

# **Presidential Commission of the Supreme Court of the United States Public Meeting #1 May 19, 2021**

## **Meeting summary**

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### **Call to Order**

#### **Dana Fowler, Commission Designated Federal Officer**

The first public meeting of the Presidential Commission on the Supreme Court of the United States was called to order by Dana Fowler, Designated Federal Officer (DFO). She established a quorum of Commissioners (33 of 36, see Appendix A) was present and provided brief remarks on her role, the status of public comments received to date, and the ethics and Federal Advisory Committee training that Commissioners completed.

She reminded viewers and participants that the meeting was being recorded and would be available on the Commission website at <https://www.whitehouse.gov/pcscotus/>

### **Swearing in Commission Members**

#### **Dana Fowler, Commission DFO**

Commissioners were sworn in by Dana Fowler, Commission DFO. All Commissioners were in attendance with the exception of Commissioners Andrew Manuel Crespo, Laurence H. Tribe, Sherrilyn Ifill. The absent Commissioners will be sworn in at a later date.

### **Welcome and Opening Remarks**

#### **Commissioner Bauer and Commissioner Rodriguez, Co-Chairs**

Commissioner Cristina Rodriguez provided an overview of the agenda for the meeting. This is the first of what will be several public meetings of this Commission to be held over the course of the next 6 months. The purpose of this meeting is to describe the process by which this Commission will do the work that it has been charged to do, to articulate its conception of the research and investigation required, and to explain how it will ensure that it hears from a wide array of diverse voices.

Commissioner Rodriguez discussed Executive Order 14023 of April 9, 2021, which established the Commission. President Biden charged the Commission with producing a report within 180 days of this meeting that “provides an account of contemporary commentary and debate about the role of the Supreme Court in our system of government.” The Commission is not charged with making specific recommendations, but rather with providing an evaluation of the merits and legality of particular reform proposals being debated today, many of which have historical antecedents. The Commission will consider other periods in U.S. history when the Supreme Court’s role and calls for its reform have been prominent. And it will assess the calls for reform

themselves to assess the arguments for why reform is pressing, as well as why it might not be.

Commissioner Rodriguez noted that it's crucial that the Commission will not just be summarizing familiar arguments or rehashing debates in academic literature and political and public commentary and debate, but also that it critically evaluate them.

Commissioner Rodriguez additionally stated that "The President has expressly charged us with considering a 'broad spectrum of ideas.'" She turned the meeting over to her co-chair Bob Bauer to discuss the Commission's broad conception of its operations.

Commissioner Bauer reinforced that the Commission expects and encourages broad public participation and will be regularly restating its interest in having all points of view brought to bear on its work. Additionally, he said, the President's expectation, as in the EO that Commissioner Rodriguez, is that it will do its work with the benefit of the broadest diversity of perspectives on every measure.

The Commission will be encouraging the sharing of these perspectives broadly, through the Commission's public meetings and testimony, and through the website: <https://www.whitehouse.gov/pcscotus/>.

Commissioner Bauer turned the meeting back over to Commissioner Rodriguez.

### **Adoption of Bylaws by Commission Membership**

#### **Commissioner Rodriguez**

Commissioner Rodriguez provided an overview of the draft bylaws to the meeting participants and Commissioners.

The Commission bylaws:

- Lay out the Commission charge as reflected in the Executive Order
- Affirm that the Commission is governed by the Federal Advisory Committee Act
- Provide for our Designated Federal Officer and staff assistance from the General Services Administration.
- Establish that the Commission will meet on six occasions, including this one, in convenings open to the public, and provide notice of those meetings 15 days in advance of them in the Federal Register.
- Provide for the posting of our agendas and meeting minutes on the Commission website.
- Establish Commission quorum requirements and voting rules.
- Affirm that the Commission is authorized to create subcommittees as necessary to support the Commission's work.

- Indicate that the Commission shall terminate within 30 days of submitting its Report to the President, consistent with the EO.

Commissioner Rodriguez stated that the Commissioners have read these bylaws, and was open to entertaining a motion to vote on the bylaws. Commissioner Driver made the motion to vote to adopt the bylaws (no second required). Roll call vote was conducted, in alphabetical order.

- |                                |                              |
|--------------------------------|------------------------------|
| 1. Michelle Adams - yes        | 19. Sherrilyn Ifill - absent |
| 2. Kate Andrias - yes          | 20. Olati Johnson - yes      |
| 3. Jack Balkin - yes           | 21. Michael Kang - yes       |
| 4. Bob Bauer - yes             | 22. Alison LaCroix - yes     |
| 5. Will Baude - yes            | 23. Maggie Lemos - yes       |
| 6. Elise Boddie - yes          | 24. David Levi - yes         |
| 7. Guy Uriel-Charles - yes     | 25. Trevor Morrison - yes    |
| 8. Andrew Crespo - absent      | 26. Caleb Nelson - yes       |
| 9. Walter Dellinger - yes      | 27. Rick Pildes - yes        |
| 10. Justin Driver - yes        | 28. Michael Ramsey - yes     |
| 11. Richard Fallon - yes       | 29. Cristina Rodriguez - yes |
| 12. Caroline Fredrickson - yes | 30. Kermit Roosevelt - yes   |
| 13. Heather Gerkin - yes       | 31. Bertrall Ross - yes      |
| 14. Nancy Gertner - yes        | 32. David Strauss - yes      |
| 15. Jack Goldsmith- yes        | 33. Laurence Tribe - absent  |
| 16. Tom Griffith - yes         | 34. Michael Waldman - yes    |
| 17. Tara Leigh Grove - yes     | 35. Adam White - yes         |
| 18. Bert Huang - yes           | 36. Keith Whittington - yes  |

Bylaws were adopted by unanimous decision.

## **Commission Schedule and Structure**

### **Commissioner Bauer and Commissioner Rodriguez, Co-Chairs**

Commissioner Bauer provided an overview of the Commission schedule and structure.

#### ***Public Meeting format and calls for testimony: Commissioner Bauer***

The Commission will hold 6 public meetings, including this one. Two full days of public testimony, morning and afternoon at dates in late June and then again in late July at dates to be announced shortly. Commissioner Bauer described the meeting format. Witnesses will be asked to submit brief written statements and to summarize them at the outset of those meetings. Witnesses will then respond to questions from the Commissioners.

The Commission will also have a series of public meetings at which the Commission will deliberate on its analysis, taking up drafts that will be posted publicly to our website

prior to those meetings. The Commission will have notices of the dates of the public meetings for 15 days in advance in the Federal Register and on our website.

In addition to our public testimony, the Commission will welcome all written comments and encourage members of the public to submit them by August 15, 2021, to ensure the Commission has ample time to consider them. Its website will host a space where comments will be posted for the public to see. So throughout the Commission's work, the Commission will need and will be asking for all those who have views to offer to share them with the Commissioners and with the public. The address to which all written comments and testimony should be directed is [info@pscscotus.gov](mailto:info@pscscotus.gov).

The Commission's website—now live—can be found at <https://www.whitehouse.gov/pscscotus/>. The website will include:

- testimony received
- recordings of public meetings
- information and agendas for upcoming meetings
- materials to be deliberated over at public meetings of the Commission

### ***Areas of Research Focus: Commissioner Andrias***

Commissioner Andrias, with the assistance of several Commissioners, described each of the five areas of research the Commission will engage in to inform its report.

**The first area of research will set the stage for the Commission's work by considering "The Genesis of the Reform Debate" and by defining "the Commission's Mission."** The Commission will consider why reforming the Supreme Court has been a persistent subject of debate, and what factors contribute to the debate of late.

Commissioner Pildes provided additional detail: "We will consider a range of overarching questions that will shape our assessment of the more specific proposals. Among these questions will be: What problems, if any, would and should Court reform be designed to address? What are the thoughtful objections to any such reform proposals? How might we critically evaluate the arguments, pro and con, regarding Court reform or specific proposals? And we also want to assess these issues in a broader historical context ... Over the course of the nation's history, what issues or events have prompted serious calls for Court reform? How do we assess the arguments that were made back then for and against various Court reforms at these earlier moments in American history, and how should that affect our deliberations now?"

**The second area of focus will be "The Court's Role in the Constitutional System."** To that end, the Commission will examine debates about the scope of judicial review

and more generally the authority of the Court to invalidate the acts of the other branches of government.

Commissioner Baude stated, “We will evaluate how proposals to reform the scope of judicial review would affect the Court's role in relation to the other branches of government (the separation of powers, essentially) and consider the consequences of proposals that affect the scope of the Court's authority, such as stripping the Court's jurisdiction, requiring it to use a supermajority when it votes to invalidate congressional action or other government action, creating a procedure for Congress to override Supreme Court decisions, and other proposals.”

**The third area of focus will be “Length of Service and Turnover of Justices on the Court.**

Commissioner Johnson stated, “We are going to look at the Justices' length of service and how frequently the Court's membership should turn over, and this is going to include proposals for term-limits and mandatory retirement. We will look at arguments for particular proposals, the strengths and weaknesses of these proposals, and some of the practical and constitutional questions they raise.”

**Fourth, the Commission will consider proposals regarding the “Membership and Size of Court.”** We will consider the debates about whether to expand the size of the Court or otherwise reform how it is constituted.

Commissioner Gertner noted, “We are going to consider proposals... for the membership and size of the Court, and the strengths and weaknesses of the various proposals. We plan to look, as others have indicated, not only at current proposals, but also proposals about membership and size that have been floated at other times in American history, including the 18th century shortly after the constitution was adopted, 19th century reforms, and 20th century. What do these proposals teach us about what we should be doing at this time? Then we will look at current proposals to expand the membership and size of the Supreme Court, and whether those proposals require other reforms. An expanded Court, for example, might require a panel system for deciding cases, as an expanded Court could not possibly sit on all cases all the time. We will evaluate proposals to change the composition of the Court, including a proposal for a lottery of judges in rotating panels drawn from appellate court judges. Obviously, we are all working together, so we will consider how these proposals about membership and size relate to other proposals concerning the turnover of justices or term-limits.”

**Finally, the Commission will consider issues around the Supreme Court's case selection and review -- its Docket, Rules, and Practices.** That is, the Commission

will analyze debates surrounding the Court's workload and processes for selecting, deciding, and hearing cases, as well as its relations and interactions with the public.

Commissioner Huang elaborated, "We will consider concerns that have been raised about what is sometimes called 'the Shadow Docket,' including emergency orders and summary decisions dealing with important issues but without full briefing and argument. We will also consider a range of perspectives about the Court's discretionary power to decide which cases to hear, about other aspects of the certiorari process or merits-stage briefing and argument, and about transparency in the work of the Court, as well as the ethical norms that govern its work."

Commissioner Andrias concluded, "As we consider these various issues, and other issues raised by public comment, we will engage in historical research, conduct comparative analysis, and consider parallel matters within state judicial systems. We will consider whether reform would require legislation, constitutional amendment, or reinterpretation of doctrine, or would otherwise raise legal concerns. And we will consider the relationship between reform proposals and debates about the confirmation process."

***Questions from Commissioners: Commissioner Rodriguez***

Commissioner Rodriguez asks if any of the Commissioners have any questions. No questions are received.

**Adjourn**

Commissioner Rodriguez adjourned the meeting.

**Certification of Co-chairs:**

I hereby certify that, to the best of my knowledge, the foregoing minutes of the proceedings are accurate and complete.

Bob Bauer and Cristina M. Rodríguez  
August 4, 2021

## **Appendix A: Presidential Commission on the Supreme Court of the United States**

**May 19, 2021**

### **Commissioners in Attendance:**

Michelle Adams  
Kate Andrias (Rapporteur)  
Jack M. Balkin  
Bob Bauer (Co-Chair)  
William Baude  
Elise Boddie  
Guy-Uriel E. Charles  
Walter Dellinger  
Justin Driver  
Richard H. Fallon, Jr.  
Caroline Fredrickson  
Heather Gerken  
Nancy Gertner  
Jack Goldsmith  
Thomas B. Griffith  
Tara Leigh Grove  
Bert I. Huang  
Michael S. Kang  
Olatunde Johnson  
Alison L. LaCroix  
Margaret H. Lemos  
David F. Levi  
Trevor W. Morrison  
Caleb Nelson  
Richard H. Pildes  
Michael D. Ramsey  
Cristina M. Rodriguez (Co-Chair)  
Kermit Roosevelt  
Bertrall Ross  
David A. Strauss  
Adam White  
Keith E. Whittington  
Michael Waldman

### **Commissioners Absent:**

Andrew Manuel Crespo  
Laurence H. Tribe  
Sherrilyn Ifill