sibelius*, 567 U.S. ___ (2012) (upholding constitutionality of the Patient Protection and Affordable Care Act; concluding that the individual mandate penalty for failure to purchase insurance coverage is a tax for purposes of the Taxing and Spending Clause and a valid exercise of congressional authority); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (constitutional right to same-sex marriage); *Fisher v. University of Texas*, 579 U.S. ___ (2016) (holding that university’s consideration of race in the admissions process did not violate the Equal Protection Clause); *Department of Commerce v. New York*, 588 U.S. ___ (2019) (blocking Trump Administration from reinstating a citizenship question on the census because Commerce Secretary did not comply with the Administrative Procedures Act); *Department of Homeland Security v. Regents of the University of California*, 591 U.S. ___ (2020) (holding that DHS’s decision to wind down the Deferred Action for Childhood Arrivals program was arbitrary and capricious in violation of the Administrative Procedures Act); *Bostock v. Clayton County*, 590 U.S. ___ (2020) (holding that Title VII’s prohibition against employment discrimination on the basis of “sex” includes discrimination on the basis of sexual orientation and gender identity).

⁵⁹ 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>.

⁶⁰ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

⁶¹ This sentiment was also expressed by Alexander Hamilton in Federalist No. 78 (“This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a

tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.”). THE FEDERALIST NO.78 (Alexander Hamilton).

⁶² *The Supreme Court Oath of Office*, CONST. FACTS, <https://www.constitutionfacts.com/us-supreme-court/history-of-oaths-of-office/> (last accessed July 15, 2021).

⁶³ *West Virginia State Board of Education v. Barnett* 319 US 625, 638 (1942).