Written Testimony of

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Introduction and Overview

My name is Michael Gerhardt. I am currently Burton Craige Distinguished Professor of Jurisprudence at the University of North Carolina at Chapel Hill, Scholar in Residence at the National Constitution Center, and the inaugural Richard Beeman Visiting Scholar and Senior Lecturer at the University of Pennsylvania Law School.[1] I appreciate the invitation to submit written testimony to the Presidential Commission on the Supreme Court of the United States (hereafter "the Commission"). As directed, my written testimony will focus on the major subject matters that the Commission has been established to address in Executive Order 14023 (April 9, 2021).

While I only speak for myself and in my individual capacity in this testimony, the views and recommendations expressed herein are informed by my experiences within the Supreme Court selection process and by my research and scholarship, including the book *The Federal Appointments Process* (Duke University Press, revised edition 2000). From 2009 to 2021, I have had the honor and privilege of serving as Special Counsel to the Democratic members of the Senate Judiciary Committee for the Supreme Court nominations of Sonia Sotomayor (2009), Elena Kagan (2010), Neil Gorsuch (2016), Brett Kavanaugh (2018), and Amy Coney Barrett (2020). In addition, I testified as an expert witness during the confirmation proceedings for Justice Samuel Alito (2006), was Special Counsel to the Ranking Member on the nomination of John Roberts as Chief Justice of the United States (2005), served as Special Counsel to the Clinton White House for the nomination of Stephen Breyer to the Supreme Court (1994), and was one of the eight members of the Clinton-Gore Justice Department

[1] I am grateful to Albert F. Cacozza (Partner in the Washington, D.C. office of Ropes & Gray) and Jeffrey Peck (Senior Partner Peck Madigan Jones Inc., 2001-2019, and Managing Partner, Tiber Creek Group Inc., (2021-to date) for their helpful insights and feedback, and to both Sara Margolis and Caroline Spence, UNC Law School Class of 2023, for valuable research assistance.

Transition Team and the principal author of the team's judicial selection policy for the incoming administration of President Clinton (1992).

This testimony is divided into seven parts: Part I sets forth some basic facts and objectives that, in my judgment, should inform the Commission's efforts to develop proposals for reforming the Supreme Court, including fully considering the respective roles of the principal actors in the Supreme Court selection process – namely, the Supreme Court as an institution, subject, as it is, to the powers of Congress to shape its jurisdiction and size and to fashion a code of ethics for the Court's members; the Senate; the nominee; interest groups; and the general public. Parts II through VII consider proposals for reforming how each of these major actors perform in the process. The final part stresses the importance of broadening and enriching public education about the Court. The more and better informed the public is about the Supreme Court, the better able the public will be in serving as a check on the performances of the governmental actors who perform formal roles in Supreme Court selection and regulation. While any changes in the Supreme Court are likely to be incremental and to be directed, at any given time, at only one or two of the actors in the appointments process, genuine and enduring reform of the Court must be attentive to the reality that the actors with influence within the selection and regulation process do not function in a vacuum or in practical isolation from the corrosive partisanship that dominates all too often congressional and presidential decision-making on the Supreme Court.

I
Accepting the Supreme Court as a Political Construct

I begin with the observation that the Supreme Court is a political construct. Because the framers vested the authority in selecting and regulating the size and jurisdiction of the Supreme Court in national political leaders, the process necessarily reflects and is shaped by

political concerns. In other words, everyday partisan politics cannot be detached from – and indeed, substantially determines -- whatever happens in the selection process for Supreme Court justices and in deliberations on possible regulations of the size and jurisdiction of the Supreme Court.

How then should the Commission proceed given the harsh political realities of Supreme Court appointments? Understandably, the Commission is principally concerned about the constitutional ramifications of any given Supreme Court reform proposal, and it would be inappropriate, to say the least, for the Commission to be assessing the politics of Supreme Court reform. Nonetheless, a strong constitutional argument rarely moves the needle on the political dynamics of Supreme Court appointments and reform. I respectfully suggest therefore that the Commission fashion recommendations for Supreme Court reform that are realistic and have the potential to appeal to members of Congress and presidents, regardless of their party affiliations.

Though this initial observation should hardly be news to any of the commissioners, several important insights follow from it. First, as a practical matter, the primary if not the only thing of concern to presidents and senators in the Supreme Court selection process is the bottom line. Appointing justices is a numbers game, and the objective of presidents and usually of the senators from the president's party is to secure a majority in order to get their nominees confirmed. The selection process is not a seminar or mere academic exercise; it is not designed to educate, or entertain, the public. For senators who oppose the nomination, the process is still a numbers game: It is difficult if not impossible for them to affect outcomes unless they can command a majority within the Senate.

Second, it should be no surprise that confirmation hearings (and even nominations themselves) are largely political theater. This has been especially true since nominations and confirmation hearings have been widely covered in the media. If the Supreme Court selection process and regulation are to change at all, it will have to be because national political leaders have the incentives to make changes. As of 2021, there do not appear to be any such incentives.

Third, the harsh political reality of the appointments process does not exclude concerns about the impact of Supreme Court appointments on constitutional law. National political leaders plainly have had such concerns throughout American history. We sometimes refer to such concerns as "constitutional politics," or an elevated realm in which national political leaders are concerned with matters more important and ennobling than mere partisan politics. Constitutional politics is still politics, albeit more complex than pure partisanship, and thus raw political power still determines what happens.

Once one accepts the political realities of Supreme Court appointments (or in the deliberations and debate over any legislation aimed at regulating the jurisdiction or size of the Court), it is easier to understand the history of Supreme Court appointments, including the fact that there has never been a golden era in which national political leaders were concerned with just "merit" and not just the political ramifications of and ideology, or likely performances of, the nominees under consideration. There is but one exception to this pattern (which I will discuss shortly); otherwise, both partisan and constitutional politics have overwhelmingly shaped the Supreme Court selection process throughout American history.

For example, the Senate rejected President George Washington's nomination of John Rutledge as Chief Justice of the United States because the Federalists, who then controlled the Senate, objected to

Rutledge's criticisms of the Federalist-backed Jay Treaty and had concerns about his sanity. President Franklin D. Roosevelt, a Democrat, made nine nominations to the Court, which were all confirmed by the Democratic majority in the Senate. President Tyler made nine nominations to try to fill two open seats on the Supreme Court, but the Senate, which largely viewed Tyler as an accidental president rejected by both parties and therefore rejected all but one of his nine Court nominations. Political considerations explain these events.

To be sure, in the modern era, there have been several instances when concerns about qualifications or the nominees' integrity have shaped the outcomes. For example, in 1968, a filibuster derailed President Lyndon Johnson's nomination of then-Associate Justice Abe Fortas to be Chief Justice based on disdain for the Warren Court's activism and ethical concerns arising from his frequent meetings with President Johnson to discuss political matters and his acceptance of a large fee from various businesses to teach a class at the law school at American University. A year later, the Senate rejected President Richard Nixon's nomination of Fourth Circuit Judge Clement Haynsworth based largely on his failure to recuse himself from cases involving businesses in which his wife owned stock. In 1970, the Senate, in a bipartisan vote, rejected President Nixon's nomination of Harold Carswell based on his support for segregation and mediocre credentials (prompting then-Nebraska Senator Roman Hruska's infamous and likely antisemitic defense of Carswell's mediocrity, "[T]here are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance. We can't have all Brandeises, Frankfurters, and Cardozos."). In 1987, President Ronald Reagan withdrew his hasty nomination of Judge Douglas Ginsburg because of the nominee's failure to disclose on his formal questionnaire that he had smoked marijuana at a public event (and at a time when doing so was illegal in the state of Massachusetts). And in 2005, President George W. Bush withdrew his nomination of

then-White House Counsel Harriet Miers because of mounting concern within the Senate that she lacked the qualifications to merit appointment to the Court.

The principal exception to the overall failure to reach consensus within the selection process on the criteria for measuring the merit or qualifications of Supreme Court nominees was the 1975 appointment of Justice John Paul Stevens to the Supreme Court. Shortly after William O. Douglas announced his retirement from the Court on November 12, 1975, President Gerald Ford directed his Attorney General Edward Levi to find "the best qualified" person to appoint to the Court's open seat. *See generally* David M. O'Brien, *The Politics of Professionalism: President Gerald Ford's Appointment of Justice John Paul Stevens*, 21 Presidential Studies Quarterly 103-126 (1991). An eminent legal scholar in his own right and former President of the University of Chicago and dean of its law school, Mr. Levi oversaw a selection process that focused primarily on what he and the top Justice Department lawyers considered to be the essential criteria for a merit-based appointment to the Court – first-rate judicial temperament; distinguished career in the law (including but not limited to judicial experience), entailing significant impact on and/or leadership in the law; first-rate legal mind; and superb writing skills. The list was eventually narrowed to two outstanding jurists – Arlin Adams of the Third Circuit and John Paul Stevens of the Seventh Circuit. President Ford's eventual nominee, John Paul Stevens, met the criteria, and was, in Ford's words, a "judge's judge" and the "best decision" he ever made as president. President Ford nominated Stevens on November 28, 1975; barely two weeks later, the Senate confirmed Justice Stevens to the Court. (Even so, Justice Stevens was quizzed about ethics, his views on constitutional interpretation, and his health.)

True, many presidents have nominated well qualified nominees to the Court. The Supreme Court has achieved its stature in part because

of the appointments and service of such eminently qualified jurists as Louis Brandeis; Charles Evans Hughes (appointed once as an associate justice and later as Chief Justice); Benjamin Cardozo; Robert Jackson; Harlan Fiske Stone (as both an associate justice and Chief Justice); Thurgood Marshall; Ruth Bader Ginsburg; and John Roberts. Even so, nearly all of these outstanding lawyers had their credentials questioned if not attacked in the confirmation process. Though many of the most eminent justices did not have prior judicial experience (such as John Marshall and Joseph Story), Republicans in the Senate have changed course from the days in which they approved non-judges to the Court and insisted, as almost of them do today, that prior judicial experience is required for Supreme Court appointments. For them, merit is synonymous with ideology, and prior judicial experience indicates whether nominees are adhering to the right kind of ideology. *See* Michael J. Gerhardt, *Merit v. Ideology*, 26 Cardozo L. Rev. 353 (2005).

Republican senators are, of course, entitled to make such a choice. Indeed, Democratic senators, over the past few decades, have made their own choices, which have included acknowledging prior judicial experience as relevant but not required for service on the Supreme Court. Hence, many Republican senators disagreed with their Democratic colleagues over whether or not Justice Elena Kagan was superbly qualified for the Court, given her prior experience as the dean of one of the nation's premier law schools, President Obama's first Solicitor General, experience clerking for Justice Marshall and serving as a top lawyer in President Clinton's White House Counsel's office, and tenured professor and scholar at two of the nation's most prestigious law schools (Harvard and the University of Chicago). Neither side was necessarily "wrong" or "right" in its evaluation of Justice Kagan's credentials, but the differences were attributable to the different political and constitutional priorities of the Democratic and Republican causes in the Senate.

It is likely there will be pushback against my depiction of the Supreme Court confirmation process as having always been about constitutional and party politics in the form of the argument that Democrats in the Senate are responsible for changing the confirmation process entirely when they united to defeat President Reagan's nomination of Robert Bork to the Supreme Court. By any reasonable measure, Judge Bork was extremely well qualified for the Court – a leading expert in the fields of antitrust and constitutional law at Yale, a former Solicitor General, and a judge on the United States Court of Appeals for the District of Columbia. Yet, Judge Bork's nomination failed largely because of Bork himself. Both he and the White House failed to appreciate the political realities of his nomination, arising from the fact that the opposing party controlled the Senate at that time, and Judge Bork ignored White House offers to assist with his preparation and chose to break tradition by testifying at great length about his views on constitutional law. His views, then, became the central focus of his confirmation proceedings and, ultimately, a major reason for his rejection by the Senate in a bipartisan vote. Senators may and do take political considerations into account when they vote on nominees, and most seniors believed that Judge Bork's critique of politically popular (and well established) Supreme Court decisions posed a threat to their stability and endurance in constitutional law. No surprise, then, that subsequent nominees have chosen to follow the same path as nominees before Judge Bork – to give the shortest truthful responses to inquiries, an approach which is similar to the strategy that lawyers suggest for their clients to follow in depositions.

Even so, Justices Clarence Thomas, Anthony Kennedy, David Souter, and Ruth Bader Ginsburg each spoke at greater length than the last three nominees about their respective judicial philosophies and views on landmark Supreme Court decisions. While it has become common, within some circles, to mischaracterize Justice Ginsburg's testimony at her hearings as supposedly marked by her steadfast

refusal to answer any questions about her history as a lawyer and her judicial philosophy, she did, in fact, discuss those things, including the merits of past rulings of the Supreme Court, such as *McCulloch v. Maryland* (1819), in far greater detail than Justices Gorsuch, Kavanaugh, and Barrett did in their respective hearings.

With the realpolitik of Supreme Court reform and an accurate understanding of the history of Supreme Court appointments in mind, I urge the Commission to consider several politically feasible reforms. The first is to prioritize transparency in the selection process. Neither side should fear increasing transparency in deliberations over the composition, size, jurisdiction, and direction of the Supreme Court. For example, when Donald Trump first ran for the presidency in 2016, he publicized a list of the people he would consider for nominating to replace Justice Scalia on the Court. Once in office, President Trump amended the list more than once, though his public statements explaining the criteria for the list focused on the ideological commitments of the judges who made the cut. The Trump campaign issued a statement that the original list was, "first and foremost, based on constitutional principles, with input from highly respected conservatives and Republican Party leadership." Just before announcing his selection of Justice Gorsuch to replace Justice Scalia, President Trump declared that the "list of potential Supreme Court justices is representative of the kind of constitutional principles I value." President Trump explained that Justice Gorsuch was "very much in the mold of Justice Scalia" and his later nominations of Justices Kavanaugh and Barrett as being "in the mold of Justice Gorsuch."

While publicizing the list thrust those people on it into the national political spotlight and possibly encouraged them to exercise their judicial functions in ways that would attract the president's interest and support, it gave the American public a unique glimpse into the selection process. The fact that President Trump succeeded in

appointing three judges from the list to the Supreme Court reflects how the political forces were aligned in his favor. I do not fault him for appointing someone "very much in the mold of Justice Scalia." Undoubtedly, that is exactly what he wanted to do and what he tried to do. The transparency of his selection process was on display for all Americans to see and to assess.

Whether or not presidents choose to publicize lists of the people that they are seriously considering for appointment to the Supreme Court, the Commission should encourage presidents to be as transparent as possible in their selections of nominees. At the very least, this should include making known to the public and the Senate the criteria that the presidents are following in choosing their nominees, and senators in turn are entitled to assess the relevance and merits of the criteria that any given administration has followed in making Supreme Court nominations.

Transparency facilitates a second value that any reform effort should be designed to maximize – the political accountability of presidents and senators. For example, Senate leaders defended the Senate's inaction on President Obama's nomination of Merrick Garland to the Court on the basis of a supposed principle that in a presidential election year, the Senate should allow the American people to decide which of the presidential candidates should try to fill the vacancy. I have written elsewhere about the fact that this so-called principle does not exist in constitutional history. *See, e.g.*, Michael J. Gerhardt, *Getting the Senate's Responsibilities on Supreme Court Nominations Right*, Scotus Blog, March 9, 2016. More importantly, that principle proved to be short-lived and manufactured solely as political cover for Senate inaction on Judge Garland's Supreme Court nomination. When Senate leaders quickly abandoned that principle by rushing through, less than two weeks before election day, President Trump's nomination of Amy Coney Barrett to the Court, it became clear that the real

principle at stake was not facilitating popular sovereignty but exploiting raw political power. In the Supreme Court appointments process, you live by the sword of politics and you die by the sword of politics, and it is incumbent for all the major players to navigate the political thicket in the process. Through the transparency of their decisions and actions, they can keep each other in check.

The third institutional value that the Commission should (and will likely) consider in formulating any reform proposals for the Court is the protection of judicial integrity and independence. The ideals of judicial integrity and independence are important for both individual jurists and the Court as an institution. Individual jurists require decisional independence to do their jobs. Quite properly, the Supreme Court has repeatedly struck down legislative efforts to undo the Court's decisions. One obvious objective of Article III in the Constitution was the establishment of a federal judiciary that was formally removed from the possibility of any direct political retaliations for their decisions. This objective was designed as a benefit for both the federal judiciary as a whole and to individual judges. When legislatures weaken the independence of judges from direct political retaliation, they have impermissibly crossed a constitutional boundary.

Yet, judicial integrity and independence have their limits. Justices do not have license to do whatever they please with their positions. They still must comply with the same laws every other citizen must follow, and there is no constitutional sanctuary for them to abuse their powers. Justices, like every other governmental actor who derives their powers from the Constitution, must still respect the rule of law and face the legal and political consequences of their failures to do so.

The Constitution is not grounded on the peculiar principle that presidents, members of Congress, and all Article III judges, should be held to a lower ethical standard than everyday Americans. To the

contrary, the Constitution rests on the bedrock principle that federal officials, including presidents and Supreme Court justices, must abide by high standards of conduct and are not beyond the reach of the law.

One such standard is set forth in Article II, which, in relevant part, provides an impeachment process that is designed to oust any Article III judges who commit "treason, bribery, or other high crimes and misdemeanors." Judges at every level of the federal system, except for Supreme Court justices, must also comply with the dictates of the Codes of Judicial Conduct approved in their respective jurisdictions, and the respective bars in which they are licensed. Moreover, Article III lower court judges have been expected to comply with both the Senate Judiciary Committee's norm discouraging the nominations of people who were members of racially discriminatory private clubs and the multiple procedures and sanctions set forth for discipline or disability in the 1980 Judicial Conduct and Discipline Act.

Yet, even the Judicial Code and Discipline Act's mechanisms are not as effective as they were designed to be. For example, even though the act provides for sanctions such as censure, suspension, and even referral to the House of Representatives, the facts are that, as CNN reported in 2018, "Very few cases against judges are deeply investigated, and very few judges are disciplined in any way. In many years, not a single judge is sanctioned."[2] Moreover, none of the complaints filed are made public and any judicial orders are dumped onto circuit court websites where they are difficult to find.

Without belaboring the details, I also remind the Commission of the cautionary tale of Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit. Even though the fact that Kozinski's inappropriate behavior with his female law clerks and others was an open secret at a

[2] Joan Biskupic, *CNN Investigation: Sexual misconduct by judges kept under wraps*, January 26, 2018 https://www.cnn.com/2018/01/25/politics/courts-judges-sexual-harassment/index.html

few elite law schools, it was not known everywhere until several former clerks and others went public with their complaints. Under intense public scrutiny, a serious investigation into his misbehavior was eventually commenced, but Kozinski derailed the inquiry by resigning from the bench. *See generally* Michael J. Gerhardt, *Impeachment: What Everyone Needs to Know* 174-177 (Oxford University Press 2018). Justice Kavanaugh, who had clerked for Kozinski and considered him to be a friend, testified at his confirmation hearings that he had not been aware of the complaints against Kozinski or his misbehavior.

The theory has always been that Article III judges have the greatest stake in preserving and protecting the integrity of their profession and therefore will keep an eye on each other. But, as the Kozinski case shows, the theory has time and again run up against the reality that judges rarely punish each other because they do not want to wind up in the same position. The more reluctant they are to sanction each other, the more space they give themselves to make mistakes and to avoid meaningful accountability for any misbehavior. It is not hard to imagine how this dynamic plays out at the Supreme Court, where, as I have noted, the justices are no longer bound to comply with the same codes of conduct that apply to every other Article III judge.

The solution has to be replacing the myth that each justice can police himself or herself with effective oversight. Many members of Congress and the legal academy have long been concerned over whether an official code of ethics for the Supreme Court is, in fact, constitutional and workable. Personally, I consider the adoption of such a code to be a top priority in reforming the Supreme Court. If a justice lies under oath, receives inappropriate compensation for extrajudicial work, fails to report income, abuses a partner, takes illegal drugs, drives under the influence, sexually harasses clerks or other Court personnel, or violates state or federal criminal law, is there a workable system for

holding them accountable for these lapses? In theory, the answer has always been that the impeachment process is the only appropriate mechanism for holding them accountable. Yet, that hardly seems adequate given the difficulties of mobilizing the impeachment process even against a miscreant judge, particularly when the misconduct does not rise to the level of an impeachable offense. (Also, the two-thirds threshold mandated in the Constitution for conviction and removal is practically impossible to meet when the senators from the president's party are a substantial minority or majority and are unified in opposition to ouster. *See generally* Michael J. Gerhardt, *Impeachments Still Matter*, Slate, March 5, 2021; *James Madison's Nightmare Has Come to America*, The Atlantic, February 13, 2020.) While I discuss the important reform of adopting a code of ethics for Supreme Court justices in greater detail in the next part, I respectfully urge the Commission to be prepared to address options for holding the justices to a code of conduct in accordance with the other values I have suggested should guide its consideration of reform proposals – transparency, accountability, and respect for judicial integrity and independence, and the rule of law.

II
Constitutional Options for Regulating the Supreme Court

In this part, I consider four options for restructuring the Supreme Court itself. As I explain, I believe that each of these is permitted by the Constitution.

I have briefly mentioned the first, and perhaps the most important, of these, a formalized code of ethics applicable to the justices who serve on the Supreme Court and those who directly assist the justices, such as law clerks. Such a code may be adopted in one of two ways: The justices themselves may voluntarily adopt an ethics code, or the

Congress may enact a law that requires Supreme Court justices to comply with a code of ethics.

If the justices themselves craft such a code and voluntarily agree that they will comply with it (and with sanctions for any deviations), there is nothing in the Constitution that stands in the way. To be sure, one or more justices may object to a formal code of ethics applied to them because they believe that it impermissibly infringes on their decisional independence. The same logic explains why the Court has never adopted a uniform recusal policy for its members and instead has allowed each justice to determine for themselves on whether they should recuse themselves from participating in the Court's decision-making in particular cases. But, given that the justices themselves rarely if ever take a colleague to task for their recusal decisions, this norm is relatively weak, and that is the major problem in a nutshell with the Court's governing itself. Any code of ethics adopted by the Court for itself is likely to function as a weak norm at best.

Relying on the justices to police themselves does not make them more ethical. It removes them farther from any meaningful accountability for their exercises of their judicial power.

In our constitutional system, no governmental actor should be allowed to be the judge of their own actions. We do not allow that for members of Congress. Each chamber has an ethics committee charged to deploy certain sanctions (ultimately approved by the chamber itself) for infractions of the code of ethics adopted by the chamber. Nor does the Constitution allow that for presidents, who are subject to the impeachment process for impeachable misconduct and to reelections. (Interestingly, the only mechanisms for sanctioning the misconduct of reelected presidents is the same – impeachment – as it has been for Supreme Court justices. Notably, no president nor any member of the Supreme Court has been impeached, convicted, and removed from

office.) Our legal system rests on a fundamental principle that neither members of Congress nor presidents ought to be the final arbiters of their compliance with the law or the constitutional standards for impeachment and conviction. High office should not become an ethics-free zone for those few people who attain it. The Supreme Court should not become a safe harbor where the justices are practically beyond the reach of meaningful accountability for their ethical lapses.

Nonetheless, the Congress has yet to adopt a formal code of ethics for the justices for at least two reasons. One is the absence of a working majority on the matter. The other is concern among the members of Congress on whether such a law is constitutional. Many members consider such a law as usurping or impeding the decisional independence of the Court as a whole and the decisional independence of each justice to monitor themselves.

I consider, however, the arguments supporting the congressional adoption of a code of ethics for the Court to be more persuasive. First, we already have such codes for every other judge in the country. These codes have been upheld by courts in every case in which they have been challenged. If any justices have been lower court judges prior to their elevation to the Court, they will have already been subject to a code of ethics in their respective jurisdictions. State supreme court justices are of course among these, and those justices occupy not a dissimilar position to Supreme Court justices on certain matters – but they do so subject to judicial codes of conduct that are plainly constitutional. Moreover, the justices already must abide by certain financial disclosure laws, which, in many respects, would be encompassed within judicial codes of conduct.

A second reason that adopting a code of ethics for the justices is constitutional is that the consequences for failing to do so are worse than the benefits of foregoing one. The rule of law has meaning only if

everyone in society, no matter how rich or highly placed, is subject to it. One of the central concerns driving the Declaration of Independence was that the King was not subject to the rule of law, and Americans valued a system in which no one was above the law. Justices, who are not compelled to follow the same strictures as they once did as lower court judges, are, by virtue of their new status, liberated from having to comply with such strictures. The fact that elevating someone to the Court removes them further from ethical oversight is bizarre, to say the least. As the commissioners well know, lawyers are governed by professional codes of conduct that are issued by state bars, and it makes no sense to hold judges on lower courts and lawyers appearing before the Court to higher ethical standards than the justices themselves.

The greater public profile (and power) of justices does not necessarily constrain their day-to-day activities as a justice. The likely opposite dynamic is at work. Supreme Court justices are freer than ever before to meet with interested parties, ignore whether the funding in support of their nominations is coming from parties that now appear before them in adjudication, and lend credence to the myth of the Court as being the embodiment of the rule of law and above the partisan politics that the leaders of the other branches are immersed in every day. When, for example, justices participate in the social activities of the Alfalfa Club or the activities of other organizations (such as the American Constitution Society or the Federalist Society) with stakes in what the justices do, there is no monitoring system in place to ensure that the justices are not compromising their integrity or decisional independence. At the very least, justices should be obliged to fully disclose their memberships in any organizations and interactions with *any* people or organizations that have vested interests in the Court's business.

The failure of Congress to adopt a code of ethics for the Court has thus left a range of misconduct unreachable by any authority. For example, if a justice were to have lied under oath in their confirmation proceedings, the only possible sanction at present is impeachment, which is difficult to mobilize for anything but the most egregious misconduct. If the social activities of the justices are entirely left to them, there is no practical way to ensure that they are not interacting with people who have vested interests in how the justices do their jobs.

Last but not least, adopting a code of ethics for the Supreme Court will strengthen, not weaken, the Court's reputation as an embodiment of the law. The justices should be held to a higher standard than lower court judges or private citizens when it comes to ethical conduct. In this country, the more power some official has, the more important checking mechanisms are available to constrain their misconduct. Our history shows what happens when the justices are left to their own devices – Chief Justice Taney's correspondence and unrecorded conversations with President Buchanan over the *Dred Scott* case and Justice Abe Fortas's continuing to advise the President of the United States on political matters are but two examples of the kinds of conduct that should have been but were not subject to ethical charges. In the absence of an ethical code that may be enforced against the justices, some indiscretions are likely never to come to light or only become known well after the justices have left the Court or died.

A second option for Congress to consider is the legality and propriety of regulating the Supreme Court's size. There is little doubt about the constitutionality of the Congress's authority to expand or contract the size of the Court: The Constitution does not specify any particular number of seats on the Court, leaving the matter to the discretion of Congress. From 1789 thru 1869, the Congress altered the Supreme Court's size seven times, beginning with creating six seats in the Judiciary Act of 1789, reducing it to five in the Judiciary Act of 1801,

repealing the Judiciary Act of 1801 and thereby re-establishing the Court's size to six seats in 1801, expanding the Court to seven seats in 1807, adding two more seats to the Court in 1837, expanding the Court's size to ten seats in the Tenth Circuit Act of 1863, the Republican-controlled Congress' prospectively abolishing two seats in 1866, and Congress' finally settling on nine in the Judiciary Act of 1869.

The choice on whether or not to tinker with the current size of the Court is not constrained by the Constitution but instead by adherence to norms. Though there may be concern among scholars or others that legislatively shrinking the Court could pose a constitutional problem since it would require the removals of justices by means other than the impeachment process, the fact that the Repeal Act (abolishing the judgeships that the Federalist Congress established for President John Adams to fill near the end of his administration) was never struck down suggests otherwise, as does the longstanding acquiescence and deference in our system of law to Congress's tinkering with the Supreme Court's size. This deference could extend to the Congress's choices on whether or not to prospectively abolish seats (as Congress had done to two seats while Andrew Johnson was president) and to continue adhering to the present size of the Supreme Court.

Adherence to the norm of nine seats on the Court is likely to remain strong for political reasons. It is not just that there might be immense political pressure to keep the Court at its current size. A significant disincentive for changing the size of the Court is that whatever size one Congress has chosen for the Court may be changed by a different Congress. This, indeed, has been the pattern in moderating the size of the Court. Every successful effort to expand or contract the Court's size has been both partisan and constitutional. Consequently, if a Democratic-controlled Congress were to expand the size of the Court, a subsequent Republican-controlled Congress would use the same power to abolish the extra seats or expand the size of the

Court further. We adhere to the norm of nine to avoid the vicious cycle of never-ending party warfare over the size of the Court.

While Congress plainly continues to have the power to regulate the jurisdiction of the Court, that power has its limits. Obviously, Congress may not try to undermine Supreme Court decisions through the exercise of its power to regulate the jurisdiction of the Court. That leaves Congress, as a practical matter, in the position of tinkering with the Court's jurisdiction in ways that do not compromise or impede the basic power and independence of the Court. Congress therefore could prospectively expand, say, in 2030, the size of the Court and thereby reduce the concerns about its partisanship or restrict federal jurisdiction further by increasing the monetary amounts that are at stake in federal diversity cases, but it may not prevent the Court from continuing to decide cases in areas that have proven to be overwhelmingly politically sensitive, such as church and state, criminal procedure, and abortion-rights disputes. Any attempts to exclude subject matters from the Court's jurisdiction are plainly directed at preventing the Court from adhering to its own prior constitutional decisions and therefore, in all likelihood, unconstitutional.

A third option for the Commission to consider suggesting to the Congress is altering the votes required on the Court to grant cert. At present, the Court follows the internally imposed "rule of four," which means that only four justices are needed for the approval of certiorari petitions. That procedure effectively allows a minority of justices to set the Court's agenda. At present, it is unclear whether there is any interest among the justices to alter that rule and follow the practices of other institutions created by the Constitution, such as the House and Senate, to follow majority rule. The Court could, if it chose, adopt a rule of six for decisions on whether or not to grant cert or perhaps for overruling prior constitutional precedents. No one expects the Court to do this. Nevertheless, a new rule of six will likely, particularly in the long

run, sharpen the Court's focus, clearly make responsible a super-majority on the Court for shaping the Court's agenda, and making it harder for the Court, as an institution, to involve itself in politically controversial disputes.

If the rule of six were applied not just to granting cert petitions but to overruling the Supreme Court's constitutional precedents, 6-3 decisions will command greater respect from the public and be more difficult, than any 5-4 decision would be, to overrule later. *See generally* Michael J. Gerhardt, *The Power of Precedent* (Oxford University Press 2008). The obvious problem with 5-4 decisions is that a single change on the Court would make it possible (as it has been in the past) for the Court to overrule the 5-4 decision overruling earlier 5-4 decisions. A vicious cycle of overruling seems inevitable. But, requiring something more than a bare majority of the Court for granting cert petitions, overruling precedent, and overturning (or upholding) federal statutes, will likely have the salutary effect of enabling the Court to decide fewer cases or crafting narrower decisions. That would leave more room for democratically elected officials to address constitutional matters.

A final structural reform for the Commission to consider suggesting to the Congress is creating a new federal court of appeals whose jurisdiction would be to settle splits between circuit courts of appeal. This idea dates back to at least the 1970s. *See* Peter S. Mennell & Ryan G. Vacca, *Revisiting and Confronting the Federal Judiciary Capacity "Crisis": Charting a Path for Federal Judiciary Reform*," 108 California L. Rev. 789 (2020). The benefits of such a new federal court of appeals are many – it would slow the Supreme Court down from reaching out to decide constitutional issues before there has been a split, harmonize the splits that frequently occur among the circuit courts, and allow for greater diversity of opinion in settling such splits because its composition would likely consist of a rotating cadre of previously confirmed Article III judges.

A principal concern about a new national intermediate court of appeals, which has proven to be an enduring impediment to its enactment, is that it would simply add another level to the bureaucracy of the federal court system. Litigants would be put to more costs as their appeals will have to navigate through another procedural hurdle. Thus, it might conceivably only delay, not prevent, the Supreme Court from weighing in on hotly disputed constitutional issues.

A counter to this objection is that a new national appellate court holds the promise of depoliticizing the judicial process further and particularly diluting the impact of ideological activists on the bench. This is because the new national appellate court would have rotating membership, as there would be limited terms for the judges who rotate onto the new court and back into their original Article III status. Thus, if rotation worked every two years, a small contingent of judges would be unable to drive the decisions or agenda of the new national intermediate appellate court below the Supreme Court. Instead, this new court would have the incentive to ensure unified federal law, and, in turn, eliminate the Supreme Court's need to settle splits.

Frankly, giving the Supreme Court less to do gives it fewer opportunities for mischief or error. If Congress were to exclude from the Court's jurisdiction areas of constitutional law where there are no splits among the circuit courts, it could make the Court less of a political football. Granted, politics can never be completely removed from the creation, jurisdiction, and composition of a new federal intermediate court of appeals, but the argument in favor of improving the efficiency of the court system is powerful because its improvements benefits everyday Americans who are litigating in Article III courts. The argument moved Congress in 1891 to create the circuit court system that we still have today with modifications made in the interim, and Congress could act again to improve the system that it created. There is nothing magical or, indeed, permanent about the current federal

appellate system, which Congress has historically tinkered with in its efforts to improve the administration of justice in this country.

III
Presidential Autonomy in Nominating Supreme Court Justices

Reform proposals relating to the Supreme Court rarely address the role of presidents in the selection process. Understandably, presidents zealously protect their autonomy in making nominations to the Court and in signing or vetoing legislation involving the Court's size or jurisdiction. Since few expect presidents ever to agree to changing their systems to please any external constituencies (though, arguably, President Trump did by working with Federalist Society leaders and publicizing his list of possible nominees), reforming the president's role in the selection process may well be impossible.

Previously, I suggested as a model President Ford's notable direction to his Attorney General to find the "best possible nominee" for the Court. Attorney General Levi adopted classic criteria for his recommendations. Other presidents have the freedom to follow or adapt this model as they each see fit, while all attempt to exercise that freedom to (re)shape the Court's composition and direction. Some have more success than others, as President Lincoln did with his five appointments to the Court, Franklin D. Roosevelt with his nine appointments to the Court, and Donald Trump with his three Supreme Court appointments. Other presidents have had less success, such as John Tyler's failure to fill both vacancies on the Court while he was president, or Herbert Hoover, whose declining popularity made it necessary for him to defer to Senate leadership on his appointment of Benjamin Cardozo as an Associate Justice. Some presidents consult widely across the Senate (as President Obama did before nominating Sonia Sotomayor and Merrick Garland to the Court), and others barely

do so or not at all (as was the case with Lyndon Johnson's nomination of Abe Fortas to the chief justiceship).

While there is no set mode that presidents follow in making Supreme Court nominations because of the different ways they exercise their autonomy in making judicial appointments, I have two suggestions for improving the quality of the President's performances in choosing justices for the Court. The first is that the President, of whichever party, prioritize diversifying the Court through his appointments. Here, I do not just mean considering people who have previously never been represented on the Court because of their race or gender. I mean also seriously considering following President Trump's decision to deviate from the more recent practice of nominating people who had attended only Yale or Harvard Law School. When President Trump chose Amy Coney Barrett, he helped to break the cycle of extending the outsized influence of these two great law schools in Supreme Court selection. The fact that Justice Barrett had excelled at Notre Dame Law School was a helpful reminder to the nation that there are many legal institutions that produce high caliber lawyers who are qualified to sit on the Court. (Unfortunately, her nomination provoked unseemly comments from some legal commentators about the middling quality of her legal education and the law school at which she taught for more than two decades.) President Trump diversified the Court further by reaching outside of the northeast to select Justices Gorsuch (from Colorado) and Barrett (from Indiana).

A common problem with Supreme Court selection is, however, that it has tended to be Washington-centric, by which I mean that the people advising presidents on possible nominations tend to pick people who look like themselves in terms of their respective backgrounds and qualifications. When, for example, President Obama chose Sonia Sotomayor as his first nominee for the Court, he got (unsurprising)

pushback from within the academy and some interest groups because she did not fit the pattern of prior nominees who had been Supreme Court or federal appellate court clerks and who had spent substantial time on Wall Street or in Washington working for the federal government, particularly the executive branch, before ascending to the bench. There were those (especially on the left) who even questioned her intellect, though time has clearly proven, in my judgment, that she is formidable force on the Court.

America deserves better than myopic selection of justices. At present, only one justice came to the Court from west of Chicago. The other justices, excluding Justice Barrett, came to the Court from the northeast. While the geographic origins of nominees do not necessarily illuminate how well they will do their jobs, they count in terms of the justices' professional experiences. President Lincoln nominated the eminently qualified Samuel Nelson to the Court, because the Congress had created a new seat to be filled by a lawyer from the western United States and congressional leaders had pushed Lincoln hard to pick the Iowan Samuel Miller, who served with distinction on the Court. Alabama, my home state, has been home of only two justices – John Campbell (appointed by President Fillmore) and Hugo Black (appointed by President Franklin D. Roosevelt) – though each was a superb lawyer in his own right (but not by the Washington elite). Sandra Day O'Connor, the first woman appointed to the Court, came from Arizona, where she had blazed a path as a leader in the state legislature and served as a state appellate court judge. Overlooking people who did not do their "time" in Washington hurts only the Court, because it deprives the Court of their experiences and perspectives. The Court is not stronger when it is monolithic in terms of the professional and religious backgrounds of its members.

In a nation as grand as the United States, great lawyers do not just abide in the Northeast. They may be found throughout the country,

and Supreme Court selection should showcase that basic fact. When, for example, Franklin Roosevelt opted to make Hugo Black his first nominee to the Court (his first choice Majority Leader Joseph Robinson had died on the Senate floor), many people, including many of Roosevelt's closest political allies, were aghast – and not just because of Black's (later confirmed) association with the Ku Klux Klan. Academics questioned Black's credentials both because he had not attended an elite law school and had practiced law in Alabama rather than a jurisdiction that Washington lawyers at the time deemed to be the more appropriate home of a Supreme Court nominee. Yet, Justice Black distinguished himself on the Court and had greater impact on its constitutional doctrine than his seemingly better qualified colleague Felix Frankfurter, who had the stellar credentials we expect in a nominee but lacked the temperament to be a good colleague. Indeed, the justices whom we often credit as among the Court's most distinguished and influential include not just Harvard and Yale Law School graduates (such as Joseph Story, Louis Brandeis, and Byron White), but also largely self-taught lawyers (Robert Jackson and Hugo Black are among the more notable of these). There have been justices from other distinguished law schools, such as Columbia (Benjamin Cardozo and Harlan Fiske Stone, for example) and Stanford (William Rehnquist and Sandra Day O'Connor, for example). Yet, some widely revered justices attended what many might consider to be lesser-known law schools, including John Marshall (who studied with George Wythe at the College of William & Mary) and John Marshall Harlan the second (who studied at New York Law School). Excelling at a prestigious law school impresses others who excelled at the same or similar schools, but it is not the only means through which meritorious nominees may develop excellent judgment, temperament, and leadership and legal skills.

The Roberts Court, as of the summer of 2021, is hardly a model of diversity. This is not to suggest that any of the justices currently on the

Court should not be there but rather is a reminder of the importance of a Supreme Court that can truly be said to be as diverse and as strong as the country itself. Judicial excellence is not the province of one or two law schools or one or two regions of the country. It abounds in this country, which serves to have its presidents consider a much bigger and more diverse array of nominees than they have been for most of the last few decades. (It is telling that the criticisms of Justice Barrett's graduating from and teaching at a good but not top-ten law school came mostly from people who taught at more prestigious law schools.)

Diversifying the Court should not end there. Other kinds of diversity are equally important, such as career and religious diversity. For example, all the current justices save Justice Kagan came directly from the federal circuit courts, and all the justices, at present, are Catholic or Jewish. The Court's failures to be diversified in terms of their backgrounds or faiths and in other ways may be arguably attributable to the small set of people from whom presidents select their nominees for a Court which is relatively small, but there are costs when the Court lacks the diversity of the profession itself. We the People were diminished when women and people of color were not citizens and therefore included among those considered to be the ultimate sovereigns in our nation, and the Court's legitimacy is diminished when the people who practice before the Court are more diverse than those who are the justices. Perfect diversity might be an ideal just out of reach, but better diversity is always within the reach of presidents and senators.

My second recommendation is for the Commission to support legislation that will insulate FBI investigations of Supreme Court nominees from presidential meddling (or meddling done at the president's bidding). The need for such reform was made apparent when the Chairman of the Judiciary Committee referred a request for the FBI to investigate the credibility of any charges made that Justice

Kavanaugh had either molested a young woman many years before or lied about what he had done in his confirmation hearings. As recently reported, any "relevant tips" were sent to President Trump's White House Counsel Office, where they disappeared. Apart from whatever one thinks of the merits of the investigation (or any of the charges made against then-Judge Kavanaugh), it rides roughshod over the rule of law for FBI investigations to become politicized in any ways. Therefore, my suggestion is to enable either the Chair or the Ranking Member of the Judiciary Committee to request an investigation – and incumbent upon the President (and his team) not to interfere with the ensuing investigation in any way.

Presidents and their lawyers are likely to resist congressional directives on how they should do their jobs. When this resistance is coupled with a robust commitment to the unitary theory of the executive, the possibilities for abuse are extremely high. Even if it is not politically feasible for any new laws to be enacted that insulate FBI investigations from presidential interference, the Congress should try and, in trying, will be engaging the President in a public dialogue about the limits and dangers of the unitary theory of the executive and about the commitments of each branch to respect and follow the rule of law.

Moreover, the Commission should ask the Congress to consider legislation shortening the time-period before the publication of materials produced by the executive branch (including the President) on behalf of the nomination. This new law should apply broadly enough to encompass FBI investigations and the participation of non-governmental personnel in the selection and promotion of the President's nominee for the Court. For instance, more than two years after it was done, the FBI's background investigation of Justice Kavanaugh, broadened during the Judiciary Committee's confirmation hearings, was not made public – or available to the Senate. That delay prevents the investigation from being much help and particularly

making the political actors who torpedoed the investigation politically accountable. Meaningful accountability of the President or leadership of the FBI requires timely disclosures of presidential and FBI performance.

Presidents and their legal counsel can find ways around new laws requiring the preservation of document. Some may view congressional mandates requiring archiving presidential records to undermine the unitary theory of the executive by making Congress, not the President, the last word on how or even whether such communications should be preserved. Those who buy into this theory of the presidency may destroy any records they deem embarrassing. Oral communications can also be used to circumvent the laws requiring archiving presidential records. Any new law should be sure to close the loopholes that presidents and their staffs may use to avoid compliance with congressional dictates.

IV
Reducing Partisan Warfare in the Senate

Most reform proposals focus on the Senate. This is largely because Senate confirmation hearings are the only public event associated with the Court that features heated exchanges and conflicts over Supreme Court nominations. Presidents tend not to talk publicly at length about their nominees (though President Trump pushed against this norm as well) and the Court itself is usually silent about confirmation proceedings, while the Senate is of course not – senators can debate nominations for days and nominees who testify can sometime go off script. Reform proposals therefore seek to impose more order to the process so that it may unwind in a more dignified and arguably more substantive fashion.

Most reform proposals of the confirmation, however, go nowhere because there is no Senate majority over time committed to adhering to the norms that the proposals purport to perpetuate, such as allowing for more substantive questions from the senators or more professional questioning of the nominee. In recent years, it has become obvious that the norms that sometimes can govern a confirmation hearing are easily discarded. Democratic senators in the majority often accorded the American Bar Association Committee, charged with evaluating the nominee's qualifications, a special role in the confirmation process, while Republicans removed any special role for the ABA Committee in its Supreme Court confirmation hearings. The norm of allowing for an average of six weeks for preparation for Supreme Court confirmation hearings was quickly discarded by then-Judiciary Committee Chair Lindsey Graham in order to expedite the confirmation of Justice Barrett. The norm of allowing a Supreme Court nominee to meet senators or have a hearing was dropped in the case of Merrick Garland. When the norms used sometimes to guide the process are easily and often abandoned, there is no realistic possibility of enduring reform of the Senate's role in the confirmation process.

The most likely way to preserve any norms governing how senators process Supreme Court nominations is to find norms that the leaders of both political parties will consistently adhere to, regardless of who is in the White House and regardless of who the nominee is. This quest is difficult but not impossible. I suggest there may be at least three such norms worth cultivating.

The first is to prioritize truth-telling by any sworn witnesses in the process. In the previous part, I suggested new legislation to ensure credible FBI investigations into nominees' backgrounds. The senators themselves may sometimes be prone to puffing and misdirection in the proceedings, but when witnesses swear an oath to tell the truth under penalty of perjury, there must be some credible mechanism for

penalizing them when they fail to do that. Commentators and even sometimes the participants in the confirmation process suggest there have been falsehoods or significant omissions in the testimony of witnesses before the Senate Judiciary Committee, including nominees. As a result, there should be a procedure in place for any senator to have the misstatement(s) investigated. In order to ensure that neither side in the Senate may balk at this, I suggest that, once a senator identifies statements that he or she perceives as untrue, then each side within the Committee may appoint one senior staffer each to conduct an inquiry on the matter and report back to the Committee as a whole. The report should be written and become a permanent part of the record. If there has been perjury, the report may be sent not to the White House or the FBI but to the United States Attorney for the District of Columbia, who will then be responsible for whatever happens next.

The second norm that I suggest should be adopted is to limit the kinds of witnesses who testify in Supreme Court confirmation proceedings. Expert witnesses are called to share their expert opinions about the nominees' legal work. The fact witnesses who appear should have first-hand knowledge about the nominees' possible misconduct, integrity, and character. I personally see no point in calling as witnesses the parties who lost a case before the nominee. Everyone can just presume losing parties are unhappy but still believe in the positions their lawyers advanced before the nominee. Experts can reference the case if it is important to the nomination, but the parties themselves will likely not know the law as well as their lawyers did and will be perceived, for better or worse, as simply spouting sour grapes.

A third norm to consider adopting to improve the confirmation process is considering having an expert, on each side, formally made available to ask questions to the nominees. This practice has sometimes been used with respect to other matters in the Senate, and

each side may not wish to deprive any of its members on the Committee from asking the questions they wish to ask. Nonetheless, using such experts may help to expedite the hearings and keep them focused on the questions that they consider to be the most pertinent for the nominee. While one or both sides of the Committee may forego this option, each side has an incentive to deploy it – those supporting the nominee may be able to ensure that their experts can help to clear up any questions that the nominees did not handle as well as they could have, and those opposing the nominee could have their experts sharpen or pinpoint the specific reasons for their opposition. While the adoption or enforcement of any norm will be difficult at best, and likely impossible as a practical matter to maintain consistently over time, public dialogues about the norms help to illuminate the process and the stakes for the general public.

A variation of this latter norm, which may have more political appeal to both sides in the Senate, is to have each side formally hire an expert to consult with staff and the members about the nominee's legal record. This often happens anyway, sometimes through consulting experts informally and sometimes formally. Formalizing the appointments, as has been the case with my own appointment as special counsel on five occasions, makes them easier to track and thus more transparent to the public, the Senate, and those covering or studying the process. It would help to professionalize the deliberations if genuine experts were available to educate each side about the nominee's judicial and scholarly records.

V
Narrowing the Nominee's Role

Besides the suggestions I have previously made that the questioning of Supreme Court nominees should be restricted to their professional records and any credible evidence of serious misconduct

and the Judiciary Committee should consider formally hiring constitutional experts who could advice the different caucuses on the nominee's constitutional writings, I have one further recommendation pertaining to Supreme Court nominees' role in the confirmation process -- that the Commission should ratify the practice of having Supreme Court nominees testify before the Senate Judiciary Committee. More than a few academics question the utility of this practice and go further to question the purpose or utility of confirmation hearings at all. Justice Kagan famously described such proceedings as nothing more than a "kabuki dance," a caricature aimed at denigrating the process as entirely orchestrated and thus without any useful purpose. Besides being offensive (I perceive nothing wrong with the actual Japanese Kabuki dancing), the metaphor is inapt. The caricature feeds into a preconceived story that nothing important happens in Supreme Court confirmation hearings. In fact, the real history of Supreme Court confirmation proceedings proves just the opposite to be true – that they are, in fact, quite revealing.

The truth is that, in their rhetoric, omissions, pronouncements, and misleading and sometimes false statements, Supreme Court nominees reveal a lot about their attitudes about the Supreme Court, constitutional interpretation, and constitutional doctrine. History has shown further that the actual performance of the nominees once confirmed to the Court tracks the the testimony given during their confirmation hearings. In short, their performances as justices align quite neatly with what they said, evaded, omitted, and/or misled during the hearings.

At the same time, the Senate Judiciary Committee is not a law-free zone in which nominees or other witnesses may lie or express misleading or false statements whenever it suits them. In fact, nominees or other witnesses testify before the Senate Judiciary Committee under the penalty of perjury. Moreover, when nominees or

other lawyers testify before the Senate Judiciary Committee, they are subject to the Rules of Professional Responsibility, particularly Rule 3.3. Every jurisdiction has adopted this rule in some form, which requires "truth" and "candor" from lawyers appearing before any kind of legal tribunal, including legislatures. Thus, lying under oath or making a "false statement of fact or law" or a "misleading" statement before the Senate or the Senate Judiciary Committee violates Rule 3.3. Thus, the Senate Judiciary Committee should be prepared to cooperate and work with state bars to investigate and, if necessary, support the sanctioning of any lawyer – including Supreme Court justices – who violate this rule when testifying before the Senate Judiciary Committee or in making public statements regarding their qualifications or nominations.

While it is not uncommon for critics to argue that Supreme Court nominees (and their supporters) mouth nothing but platitudes and do not reveal anything new or illuminating within the confirmation process, the differences among Supreme Court nominees are manifest in any close study of confirmation proceedings. For example, all three of the justices appointed by President Trump did this: Justice Gorsuch revealed more than a hint of arrogance and stubbornness as a judge and his protestations of committing himself to original public meaning (a newly coined characterization of the source on which conservative justices should primarily rely) and to be an acolyte of Justice Scalia were plainly manufactured for the occasion. True, Justice Gorsuch's confirmation hearing was political theater, as all high-profile confirmation hearings prove to be. But the fact that something is political theater does not deprive it of meaning. It is also true that, orchestrated or not, Justice Gorsuch said things that are quite different than the statements made by Justices Sotomayor and Kagan just a few years before. His refusal to acknowledge *McCulloch v. Maryland* as having been correctly decided undoubtedly allowed him more discretion in restricting the Congress's power. The orchestration was different in each of these situations, and the differences are revealing.

While insisting that original public meaning should be the principal source that justices consult in constitutional adjudication, Justice Gorsuch went further to argue, more than once, that the Court's landmark decision in *Brown v. Board of Education*, striking down state-mandated segregation in public schools, was properly decided because it aligned with, and was supported by, "original public meaning". This insistence was designed to make the nomination appealing to conservative groups, because "original public meaning" is political code for reaching the "right" results in cases of greatest concern to conservative groups. *See generally* Robert Post & Reva Siegel, *Originalism as Political Practice: The Right's Living Constitution,* 75 Fordham L. Rev. 545 (2006).

The re-characterization of *Brown* is a case in point: It signals the nominee's supposedly rigid commitment to prioritizing original public meaning in every case, despite the fact that, in *Brown* itself, the unanimous Court expressly declared the original meaning of the Fourteenth Amendment to be "inconclusive" on the constitutionality of state-mandated segregation in public schooling and therefore unhelpful and ultimately irrelevant to the decision. Subsequent scholars have tried to do one better than the Warren Court in making the argument that original meaning actually supports the decision in *Brown*, though the case made by these scholars is not grounded in the same understanding of original meaning that Justice Gorsuch was espousing. The fact that Justice Gorsuch reportedly disappointed President Trump in not shouting down his inquisitors (as Justice Kavanaugh would later do) reflects an independent streak in Justice Gorsuch that has been manifested more than once during his tenure thus far on the Supreme Court. Moreover, nearly five years after his appointment to the Court, Justice Gorsuch rarely writes of original meaning and is at odds sometimes with his other conservative colleagues in constitutional and statutory cases.

Revealingly, Justice Kavanaugh barely mentioned, much less pledged to abide by, original public meaning in his confirmation hearings; instead, he spoke of balancing (usually anathema to conservative constitutionalists) and vigorously evaded embracing the most troublesome implications of his opinions and extrajudicial writings. Once on the Court, Justice Kavanaugh has thus far almost never mentioned original meaning, much less original public meaning, and does, in fact, do a lot of balancing in constitutional cases. As for his tirades against Democratic senators in the second phase of his hearings, it confirmed a lot about who he is – his snide comments to Democratic senators pleased President Trump and reflected the adeptness of Justice Kavanaugh as a political operative. Thus, the principal strength he brings to the Court is that he will continue in his position to align his opinions with the hopes and expectations of the Republican establishment. If, in future cases, he votes to weaken *Roe v. Wade* and to strengthen the presence of religion in public life, it will be no surprise to those who supported him. And, if anyone thinks Justice Kavanaugh's performance before the Senate Judiciary Committee was fungible with the performances of Justice Sotomayor or Justice Kagan, they should re-read the transcripts of each justice's hearings. The rhetoric in each case might have been orchestrated, but it was illuminating about each justice's performance on the Court.

It is true that, in assuring his supporters that his nominees all have been "in the mold of Justice Scalia," President Trump created a new way to signal the likely performance of his nominees once they were confirmed. The references to "original public meaning" and to "conservative principles" were of course designed as signals to the Republican base that the nominees were committed to voting as Justice Scalia had done in all of the hot-button cases of concern to them, including abortion and privacy rights cases. Thus, "in the mold of Justice Scalia" and "original public meaning" are just politically loaded terms like "judicial restraint" (espoused by President Reagan's

nominees") and "strict constructionists" (espoused by President Nixon's nominees) that send the right signals to the right people.

Even though there is little in confirmation hearings that is purely impromptu and not previously scripted by administration lawyers, the nominees are making public commitments that they cannot easily later escape once they are confirmed as justices. Presumably, the nominees sincerely believe in the commitments they are publicly acknowledging. Yet, when nominees deviate from the party-line, the deviations and surprises are revealing. When, for example, Justice David Souter opened his remarks before the Judiciary Committee with high praise for Justice William Brennan whom he was replacing, it sent shock waves through the Republican establishment but revealed exactly the kind of justice whom Souter would become, not a conservative ideologue but a pragmatist who leaned toward the same kinds of outcomes that Justice Brennan himself had supported. This is why some members of the Federalist Society and other conservative organizations later vowed "no more Souters;" the nominees they wanted had to espouse and follow quite different ideological commitments.

President Biden's Executive Order 14023 suggested that the Commission should also address a controversial issue relating to the selection process, namely, that the constitutional language often construed as granting life tenure to federal judges – that they serve "during good behavior" – actually does not grant them life tenure as conventional wisdom has come to accept. *See generally* Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J. L. AND PUB. POL'Y No. 3 769, 864 (2006). Under this interpretation, limiting an individual's tenure on the Supreme Court would be constitutional as long as that individual otherwise enjoyed life tenure on the federal bench. *Id.* Professors Calabresi and Lindgren acknowledged that this interpretation could be supported by historical practice; the historical practices of circuit riding

and sitting by designation demonstrate that tenure between the inferior and supreme courts was not treated as mutually exclusive. *Id.* at 867. In addition, the Framers could easily have clarified whether all persons appointed to the Supreme Court have life tenure only on that Court and all persons appointed to inferior courts life tenure on those courts, yet the language remains ambiguous. *Id.* at 865. For a similarly well-considered view in agreement with that of Professors Calabresi and Lindgren, *see* Roger Cramton, *Reforming the Supreme Court*, 95 Cal. L. Rev. 1313 (2007).

A stronger version of this argument is that the constitutional language "during good behavior" should be read to mean that Article III judges may serve for limited terms or as long as they do not engage in misbehavior as defined by the Congress. Granted, traditionally this text is read to mean life tenure, but the terms may be read in an entirely different and arguably more credible way, as allowing the Congress to define what the "good behavior" of a judge or justice should be. Members of Congress could read that text as meaning that Congress could restrict Article III judges and justices to term limits and that serving beyond those limits is not good behavior.

There are at least two major problems with the argument made by Professors Calabresi, Lindgren, and Cramton. First, it does not appear that the framers who drafted and the delegates who ratified the language "during good behavior" perceived it as meaning anything other than life tenure. As noted by these three scholars, among others, Democratic-Republicans abolished inferior courts and Supreme Court circuit riding and cut the Court's size as among their first acts when they took control of the Senate away from the Federalists. Moreover, neither President Thomas Jefferson, nor his Secretary of State James Madison, two of the most eminent thinkers and politicians of that era, took no action to formally shorten the term of Chief Justice Marshall (except through threats of impeachment, which never materialized).

The silence of both Jefferson and Madison on the legality of shortening Marshall's term or redefining his duties or reassigning him to a different Article III court is akin to the famous incident of the dog who did not bark in the Sherlock Holmes story, *Silver Blaze*; the absence of any such efforts in an era in which the political parties were at war over Supreme Court appointments is credible evidence that they are not permissible. The long acquiescence by presidents and Congress in not using the mechanisms for which Professor Calabresi and others have advocated reinforces the conventional wisdom that "during good behavior" means life tenure on the Article III courts to which judges and justices have been nominated and confirmed.

VI
Bringing Interest Group Impact and Participation into the Open

From the beginning of our democratic republic to the present, interest groups, in one form or another, have attempted to wield influence over the selections, confirmations, and regulations of Supreme Court justices. The groups attempting to wield such influence are sometimes well organized, such as the hierarchy and leadership of the two major political parties in Congress, pro-labor and anti-union organizations, pro-choice and anti-abortion concerns, and liberal or conservative organizations. Sometimes they are not so well organized, as was the case with racist senators and members of the public (and other groups) who opposed the nomination of Justice Thurgood Marshall or the antisemitic lawyers and bar leaders who tried to defeat the nomination of Justice Louis Brandeis.

The impact and influence of any such organizations or movements cannot be eliminated entirely, but they can become more transparent. In particular, I recommend that the Commission support legislation that would make public the contributors to any such organizations. As Senator Sheldon Whitehouse has repeatedly urged over the last

decade, such legislation is needed to counter the "dark money" that potentially corrupts not just confirmation hearings but the entire legislative process. If people or organizations who have business before the Court are contributing money to have certain justices supported or opposed, their identities should be known.

In *Caperton v. Massey*, the Supreme Court, 5-4, ruled that a West Virginia Supreme Court justice violated the Fourteenth Amendment Due Process Clause by failing to recuse himself from an appeal of a $50 million jury verdict even though the CEO of the lead defendant in the case had contributed $3 million to his campaign. The Court explained that the "serious risk of actual bias" wrought by the justice's failure to recuse required reversal.

Similar concerns arise any time when a Supreme Court justice fails to recuse himself or herself from participating in cases in which donors contribute substantial money to confirm the justice are parties or funding briefs in those cases. Such concerns are yet another reason for the Congress to enact legislation requiring justices to adhere to a code of ethics (which presumably would spell out the conditions for recusal), but, even if Congress failed to do that, the Fifth Amendment Due Process Clause requires justices not to be judges in their own cases, their friends' or family members' cases, and cases involving people who have been involved, directly or otherwise, in securing the justice's appointment.

No doubt, interest groups are now so infused throughout the Supreme Court selection process that it will be difficult to figure out their precise impact. Nevertheless, the effort should be made, in the forms of a code of ethics that subjects the justices to congressional oversight, legislation requiring transparency in funding of support for or opposition to Court appointments, or both. Even if the effort fails, it will be a reminder of how much freedom the justices have been given

in policing themselves and therefore being above the law or beyond the reach of judicial codes of conduct.

Another recommendation for the Senate or Senate Judiciary Committee is to formally identify specific experts or organizations that its members believe are able to provide nonpartisan assessments of nominees' ethical conduct in their testimony or professional activities. Over the past several decades, consensus within the Senate Judiciary Committee has broken down on whether there are such organizations. Republican senators reject the American Bar Association as capable of providing this kind of assessment. Yet, the State of Alabama has successfully adopted this kind of mechanism (in the form of a special bar committee) in twice removing Roy Moore from his position as Chief Justice of the Alabama Supreme Court for violations of the Code of Judicial Conduct.

The question that every senator should answer is whether there are any people, organizations, or entities that the senators can agree are able to provide nonpartisan assessments of nominees' ethical misconduct. If senators cannot agree on whether there are any such authorities, then each coalition within the Senate should be encouraged, if not required, to explain publicly (1) the reasons for their determinations that consensus on external authorities that can dispassionately assess the qualifications and merit of Supreme Court justices is impossible; and (2) which, if any, people or organizations each side deems are worthy of exercising this kind of function at the federal level, particularly for Supreme Court justices. If one or both parties conclude that only the United States Senate may perform this function, then one or both should be required to explain why nonpartisan assessments of unethical misconduct on the part of any Supreme Court justice are not possible in our system of law.

VII
Improving Public Education on the Supreme Court

National political leaders have vested interests in politicizing the Court, that is, in ensuring that the justices will act, or not act, as the leaders want, and thus they have little or no incentives in educating the public about anything other than their own politically charged perspectives on the Court. But educating the public about the Court is one important way of making transparent politicians' motives and rhetoric about the Court. By vesting the authority over Supreme Court selection, the framers deliberately chose political figures who would be accountable through oversight and elections (and impeachment in the case of the president) for their choices and actions in Supreme Court selection. Accountability depends on the public's understanding of what is really happening when national political leaders are attempting to shape the Court's composition, size, and direction.

The people who are best tasked with educating the public about the Court are those who are best situated to speak truth to power – constitutional law experts, historians, and political scientists. The National Constitution Center (where, admittedly, I serve as scholar in residence) is a good model, as it is one institution whose sole purpose is to educate the public rather than seek to fulfill some political mission. Moreover, I routinely visit middle and high schools to speak to civics and social studies classes – not to indoctrinate anyone in so-called progressive constitutionalism but rather to speak to introduce students to constitutional history. Frankly, constitutional scholars have by virtue of their training and expertise the duty of helping the public better understand the world of constitutional law. The yearly celebration of Constitution Day is an example of Congress's prioritizing civic education about our Constitution for law schools and the public.

Constitutional scholars are prone to speak only to each other or other elite groups, but it would behoove the Commission, in my opinion, to encourage the people who teach law, or about the Court, or both, to teach more than just their students and colleagues. We have the responsibility of speaking truth to power on all aspects of the Court not just to those directly responsible for composing or regulating the Court but also the public, who are the ultimate authority behind the Constitution and live their lives subject to the Court's directives on individual liberties and the essential conditions for our democratic republic to function as it was designed to function.

National political leaders espouse their political rhetoric about the Court because they can get away with it and because it works with their constituents. But much of the public is not firmly invested in a partisan perspective on the Court; instead, it yearns to understand the constitutional politics surrounding the construction of the Court. The better informed the public is about the Court, the less easily it may be fooled into accepting the rhetoric of national political leaders as honest accounts of the actual history of the Supreme Court selection process.

Conclusion

Supreme Court Justices are more than just the embodiment of the rule of law in this country. They should be accountable under the law for any serious misconduct in securing or discharging their constitutional duties, and the surest way to ensure such accountability is for Congress to take its oversight and regulatory powers over the Court's size and jurisdiction more seriously and to enact an enforceable code of ethics for Supreme Court justices. The congressional implementation of explicit ethical guardrails on the justices' conduct is indispensable for ensuring in the future that the justices, in their zealous exercise of their independence, do not compromise their integrity and are not placed above the law.

Appendix: List of Recommendations Made in this Testimony

I respectfully encourage the Commission to consider

(1) prioritizing transparency, accountability, and respect for the rule and judicial independence and integrity in their recommendations for Supreme Court reform,

(2) recognizing the political and constitutional ramifications of accepting the Court as a political construct and thus the unreviewable discretion of national political leaders in shaping the Court's composition, size, direction, and jurisdiction,

(3) recommending that the Congress study, draft, and adopt a code of ethics for Supreme Court justices,

(4) recommending that the Congress should require expedited and nonpartisan FBI investigations arising from testimony or inappropriate actions undertaken during Supreme Court confirmation proceedings,

(5) recommending that the Senate Judiciary Committee formalize the hiring of constitutional experts to assist each side in reviewing the record and scholarship of Supreme Court nominee,

(6) recommending that the Congress create a new intermediate federal court of appeals (with rotating membership of previously confirmed Article III judges) to settle circuit splits on constitutional and statutory questions,

(7) recommending that the Congress authorize a comprehensive study of the meaning and ramifications of the constitutional

language “during good behavior” that defines the nature of a federal judge’s tenure,

(8) encouraging the Congress to require transparency in the funding of support for, or opposition to, Supreme Court nominations,

(9) recommending that the Senate or the Senate Judiciary Committee should cooperate and work with state bars to ensure the truthfulness and candor of *any* witnesses appearing and any lawyers working for the Committee or the administration during Supreme Court confirmation hearings,

(10) encouraging presidents to diversify the Supreme Court in terms of religion, professional backgrounds, gender, geography, and race,

(11) encouraging presidents to be as transparent as possible in their selection processes for Supreme Court nominations,

(12) encouraging Congress to increase funding and support for constitutional education for the public,

(13) recommending that the Senate Judiciary Committee restrict witnesses in confirmation proceedings to the nominees (with particular focus on their professional records), recognized experts on the nominees’ records and scholarship, and people who have first-hand knowledge of the nominees’ character and integrity, and

(14) encouraging the Senate and/or Senate Judiciary Committee to identify experts or organizations that can provide nonpartisan

assessments of nominees' qualifications and temperaments or to explain their inability or reluctance to do so.