

Meeting Minutes
Presidential Commission of the Supreme Court of the United States
Public Meeting #2 (Virtual)
June 30, 2021

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Call to Order

Dana Fowler, Commission Designated Federal Officer

The second public meeting of the Presidential Commission on the Supreme Court of the United States was called to order by Dana Fowler, the Commission's Designated Federal Officer (DFO). The DFO established that a quorum of Commissioners was present (see Appendix A for a list of Commissioners that joined throughout the meeting), and provided brief remarks on her role and the Commission's status as a Federal Advisory Committee.

Welcome and Opening Remarks

Commissioner Rodriguez, Co-Chair

On April 9th, 2021 President Joseph Biden issued [Executive Order 14023](#), establishing the Presidential Commission on the Supreme Court of the United States. This Commission, comprised of a bipartisan group of distinguished constitutional scholars, retired members of the Federal judiciary, and other individuals with Supreme Court expertise, is charged with producing a report that would provide:

- An account of the contemporary public debate over the role of the Supreme Court in our Constitutional system;
- An analysis of the principal arguments for and against reforming the Supreme Court; and
- An assessment of the legality, the likely efficacy, and the potential consequences for our system of government that the leading reform proposals would have.

The Commission's report, due November 14th, 2021, will draw from a broad range of views. Public engagement has been encouraged throughout the process, resulting in over 170 unique comments as of June 30th, 2021. Comments are reviewed by Commissioners and serve as valued contributions to the Commission's deliberations. Comments can be viewed and submitted at <https://www.regulations.gov/document/PCSCOTUS-2021-0001-0003>.

Panel 1: The Contemporary Debate over Supreme Court Reform: Origins and Perspectives

Commissioners: Elise Boddie, Thomas B. Griffith, Alison L. LaCroix, Trevor W. Morrison, Laurence H. Tribe

Panel Witnesses: Nikolas Bowie, Noah Feldman, Laura Kalman, Michael McConnell, Kim Scheppele

Witness Testimony

[Nikolas Bowie](#)

[Written Testimony](#)

[Opening Remarks:](#)

Professor Bowie argued that the Supreme Court is an anti-democratic institution, exercising a power through Judicial Review to decline to enforce federal laws by a simple majority vote. He stressed that the question presented by judicial review is not whether the Constitution should be enforced but what it means when the President, over 500 members of Congress, and four Justices of the Court interpret the Constitution to permit a particular law, yet five Justices of the Court disagree and think the law is unconstitutional. He cited as an example of the Court operation in undemocratic fashion the Supreme Court's 5-4 vote to invalidate the Voting Rights Act of 1965.

[Noah Feldman](#)

[Written Testimony](#)

[Opening Remarks:](#)

Professor Feldman contended that the current debate on Supreme Court reform arose from a change in unwritten norms surrounding the confirmation process, rather than a decision or set of decisions by the Supreme Court. Professor Feldman posited that the Supreme Court plays three central roles in our current constitutional system that have evolved over time:

- 1 - **Protection of the rule of law.**
- 2 - **Protection of fundamental rights in the U.S.**
- 3 - **Oversight of democratic processes.**

Professor Feldman argued that weakening the Supreme Court through changes to constitutional jurisdiction or number of seats would undermine its institutional legitimacy, and consequently reduce its ability to perform its core functions. Professor Feldman concluded by cautioning that other U.S. institutions would likely not be suitable for performing the Supreme Court's core functions.

[Laura Kalman](#)

[Written Testimony](#)

[Opening Remarks:](#)

Professor Kalman argued that despite the historical perception that President Franklin D. Roosevelt's 1937 efforts to expand the number of Supreme Court Justices was a disastrous defeat, the President's efforts did prompt significant change. President Roosevelt had proposed adding up to six new Justices to the Supreme Court in an effort to change its ideological makeup after repeated rulings against New Deal legislation. Professor Kalman argued that while President Roosevelt was heavily criticized for this proposal, it served to move the Court's jurisprudence more into line with public support for New Deal initiatives. Professor Kalman concluded by stating that even if proposed Supreme Court reforms may not be adopted, the proposals and associated debates can have meaningful effects.

[Michael McConnell](#)

[Written Testimony](#)

[Opening Remarks:](#)

Professor McConnell encouraged the Commission to take this historic opportunity to reaffirm the principle of independence for the judiciary, which is central to the U.S.' Constitutional system, and to use its platform to explore ways to reduce partisan tensions in the Supreme Court's nominations process. Professor McConnell argued that any move toward expansion of the Court would harm the independence of the judiciary and further inflame the nomination process. Professor McConnell cautioned that while Congress is constitutionally free to expand the number of Supreme Court Justices, as it has been done before, expansion would likely be viewed by many members of the public as an illegitimate attempt to affect the Supreme Court's decisions, effectively turning it into an arm of the legislature. Professor McConnell argued against expansion of the Court.

[Kim Sheppele](#)

[Written Testimony](#)

[Opening Remarks:](#)

Professor Sheppele argued that, as the country with the oldest continuing constitution and the oldest system of judicial review, the U.S. is in need of modern reforms that many peer democracies have adopted as lessons have been learned over time. While some international practices may not translate well into the U.S. culture and context, there are still synergies and broad frameworks that could help the U.S. address some of its current concerns over the Court's role. Professor Sheppele stated that most countries with powerful peak courts have a viable avenue for checking their power, such

as an easier process for constitutional amendment or an option for legislative override. Canada's legislature, for example, can temporarily re-enact laws that have been declared unconstitutional. However, while the U.S. has a powerful peak court, the U.S. Constitution is nearly impossible to amend, and there are no other avenues for overriding the Supreme Court's decisions. Professor Sheppele argued that during times of extreme political pressure, as is currently the case, the disproportionate power of the Supreme Court causes it to become a partisan focal point. Professor Sheppele suggested approaches to this problem that include a more bipartisan confirmation process.

Questions from Commissioners

Q: Professor Feldman, your written testimony argues that implementing a supermajority rule to limit the power of the Supreme Court's judicial review role would harm its institutional legitimacy and leave the U.S. with "no institutional actor capable of protecting the rule of law, fundamental rights, or the structure of democracy and motivated to do so." Given that Congress has passed many laws in support of fundamental rights, some of which have been struck down by the Supreme Court, why would Congress, in a reconfigured system, be less protective of liberty, equality, the rule of law, and constitutional democracy than the Supreme Court?

Professor Feldman acknowledged that the Supreme Court has at times acted to constrain or strike down laws passed by Congress that promote equality and the principles established under the 14th and 15th amendments. However, Professor Feldman argued that Congress is ill-placed to engage in any form of meaningful check on the rule of law, fundamental rights, and the electoral process, as they are political actors often pursuing partisan interests.

Q: Professor Bowie, in a nearly democratic system such as ours, who would you rather be in control: an almost democratically elected Congress, or an elite Supreme Court?

Professor Bowie recommended consulting Professor Sheppele, as her testimony on international comparisons would be valuable for understanding the options available. Professor Bowie referred to democracies that lack strong powers of judicial review. Professor Bowie argued for Congress to exercise its authority under the 14th and 15th Amendments to enforce rights under the Constitution.

Q: Professor McConnell, your testimony mentions dangers around expanding the Supreme Court, but you also note that 18-year term limits would over time align the political balance of the Supreme Court with the opinions of the people as

expressed in their choice of senators and presidents. Why not operate more democratically and just give Congress the final word, subject to the amendment process, on the constitutionality of federal laws?

Professor McConnell noted the difference between the temporary passions of democracy and multi-generational American democratic values. Professor McConnell cautioned that constitutional decisions need to be insulated from the passions of the moment. Professor McConnell argued that purely democratic processes would not have produced many of the necessary outcomes reached by a Supreme Court insulated from political pressures.

Q: Professor Bowie, your testimony mentions that the Supreme Court’s relationship to Congress is best understood as a rider overseeing a horse, and that even when the reins are not tightened, the horse knows the rider is in control. Would a riderless Congress run roughshod in moments of passion over issues of rights and equality, leaving us worse off?

Professor Bowie responded that a Supreme Court without the final word of judicial review would not render the U.S. riderless. Professor Bowie would like to see increased democratization of the constitutional system to ensure that citizens are in charge of their own constitutional protections. Second, Professor Bowie rejected arguments, going back to Plato, that true democracy would lead to mob rule.

Q: Professor Kalman, the phrase “the counter-majoritarian difficulty” is a critique of the Supreme Court that refers to the tension between judicial review and the democratic process. Should the Court be a counter-majoritarian institution?

Professor Kalman noted that this critique varies with the era under discussion and most would associate that critique with the liberal counter-majoritarian Warren Court, which recent scholarship suggests was, in fact, following popular opinion.

Q: Professor Kalman, in your article *The Constitution, the Supreme Court, and the New Deal*, you explore key factors that you argue led the Supreme Court to shift its doctrine in 1937 in a way that supported New Deal programs, some of which were internal and some of which were external pressures (e.g., efforts to reform the Court). In your view, what is the relationship between internal changes in the Supreme Court’s doctrine and external changes?

Professor Kalman argued that the Supreme Court over time has shown that it is sensitive to public criticism. In 1937, the threat of President Roosevelt’s court packing plan helped the Supreme Court take advantage of flexibility in existing doctrine to begin acting in accordance with both President Roosevelt’s preferences and popular will.

Q: Professor Kalman, following up on your above response, would you say that there was a constitutional revolution in 1937? And would you consider 1937 a story about the President vs. the Court?

Professor Kalman's research has indicated that there was indeed a constitutional revolution starting in 1934 and continuing into the 1940s, with 1937 serving as a key moment. Professor Kalman acknowledged that it is difficult to know President Roosevelt's intentions 1937, but finds it plausible that there was a relationship between President Roosevelt's plan to increase the number of allied Justices and the Supreme Court's shift to be more supportive of popular domestic policies.

Q: Professor Feldman, your written testimony notes that the failed court expansion plan in 1937 took court expansion off the table, in a sense. Is it better to take lesson from the *results* of the President and Congress pushing back against the Supreme Court at that time?

Professor Feldman agreed that in addition to the explicit system of checks and balances established in the Constitution, there are less formal avenues for checking the Supreme Court's powers (as shown in 1937). The implicit threat that it is within the constitutional power of Congress and the president to engage in Supreme Court reforms, such as expanding the number of Justices or adjusting jurisdiction, functions as a check on the Supreme Court when it continues to issue decisions that are out of step with the views and values of the majority of Americans.

Q: Professor McConnell, in your testimony you attributed the violation of norms, at least in part, to contemporary debates on Supreme Court reform. Can you elaborate on that, and provide perspective on how those norms have been treated by players over time?

Professor McConnell argued that the unsuccessful nomination of Robert Bork in 1987 was the beginning of the breakdown in norms around the confirmation process, and that the unprecedented partisan conflict over nominations expanded to affect courts of appeal nominations over time. Professor McConnell noted that contemporary Supreme Court reform debates stem most apparently from the unsuccessful nomination of Merrick Garland in 2016. Professor McConnell continued that it has become a norm that Supreme Court nominations occurring in presidential election years are subject to sustained partisan "tit-for-tat."

Q: Professor McConnell, following up on your response above, what is it about the present political moment that has created this "tit-for-tat" struggle around the Supreme Court?

Professor McConnell argued that there are two factors that have led to a “tit-for-tat” struggle around the Supreme Court. First, the increasing polarization of America, which has accelerated over the past several decades. Second, the oversized role that the Supreme Court has in the U.S.’ national decision-making, coupled with a hyperpolarized political environment, makes every Supreme Court vacancy a flashpoint for Congress. Professor McConnell reiterated his written proposal for staggered 18-year terms as a solution that would stabilize and depoliticize the confirmation process.

Q: Many contemporary debates on Supreme Court reform seem to make the assumption that Justices act as partisan players. Professor McConnell, as a prior judge on the 10th Circuit, how accurate is that assumption in your experience?

Professor McConnell stated that the judiciary performs as a legal institution in the vast majority of cases, and it is nowhere near as partisan as the media portrays it. Professor McConnell noted that the Supreme Court comes to unanimous decisions on very difficult and controversial cases over which political entities would be even more divided. As an example, Professor McConnell pointed out that despite having a majority of Republican-appointed Justices, the Supreme Court rebuffed challenges to the Affordable Care Act, and also struck down President Trump’s reversal of President Obama’s Deferred Action for Childhood Arrivals (DACA) program. However, Professor McConnell noted that in a small number of highly controversial cases the Supreme Court does act along ideological lines.

Q: Professor Bowie, some witnesses have argued that independence is the key ingredient of the Supreme Court’s institutional legitimacy, and that many of the proposed reforms would reduce its legitimacy, harming its ability to perform its roles related to fundamental rights, the rule of law, and democracy. Do you agree that the Supreme Court’s independence is an important value, or would reducing its independence be beneficial to enhancing democracy?

Professor Bowie clarified that he is not advocating for the abolition of the Supreme Court or its judicial independence, as the Supreme Court plays an important role in ensuring that laws passed by Congress are administered impartially. However, Professor Bowie argued that judicial independence does not require using undemocratic methods to resolve disagreements. Judicial independence and the rule of law should not require Congress to defer to the Supreme Court on laws protecting fundamental rights, yet the Supreme Court frequently and improperly assumes that role.

Q: Professor Bowie, is it possible that had the last 50 years resulted in a Supreme Court of different ideological makeup that you would favor a more central role for the Court over Congress?

Professor Bowie identified the Supreme Court's power of judicial review as the main problem, as he sees it as fundamentally anti-democratic. If the Supreme Court were to maintain that power, Professor Bowie would find it preferable that the Court be ideologically balanced.

Q: Professor Feldman, in your written testimony you remarked that the Supreme Court could, by its own actions, threaten its own legitimacy if it consistently acted against public opinion over time. First, if that were to happen, would you say that legislation to make adjustments to the Supreme Court is defensible? Second, if it were the case that the Supreme Court was currently viewed by a majority of the public as illegitimate due to its unbalanced trend over the past 50 years, would you support current reforms?

Professor Feldman argued that while judicial review is counter-majoritarian, it is not anti-democratic. Supreme Court Justices may not be democratically chosen, but Professor Feldman posited that because the Supreme Court was *chosen by the people* as the institution to protect equality, liberty, and the democratic process, it is a democratic institution. Professor Feldman answered the first question posed by suggesting that reforms to the Supreme Court should only be undertaken at the point that an overwhelming majority of the people no longer believe the Supreme Court is fulfilling its duties of protecting equality, liberty, and the democratic process. Professor Feldman argued that the U.S. is not currently in such a situation. Hyperpolarization is causing increased scrutiny of Supreme Court decisions, but Professor Feldman noted that there has not been a pattern of ideologically one sided decision-making by the Supreme Court.

Q: Professor Sheppele, your testimony mentions that the tension between the Supreme Court's ability to nullify legislation and the difficulty Congress faces in amending the constitution result in pressure on the confirmation process. How should we think about alternative ways to reform the Supreme Court and its place in our constitutional system?

Professor Sheppele proposed giving Congress an override on judicial decisions, similar to its ability to override presidential vetoes. Professor Sheppele asserted that an override would allow Congress to object to specific Supreme Court decisions with full public accountability, without making changes to the institution as a whole. Professor Sheppele noted support for a powerful Supreme Court, but noted that without an override, there is too much pressure around the Court's vacancies and the issue of its ideological make-up.

Q: Professor Sheppele, are there risks to not pursuing Supreme Court reform?

Professor Sheppele identified the furor over Supreme Court vacancies as evidence of the risks to not pursuing Court reform. Professor Sheppele argued that the dysfunctional confirmation process threatens the Supreme Court's legitimacy.

Q: One justification for judicial review is that it allows the Supreme Court to protect people that are not being protected by the political process. Professor Sheppele, do you have a sense of how various minority populations have fared in other constitutional systems?

Professor Sheppele pointed out that the rights built into the U.S. Constitution are rooted in 18th century thought; many more recent constitutional systems have more expansive lists of rights resulting from the global push for rights over the past 100 years. Professor Sheppele agreed that stronger counter-majoritarian courts are indeed needed to provide protections for minority rights and democratic decision-making, as majoritarian political processes can neglect them. As a caveat, Professor Sheppele cautioned that without a democratic outlet for public passions, the legitimacy of Supreme Court decisions can be called into question. Professor Sheppele argued that her proposed override solution would address this issue by redirecting public passions to Congress.

Q: Professor Feldman, you argued in your written testimony that we should protect the institutional legitimacy of the Supreme Court, yet you go on to say that a credible threat of Court reforms could have desirable effects. First, how do we know if we are at the point of making credible threats? Second, who decides whether the Supreme Court's legitimacy is threatened?

Professor Feldman responded by arguing that the tension between the Supreme Court's institutional legitimacy and threats of Court reform are part of the Constitution's system of checks and balances. He argued that the Supreme Court's institutional legitimacy is threatened to the point of needing reform when, over a long period of time, a large majority of the public believes that the Supreme Court is consistently failing to correctly interpret the Constitution. Professor Feldman stated that Congress and the President, as representatives of the people, would ultimately make the determination that the Supreme Court's legitimacy is threatened, and they are empowered to pursue reform.

Panel 2: The Court's Role in our Constitutional System

Commissioners: Kate Andrias, Richard H. Fallon, Jr., Nancy Gertner, Tara Leigh Grove, Michael D. Ramsey

Panel Witnesses: Rosalind Dixon, Sam Moyn, Maya Sen, Ilan Wurman

Witness Testimony

[Rosalind Dixon](#)

[Written Testimony](#)

[Opening Remarks:](#)

Professor Dixon focused on an international comparative analysis of the U.S. Supreme Court. Professor Dixon began her testimony by highlighting 3 topics:

1 - **Criteria for the Commission to adopt in its work.** Professor Dixon concurred with Professor Feldman's assertion that fundamental rights, the rule of law, and democracy should be the guiding principles of both the Commission and the Supreme Court. Because the U.S. is a key player on the global stage and an advocate for the rule of law and democracy, Professor Dixon also stressed that the Commission should take into consideration that the Commission's report will set an example that could be used to troubling ends in unstable and democratically vulnerable countries that reference the U.S. as a model.

2 - **A range of options available in making recommendations to President Biden.** There are a range of formal and informal mechanisms that have been proposed and Professor Dixon was optimistic that the Supreme Court itself could use this as an opportunity to make voluntary internal changes.

3 - **Most pragmatic areas of reform.** The political polarization affecting the Supreme Court also affects American politics. Professor Dixon suggested that something similar to a legislative override option for overturning Supreme Court decisions would be a democratically desirable reform, but saw no means of instituting such an override without constitutional amendment.

Professor Dixon suggested that the Commission should focus its reform proposals on judicial term limits. The U.S. is alone among worldwide constitutional democracies in having unlimited judicial terms and Professor Dixon asserted that implementing a term limit would be consistent with judicial independence and the rule of law. Second, Professor Dixon suggested that the Commission evaluate the use of what is known globally as "suspended declarations of invalidity," which would allow the Supreme Court to declare a law unconstitutional, while keeping the unconstitutional law in effect for a period of time. Professor Dixon concluded by advising that the Commission's report reserve all other proposed reform options for the future, should they be necessary, but suggested that none of them be used at this time as they are not currently necessary.

[Samuel Moyn](#)
[Written Testimony](#)
[Opening Remarks:](#)

Professor Moyn contended that Supreme Court reform is a political matter. The Commissioners' legal expertise provides little basis for guiding (and none for pre-empting) what is fundamentally a political choice. Professor Moyn argued that the authoritative voice in this debate should come from citizens—their discussion and political choice—and that the Commission could contribute by encouraging democratic experimentalism. Relatedly, Professor Moyn also argued that ideal reforms would be those that disempower the Supreme Court. Professor Moyn rejected arguments that preserving the current role of the Court protects its legitimacy and reputation for neutrality above politics, as it is already perceived as overly partisan. Professor Moyn encouraged the Commission to focus on reforms with the idea in mind: “How to fine-tune the Supreme Court’s powers so that it is neither too great nor too little.” Professor Moyn argued that it is up to Americans as a people to experiment with what self-rule should mean.

[Maya Sen](#)
[Written Testimony](#)
[Opening Remarks:](#)

Professor Sen argued that increased politicization of the Supreme Court and the appointments process justifies the need for Court reform. Professor Sen argued that the confirmation process has been increasingly exploited for partisan gain, with parties going as far as refusing to hold hearings on opposing party nominees. Professor Sen cautioned that, should these practices be left unchecked, the Supreme Court will be pushed over time to sharp divergence from popular opinion. Professor Sen urged the Commission to consider term limits for Supreme Court Justices as an ideal avenue for impactful reform. Like Professor Dixon, Professor Sen noted that no other constitutional democracies have life tenure for members of their highest courts, and that 49 of 50 U.S. states have term limits in place. Professor Sen argued that term limits would stop partisan manipulation of the confirmation process, reduce the stakes around each appointment by making vacancies predictable, prevent parties from holding vacancies open for partisan advantage, reduce strategic retirements, and eliminate the incentive to appoint young ideologically rigid Justices. These improvements would collectively support the goal of aligning the Supreme Court with the public’s views. Professor Sen also viewed term limits as being a viable means of reform, as the proposal is not partisan in nature and has bipartisan support.

[Ilan Wurman](#)
[Written Testimony](#)
[Opening Remarks:](#)

Professor Wurman argued that an originalist Supreme Court (a Court that interprets the Constitution as the Framers intended) should not be feared, as it has no obvious political valence and operates democratically by leaving the answers to many modern questions in the hands of the political process. He also argued that there is a mechanism within the U.S.' existing constitutional framework to diminish the Supreme Court's power over controversial social and political issues, which is "departmentalism." While the Supreme Court's judgements are binding in particular cases, Professor Wurman argued that under a departmentalist interpretation, each branch has equal and independent authority to interpret the Constitution for purposes of guiding its own actions. Professor Wurman concluded that departmentalism should be reinvigorated, as under that practice judicial decisions merely serve as one source of a wider constitutional conversation.

Questions from Commissioners

Q: Professor Moyn, can you elaborate on your vision for reforms focusing on changes to the Supreme Court's jurisdiction?

Professor Moyn described his approach to jurisdiction reform as proceeding statute by statute. He argued that there is little concrete knowledge on what jurisdiction reform could look like, as there has been little debate in politics or in the courts about how far court reforms centered on jurisdiction could be taken. Professor Moyn made a point to emphasize that there are risks in making any court reforms, but noted that there are risks in not acting as well.

Q: Professor Moyn, would you offer any advice through this commission regarding when jurisdiction reform would be desirable?

Professor Moyn reiterated that he supports democratic experimentalism and thinks that there are valuable lessons to be learned from implementing reforms, whether they turn out as envisioned or not.

Q: Professor Moyn, in your written testimony you note that "it is an impossible mission to seek to depoliticize a political court." Can you clarify what you mean by a political court?

Professor Moyn stated that the Supreme Court attempts to use its power to make law in a way that constrains accountable political actors from interpreting the Constitution, and that this practice runs contrary to the U.S.' democratic ideals.

Q: Professor Sen, can you comment on Professor Moyn's remarks on the Supreme Court as a political institution?

Professor Sen argued that if the Supreme Court was not a political institution, Merrick Garland would have been successfully confirmed. The Supreme Court is seen and treated as if it were a political institution, operates in a political environment, and gamesmanship around its vacancies factors into parties' strategies.

Q: Following up on your above response, Professor Sen, do you think that the political landscape you described affects the way that Justices operate?

Professor Sen agreed the Supreme Court is impacted by politics, as evidenced by strategic retirements. Professor Sen argued that judges primarily retire when there is an ideological ally in the White House. Professor Sen finds that troubling, not only because it indicates that Justices are trying to manipulate the future composition of the Supreme Court, but also because if one party engages in that behavior more frequently than the other, it will rapidly create ideological imbalance on the Court.

Q: Professor Sen, your written testimony seems to indicate that the goal of reforms should be to preserve the Supreme Court's legitimacy. Can you tell us more about why that should be the goal of reforms?

Professor Sen asserted the need to reduce incentives for partisans to engage in gamesmanship over court appointments. Professor Sen argued that addressing the political gamesmanship of the confirmation process will by extension address legitimacy concerns.

Q: Professor Sen, some witnesses have argued that expanding the size of the Supreme Court reduces its legitimacy, conflicting with one of your stated goals. Can you elaborate on how expanding the Supreme Court would be able to enhance the Supreme Court's legitimacy?

Professor Sen noted that some opponents to Supreme Court expansion warn that the parties will engage in a process of "tit-for-tat" gamesmanship, adding Justices each time power turns over. However, Professor Sen's research has led her to believe that such concerns are overstated. In terms of how Supreme Court expansion would be publicly perceived, Professor Sen stated that it would be judged along partisan lines, with a large minority of the U.S. vocally opposed.

Q: Professor Dixon, your testimony notes concern that renewed U.S. Supreme Court expansion efforts could potentially be used by authoritarian countries to advance their agendas in democracies under threat. Can you expand on that risk?

Professor Dixon stressed that global risks should not be a disqualifying concern for contemporary U.S. discussions on reforms, if those reforms are determined to be fruitful. However, Professor Dixon went on to caution that reform decisions should be taken with the world in view. Professor Dixon elaborated that some of the worst attacks on democracies occurring in the last decade have involved attempts to expand peak court sizes, and reforms in the West are sometimes used in bad faith to legitimize dictatorial tactics.

Q: Professor Moyn, your testimony argues that scholars are split on jurisdiction reform, and that it should ultimately be a political discussion. Presidential administrations of both parties for decades have said that it is both unwise and unconstitutional for Congress to take away the Supreme Court's jurisdiction to review constitutional questions. How should we view that executive branch precedent?

Professor Moyn pointed out that there is very little concrete evidence and divided scholarly opinion as to whether and to what degree the Supreme Court's jurisdiction can be changed. Professor Moyn remarked that ultimately the decision should be left to political actors testing the constitutional limits, rather than legal experts reporting on hypotheses.

Q: Professor Dixon, your testimony asserts that term limits are a significant reform topic not only because the U.S. is the only constitutional democracy that does not apply term limits to its highest courts, but also because they impact other branches. Can you give us more information on the impact term limits have on other branches?

Professor Dixon elaborated her view that term limits create regular and predictable turnover of Justices that would deescalate partisan tensions around Supreme Court vacancies, as well as reduce incentives for presidents to nominate young, ideologically rigid Justices. Professor Dixon suggested that the predictability of turnover would also likely promote regular bargaining processes, which Professor Dixon argued would make the confirmation process more democratic. Professor Dixon concluded by encouraging the Commission to focus on reforms with an eye toward effectiveness, citing jurisdiction stripping as one of the proposed reforms that has had questionable success in other parts of the world.

Q: Professor Dixon, you previously mentioned that authoritarians could potentially look to the U.S. and misuse our reform efforts to suit their agendas. Do you think that term limits would have the potential to be misused in vulnerable democracies?

Professor Dixon responded that because the U.S. is the only constitutional democracy that does not already have term limits in place, the U.S. would not be setting an example that could be misused, it would merely be adopting a widely-accepted standard.

Q: Professor Dixon, your testimony recommended that the Commission further explore “suspended declarations of invalidity,” a practice used by some constitutional democracies wherein courts declare a law unconstitutional, but allow that law to remain in effect for a limited time. To what degree does that help ameliorate polarization?

Professor Dixon argued that adopting suspended declarations of invalidity in the U.S. would provide two benefits. First, it would give Congress an opportunity to act. Second, it would create a focal point for legislative action, encouraging bargaining and pushing Congress to take action before the suspension expired.

Q: Professor Moyn, do “suspended declarations of invalidity” fall within the range of experimental reforms that you would find attractive?

Professor Moyn confirmed that he supports suspended declarations of invalidity as a reform option worth exploring.

Q: Professor Dixon, your testimony covered the constitutional override provision present in the Canadian system. How do you see constitutional override playing out in the U.S.?

Professor Dixon responded that she would support a constitutional override mechanism, but noted skepticism that an effective legislative power to override could be achieved without a constitutional amendment. Professor Dixon made a point to note that constitutional override is rarely used in Canada, and that even if it could be implemented in the U.S., it might have questionable effectiveness in tempering offsetting judicial finality.

Q: Professor Moyn, following up on Professor Dixon’s response, how do you see constitutional override playing out in the U.S.?

Professor Moyn argued that from his perspective, a statutory proposal for constitutional override would be compatible with U.S. law and should be explored as an option for reform.

Q: Professor Wurman, when you think about where the courts fit into the original design of the constitution, the Founders indicated that the courts would only overturn statutes if there was clear irreconcilability between statutes. Considering the role of courts today, would you say that courts have assumed an outsized role compared to what the Founders would have envisioned with respect to constitutional adjudication?

Professor Wurman responded he did not agree with that interpretation of the Founder's position on the court's role. Professor Wurman argued that judges have a duty in their cases to enter judgement and interpret laws; if a judge determines that a statute is unconstitutional, they must vote to strike down that statute.

Q: Professor Wurman, following up on the question above, we don't have a wholly originalist Supreme Court at this point. Should originalists be concerned about the role of a non-originalist Supreme Court? Is there a way for Congress or the president to encourage the development of an originalist Supreme Court? And finally, if the development of an originalist Supreme Court cannot be encouraged, shouldn't reforms aimed at reducing the power of the Supreme Court be attractive to originalists?

Professor Wurman suggested that an originalist Supreme Court would be less likely to interpret the Constitution for political purposes. Professor Wurman expressed his skepticism about reforms that suspend the Supreme Court's judicial power in order to give Congress a chance to change law, as the judiciary's role is to render judgement under *existing* law. Professor Wurman argued that suspended declarations of invalidity are unnecessary under a "departmentalist" approach.

Q: Professor Wurman, do you think that implementing a supermajority requirement, or requiring the Supreme Court to determine clear constitutional error before overturning a statute, would return the Supreme Court to a more modest role?

Professor Wurman pointed out that his work had not focused on this question, but suggested that it could be a poor fit for a constitutional democracy such as the U.S. Professor Wurman argued that constitutional democracies try to balance two objectives: democratic authority and liberty. Professor Wurman cautioned that there are times when judicial power is needed to protect people from democratic majorities, and under such

circumstances, it would be unwise to require a supermajority in order to provide rights and protections.

Q: Professor Dixon, following up on Professor Wurman’s response above, can you comment on the success of supermajority voting requirements for high courts in other countries? And to what extent those models could be transplanted to the U.S.?

Professor Dixon noted that supermajority voting requirements have had mixed success. Korea has a stable court system that uses supermajority voting, but Poland is an example where supermajority voting has been used in anti-democratic ways. Professor Dixon suggested that cultural norms in the U.S. would likely make supermajority voting difficult to adopt. Professor Dixon also noted that in some cases, peak courts in other countries with supermajority voting requirements have turned to statutory re-interpretation as a functionally similar substitute for striking down statutes. Professor Dixon suggested that departmentalism is not an appropriate substitute for suspended declarations of invalidity, as Professor Dixon sees departmentalism as in deep tension with the rule of law.

Q: Professor Wurman, in your testimony, you emphasize the importance of departmentalism, but Professor Dixon argued that departmentalism conflicts with the rule of law. Can you respond to that and elaborate if there are reforms that would encourage the use of departmentalism in practice?

Because contemporary Supreme Court reform efforts are focused on shifting power from the Supreme Court to more democratic processes, Professor Wurman found departmentalism to be an attractive means of accomplishing that goal. He noted that departmentalism is already consistent with U.S. law and would be effective in addressing many of the proposed reforms. Professor Wurman disagreed with Professor Dixon’s assertion that departmentalism is in conflict with the rule of law. He argued that if one were to understand “rule of law” as following statutes and court judgements, departmentalism is fully consistent with those ideals. As a recent example, Professor Wurman pointed to Congress’ Religious Freedom Restoration Act of 1993, which responded directly to criticisms of the Supreme Court’s decision in *Employment Decision v. Smith*.

Q: Professor Moyn, your testimony emphasizes that all reforms should be on the table, without identifying any preferred reforms. Among the reforms that shift power away from the Supreme Court (changes to jurisdiction, supermajority voting requirements, legislative override, etc.), which do you think are most likely to achieve your goals?

Professor Moyn noted that changes to jurisdiction and court expansion are susceptible to “tit for tat” political gamesmanship by Congress. Professor Moyn suggested that other mechanisms under discussion, such as supermajority rules or legislative overrides, do not seem to serve the immediate interests of any party because they are not addressed to specific laws or topics, but instead focused on disempowering the Supreme Court in general. Professor Moyn clarified that he is not suggesting that any reforms should be taken off the table, merely that disempowering the Supreme Court to be most important.

Q: Professor Moyn, can you outline the constitutional argument for why some of the proposed reforms can be achieved without constitutional amendment?

Professor Moyn suggested that the modern impression of the Supreme Court’s powers as conveyed to students does not strongly align with the balance of opinion among legal scholars. With that in mind, Professor Moyn argued that proposed reforms such as changing the Supreme Court’s jurisdiction, implementing a supermajority requirement, or implementing a legislative override mechanism, appear to be legally available in the constitutional text, and that even if there is some disagreement on this score, it is up to Congress to test those limits.

Q: Professor Sen, your testimony mainly focuses on term limits. Do you have thoughts on other proposed reforms and how they might affect institutional legitimacy?

Professor Sen responded by cautioning against the use of a supermajority voting requirement, as it would undermine decisionmaking on ideologically balanced Supreme Courts, without similarly inhibiting the action of unbalanced Supreme Courts. Professor Sen continued that a politically balanced 5-4 Supreme Court would have difficulty functioning with a supermajority voting requirement in place. On the other hand, an unbalanced 6-3 member Supreme Court would not be impeded by a supermajority voting requirement, as it would be able to push changes with greater success than a more balanced, 5-4 Supreme Court.

Panel 3: Case Selection and Review at the Supreme Court

Commissioners: William Baude, Andrew Manuel Crespo, Bert I. Huang, Sherrilyn Ifill

Panel Witnesses: Samuel Bray, Michael Dreeben, Stephen Vladeck

Witness Testimony

[Samuel Bray](#)

[Written Testimony](#)

Opening Remarks:

Professor Bray testified that there has been a trend in the Supreme Court toward decreased use of the regular docket and increased use of what is colloquially known as the “Shadow Docket” (which Professor Bray defines as orders the Supreme Court grants without full merits consideration). He argued that the Commission’s report should critically address the claim of Judicial Supremacy (i.e. that the Supreme Court has exclusive authority over issues of constitutional interpretation). Professor Bray attributed the decrease in merits docket decisions in part to the pressure created by the perception that any Court decision is the final word on “the law.” In addressing the criticism of the shadow docket, Professor Bray argued that objections to the absence of noted votes and the rendering of judgment without opinion are ill-founded, as these practices are necessary for the Supreme Court to be able to move quickly. But he did see merit in the effects of shadow docket decisions in locking in the direction of the law in the absence of full deliberation. Professor Bray concluded by suggesting that decisions made through the shadow docket should be given less precedential weight.

[Michael Dreeben](#)

[Written Testimony](#)

Opening Remarks:

Mr. Dreeben argued that, from an empirical point of view, the Supreme Court shapes its docket to perform four major roles: deciding society’s most public legal issues, addressing legally important cases that have lower profiles, resolving lower court conflicts, and correcting egregious errors. Mr. Dreeben argued that the Supreme Court’s procedures, while not perfect, work well in performing its Article 3 duty of being the “One Supreme Court.” Some critics of the Supreme Court’s case selection have suggested that the Court should decide more cases, in addition to questioning the breadth of its discretion to decide which cases to hear. Mr. Dreeben critiqued specific proposals such as providing statutory clarity on the standards for granting, creating a certiorari division of court of appeals judges to select cases for the Supreme Court, and requiring Justices to disclose votes on certiorari petitions.

[Stephen Vladeck](#)
[Written Testimony](#)
[Opening Remarks:](#)

Professor Vladeck's testimony focused on the shadow docket and its growth in recent years both on its own and relative to the merits docket, which has shrunk to its lowest number of argued cases since the American Civil War. Prior this time, most of the Supreme Court's emergency decisions have historically consisted of stays of executions or stays of appellate mandates pending appeal -- case-specific rulings that seldom have broad impact. Professor Vladeck set out the reasons for concern with both the quantitative and qualitative rise in the uses and significance of the shadow docket, with emphasis on its role in altering the legal status quo.

Questions from Commissioners

Q: Professor Vladeck, there have been multiple views on the cause of the rise in volume and significance of the shadow docket (e.g., nationwide injunctions, COVID-19, the 2020 election, etc.). Can you respond to some of those views?

Professor Vladeck confirmed that applications challenging nationwide injunctions, COVID-19 related disputes, and election disputes make up a large portion of the rise in shadow docket rulings in recent years. However, Professor Vladeck reiterated that he finds the numerical rise to be less significant than the qualitative shift in the Supreme Court's use of the shadow docket. Professor Vladeck argued that the Supreme Court recently began using the shadow docket to resolve case types that have historically been resolved through full deliberation, even going so far as to use the shadow docket in ways that shift doctrine, which Professor Vladeck considers unjustifiable.

Q: Professor Vladeck, is your concern that the Supreme Court uses the shadow docket to resolve constitutional questions without oral argument, briefing, and lower court review an independent concern, or does that concern only apply in conjunction with your concern that the Supreme Court seems to expect lower courts to glean precedence from these shadow docket rulings?

Professor Vladeck responded that while he considers those to be independent concerns, they exacerbate one-another and to some extent reinforce one-another. Professor Vladeck pointed to *Tandon v. Newsom*, during which a significant constitutional interpretation was made without hearing from parties with a clear stake in the outcome. Less than three months later, *Fulton v. Philadelphia* presented similar questions for the Court on its regular docket, but full briefing and argument resulted in what Professor Vladeck argued was a more moderate result.

Q: Professor Vladeck, your written testimony argues that a majority of Justices seem to view the merits as the predominant consideration in considering emergency applications. What is the basis for that view and what could be done to address it?

Professor Vladeck argued that this issue is most easily seen in cases where the federal government is seeking emergency relief. Professor Vladeck has found that Justices' opinions (e.g., Chief Justice Roberts' opinion in *Maryland v. King*) indicate that a majority of current Justices *assume* that the government has been irreparably harmed when it is seeking a stay or relief because it is prevented from enforcing policy. Professor Vladeck argued that this makes the likelihood of success on the merits the dominant factor in the Supreme Court's analysis. As a partial solution to this, Professor Vladeck suggested that Congress could codify the factors for emergency stays pending appeal. Professor Vladeck concluded that emergency relief should depend not just on the merits and the harm to the government, but on a more balanced evaluation that takes into account the harms placed on the public.

Q: Professor Vladeck, your testimony suggests that the shadow docket is crowding out the merits docket. Can you say more about that?

While noting hesitancy to suggest that correlation equates to causation, Professor Vladeck argued that it is hard to imagine that there is no relationship between the substantial rise in shadow docket cases and the dramatic fall in merits docket cases. Professor Vladeck pointed to the Solicitor General's decision to hire additional staff to handle emergency applications as a revealing indicator that the Supreme Court views the shadow docket as having an increasingly significant role.

Q: Professor Bray, do you share Professor Vladeck's concerns around the shadow docket, particularly the claims that the shadow docket problems are not related to nationwide injunctions, and that the Supreme Court is not doing enough to balance equities?

Professor Bray agreed with Professor Vladeck's criticism of the Supreme Court's shift to finding irreparable injury whenever there is a government applicant for emergency relief. Professor Bray disagreed with Professor Vladeck's proposed solution (congressional codification of factors), as Justices are already required to considering other factors. Bray acknowledged that there was an increase in applications for emergency relief under President Trump's Solicitor General, but disagreed with Professor Vladeck's assertion that there is an important distinction between the quantitative and qualitative shift.

Q: Professor Bray, both you and Professor Vladeck have identified a problem wherein overemphasis on merits locks Justices into decisions. Is it possible that calls for the Supreme Court to adopt greater transparency in the shadow docket are partly responsible for that lock-in? Would it be better to reduce transparency so that there would be less lock-in?

Professor Bray confirmed that, in his view, more transparency does increase lock-in at the merits stage. For that reason, Professor Bray does not support vote disclosure for emergency decisions.

Q: Professor Bray, your written testimony seems to contrast at times with Professor Vladeck’s in how you view the “status quo”. How would you say the status quo should be understood in Supreme Court decisions? In other words, is remanding a decision to lower courts adhering to the status quo, or is allowing executive action to move forward better considered to be adherence to status quo?

Professor Bray responded that he and Professor Vladeck are using the term “status quo” to make different arguments. Professor Bray clarified that his testimony uses it to refer to the state of affairs pre-disruption. In that view, the disruption is usually the work of the lower courts, particularly in cases of national injunction. On the other hand, Professor Vladeck is discussing “status quo” as the point at which a case arrives at the district court.

Q: Professor Bray, why do you see pre-disruption as being the right way to look at “status quo”?

Professor Bray’s clarified his point with reference to the way that preliminary injunctions function—holding things in place. He cites the example of cases involving religious practice during COVID: the exercise of religion is the status quo.

Q: Professor Vladeck, can you tell us why you would disagree with Professor Bray’s response?

Professor Vladeck argued that there is a large difference between a legal challenge to a statute that has been in place for an extended period of time, and a legal challenge to a brand new executive branch interpretation of long standing statutes that have no basis in statutory text. He contended that a long standing statute and a new interpretation of statute by the executive branch should not bear the same weight in the courts. Professor Vladeck stated that he is not opposed to status quo altering rulings, merely that they should require special justification.

Q: Professor Vladeck, what are the most important practices of the Supreme Court that ensure that the status quo is preserved?

Professor Vladeck stated that he would not support the elimination of the shadow docket. However, Professor Vladeck argued that in recent years the Supreme Court has been incorrectly applying what should be high standards when issuing relief, and that those traditionally high standards should be restored.

Q: Mr. Dreeben, your testimony focuses on blind spots in the certiorari selection process, noting that important legal issues are at times neglected. Can you elaborate on the two solutions you proposed the Supreme Court adopt in your testimony: (1) more frequent Call for the Views of the Solicitor General (CVSG) and 2) certification of legal issues from the circuit courts). And as an additional question, do you think the Supreme Court should start soliciting information on cases from a more diverse range of amici?

Mr. Dreeben noted that one of the Supreme Court's main challenges is getting access to factual information about the world. Justices rely on the record, briefs, and personal research, but it can be difficult to satisfy their extensive information needs. The executive branch's CVSGs are one source and there is a presumption that CVSGs will provide candid and independent information that has been screened for reliability. Typically CVSGs are used when there is a federal interest that has not yet been heard. Mr. Dreeben also suggested that the certification process from the court of appeals has fallen into disuse because the Supreme Court tends to shape its own docket, and is also hesitant to review questions that have not yet been decided by the court of appeals. Mr. Dreeben argued that increased use of the certifications process would improve the Supreme Court's ability to identify cases worthy of review. Mr. Dreeben cautioned that an increase in the call for the views of amici could lead to concerns about impartiality depending on whose views the Supreme Court did or did not solicit.

Q: Mr. Dreeben, continuing on the question of inviting a more diverse range of amici, do you see any way to change the process that would make that a more workable option? Separately, to follow up on certification, your testimony gives an example where a circuit court tried to certify a question and the Supreme Court asked the Solicitor General's office if they wanted to file a petition instead. Having a combination of a certified question from the lower courts and a petition from a party seems persuasive. Do you think that is a process that should be adopted more consistently?

On broadening the use of amici, Mr. Dreeben suggested that the Supreme Court would likely be uncomfortable with reaching out to generate information not voluntarily offered. The Supreme Court's most valuable amici advocates also have a strong reputation for

credibility that has been built up over time. Mr. Dreeben was not averse to the suggestion that the court of appeals certify issues to the Supreme Court, but noted that they have other ways of communicating information to the Supreme Court, such as dissents, and that the Supreme Court reads and respects the work product of lower courts.

Q: Professor Bray, part of your testimony highlights shadow docket cases involving capital punishment. When a person is sentenced to execution, a number of legal issues need to be resolved in short order, often leaving mere hours for Justices to review the case before the execution is scheduled. You argue in your testimony that the Supreme Court should be much more willing to issue orders that delay executions than accelerate executions, yet in practice it is much more common for the Court to restart paused executions (even when multiple Justices have concluded that doing so would likely violate the legal rights of the person being put to death). What should be changed around the Supreme Court's practices, norms, standards of review, rules, or jurisdiction that could address these concerns?

Professor Bray argued for change that emphasizes the irreparability of injury to the person being executed, as opposed to the much lower potential injury to the state. Professor Bray suggested that the Supreme Court should prioritize its ability to decide the case, which cannot be done after the execution has taken place. Professor Bray continued by stating that the Supreme Court has a duty to preserve its ability to decide constitutional questions, and pausing executions would allow Justices to take a more appropriate amount of time to make those decisions. Professor Bray stressed that a stronger posture favoring pausing executions is a neutral principle that does not have an ideological or partisan valence.

Q: Professor Vladeck, in contrast to Professor Bray's suggestion that outside intervention is not the best avenue, can you comment on the constitutionality and advisability of congressional action to force a change in the Supreme Court's handling of executions? Specifically, can you address: 1) An asymmetric standard of review that places more weight on pausing executions; 2) A requirement for a supermajority or even unanimous vote to vacate a lower court's stay of execution; and 3) A statute that would bar the Supreme Court from considering applications to vacate a lower court's stay of execution?

On 1), Professor Vladeck found this avenue to be clearly constitutional. Congress' power to provide standards of review is not limited to symmetrical standards of review. This is evidenced by the fact that Congress has created presumptions and burden shifting standards in statutes. On 2), Professor Vladeck did not consider this an effective solution, because even if the Supreme Court failed to reach decision by supermajority

vote, the Court would likely internally agree to publicly reflect majority votes as supermajority votes. On 3), Professor Vladeck's suggested that this would be constitutional, if not normatively ideal.

Q: Mr. Dreeben, Professor Swarn's written testimony suggests lowering the vote threshold needed to halt executions, urging that executions should not go forward after 4 Justices have granted certiorari but before the Supreme Court can hear the cases. What are your thoughts on this proposal?

Mr. Dreeben suggested that the decision on how many votes it takes for the Supreme Court to take action should be a matter left to the Court, noting concern that such a proposal would threaten judicial independence in addition to raising constitutional issues. Mr. Dreeben suggested that a better approach would be a courtesy policy that if 4 Justices vote in favor of stays, the case will be heard on the merits.

Q: Mr. Dreeben, some Justices have advanced the claim that lawyers representing indigent criminal defendants are consistently outmatched by seasoned and sophisticated repeat players arguing on behalf of the government. Given your extensive experience, do you think there are any corrective steps that would be worth pursuing?

Mr. Dreeben indicated that the state of the criminal defense bar in the Supreme Court is very different now from what it was 5-10 years ago. There has been a rise in Supreme Court clinics in law schools that take on cases for free, offering excellent and dedicated services to litigants. Another development has been the rise of Supreme Court practices in private firms that are actively engaged in soliciting criminal defense attorneys (many of whom are experienced alumni of the Solicitor General's office) to represent clients before the Supreme Court. Mr. Dreeben concluded by noting that there is a structural problem with attempts to compare the Office of the Solicitor General to the defense bar, as the defense bar is inherently decentralized and has primary loyalty to their own clients' interests.

Q: Mr. Dreeben, in response to your concluding point, some have proposed creating something similar to an Office of the Defender General, which would have an institutional role in arguing alongside criminal defendant's legal counsel. There have also been proposals for a standing amicus committee to fulfill a similar function. Would you favor a similar approach?

Mr. Dreeben responded that he would not favor those approaches, as having an institutional Defender General serving as an amicus for criminal defendants in general is at odds with the goal of defendants and their counsel in trying to achieve a favorable

result. Mr. Dreeben did not think that institutional norms would favor something akin to a standing amicus that represents defense interests at large. Mr. Dreeben offered a separate comment on Professor Vladeck's mandatory jurisdiction proposal related to capital punishment. Mr. Dreeben stated that cases involving capital punishment tend to be factually intensive and involve a much larger number of issues than other cases the Supreme Court typically hears. Mr. Dreeben argued that there is no reason to think that the Supreme Court would do a better job than done by the three judges who would have worked extensively on the matter in the court of appeals. In addition, the amount of work that would be shifted to the Supreme Court would diminish its ability to perform its other functions.

Q: Professor Bray, in your written testimony you point out that shadow docket decisions have unclear precedential effects, which you say is a good thing. On the other hand, Professor Vladeck has indicated in his testimony that the Supreme Court itself expects lower courts to see some precedential expectations in its shadow docket orders. How would you address that difference in testimony?

Professor Bray agreed with the premise that the effects of the shadow docket on precedent is uncertain. However, Professor Bray does not see shadow docket precedents as black and white, that is to say that while shadow docket decisions may have some precedential effect and indicate movement on the Supreme Court, they do not settle law or answer questions with finality. Professor Bray concluded by reiterating that shadow docket decisions should not be relied on for precedent.

Q: Professor Bray, continuing a line of discussion with Mr. Dreeben related to capital punishment, would you support a reform that lowered the number of Justices needed to grant stays of execution to four?

Professor Bray agreed with Mr. Dreeben in saying that he would support the Justices voluntarily adopting a practice of hearing capital punishment cases in the event that four Justices vote in favor of stays of execution.

Q: Professor Vladeck, one of your proposals suggests that the Supreme Court itself should promote transparency around the shadow docket by revealing the identity of Justices and their votes, as well as providing written rationales. Does this proposal run in tension with one of the problems you associate with the increased use of the shadow docket, which is the increasing divisiveness of the shadow docket? Wouldn't more information exacerbate that problem and damage the public perception of the legitimacy of the Supreme Court?

Professor Vladeck argued that the divisiveness in the merits docket does not appear to have harmed public perception of the legitimacy of the Supreme Court and that data suggests that providing a clearly stated rationale will not likely lead to increasing divisiveness. Professor Vladeck finds value in requiring Justices to both endorse a rationale and to identify themselves as endorsing those rationales. He acknowledged that there could be costs to such a change, but believes that potential costs are outweighed by the value.

Q: Professor Vladeck, following up on your previous response, is there any indication that there is a trend in the Supreme Court toward voluntarily providing more information on its reasoning and increasing transparency?

Professor Vladeck responded that there has been an increase, but not significantly, and that the more they provide their reasoning, the better.

Q: Professor Vladeck, why do you think it is that there are more unusual lineups in the Supreme Court's merits cases than shadow docket cases?

Professor Vladeck responded that the Supreme Court's merits docket tends to include a higher percentage of cases that are not anticipated to divide the Justices along ideological lines, and when Justices *are* divided on those cases, it is harder to predict the outcome. The shadow docket, on the other hand, is being used much more frequently to resolve cases that divide Justices along ideological lines.

Q: Professor Vladeck, going back to capital punishment cases, do you have any ideas for reforms that could address concerns around Justices having mere hours to review cases before scheduled executions?

Professor Vladeck noted that under his proposal for a statutory right to direct appeal in death penalty cases, the Supreme Court would consider direct appeals not of the entire case. The Supreme Court would consider direct appeal of claims specifically challenging the execution, which is when much of the last minute litigation occurs.

Q: Mr. Dreeben, does Professor Vladeck's clarified proposal on capital punishment reforms change your prior objection to his proposed reform?

Mr. Dreeben reiterated that he would oppose such a reform, noting that other than giving the Supreme Court slightly more time to review the case, he does not see a benefit to such a proposal. Mr. Dreeben's experience has shown that the Supreme Court functions best when dealing with focused issues and has the benefit of an appellate process that examines trial records, applies standards of review, and

develops an opinion that allows the Supreme Court to intervene on more focused questions.

Q: Mr. Dreeben, you mentioned earlier in your testimony that the Supreme Court takes some cases in order to correct what you called “egregious errors.” As a descriptive matter, do you think there is a discernible pattern to when the Supreme Court decides to engage in error correction, and as a normative matter, do you think there *should* be a patterned reasoning?

Mr. Dreeben responded that in general, he suspects that the Supreme Court has some internal disagreement on when to engage in error correction, and that the Supreme Court likely tries to balance those decisions internally in a way that preserves their legitimacy.

Q: Mr. Dreeben, work done by Professor Richard Lazarus (among others) has shown a large disparity in success rates in getting certiorari grants between the elite Supreme Court bar and other practitioners. How would you characterize the elite Supreme Court bar?

Mr. Dreeben argued that the elite Supreme Court bar has the advantages of specialization, similar to how a brain surgeon with extensive experience will be more skillful than a brain surgeon performing their first operation.

Q: Professor Vladeck, one of your proposals suggested returning to a world where circuit judges dominate, with single Justices doing most of the work on the shadow docket. Can you clarify how a single-Justice-world would address your core concerns?

Professor Vladeck pointed to the period of time from the 1950’s to the 1980’s, when single Justices was the norm for shadow docket cases, and circuit Justices would act alone, hear oral argument in chambers, and even issue an opinion, many of which are still cited today. Professor Vladeck finds that system attractive as it is flexible (requiring only one Justice), provides useful opinions that are not precedential, gives parties an opportunity to be heard, and would give the full Court the ability to come back and overrule that individual Justice if necessary. Professor Vladeck noted that such an idea may seem outlandish today, as litigants would attempt to have favorable Justices individually review their cases, but as a general historical matter, Justices have sought to issue decisions reflective of the full Court’s position.

Panel 4: Access to Justice and Transparency in the Operation of the Supreme Court

Commissioners: Margaret H. Lemos, Olatunde Johnson, Walter Dellinger, David F. Levi

Panel Witnesses: Deepak Gupta, Amy Howe, Allison Orr Larsen, Judith Resnik, Russell Wheeler

Witness Testimony

[Deepak Gupta](#)

[Written Testimony](#)

Opening Remarks:

Mr. Gupta stated his thesis as “The [Supreme] Court and its ecosystem is too insular, too opaque, and too skewed in favor of large corporate interests.” Mr. Gupta argued that reforms aimed at changing these issues would improve the Supreme Court’s legitimacy in the eyes of the public and improve the Court’s ability to deliver on its promise of “Equal Justice Under Law.” Mr. Gupta sets out his views that:

- **The Court is too insular.** Mr. Gupta defined this as a problem of diversity, arguing that the Supreme Court ecosystem is dominated by elite, repeat players who are mostly white and male. Mr. Gupta suggested that the Supreme Court diversify its appointed counsel through an outside advisory panel that proposes candidates, and similarly work to diversify its law clerks.
- **Aspects of the Supreme Court’s work lack transparency.** Mr. Gupta asserted that complexity and secrecy serve to benefit more powerful litigants, as they are able to hire experts who know how to navigate unwritten rules. Mr. Gupta favored live broadcast of Supreme Court proceedings as a means of increasing transparency.
- **The Court is skewed in favor of corporate interests.** Mr. Gupta noted that the elite Supreme Court bar is primarily made up of lawyers associated with large corporate law firm. As corporate representatives, elite lawyers are conflicted out of representing clients that challenge corporate interests, resulting in a cycle that shapes American law in favor of those interests. Mr. Gupta advocated for the creation of a plaintiffs and public interest appellate bar to help reverse this trend.

[Amy Howe](#)

[Written Testimony](#)

[Opening Remarks:](#)

Ms. Howe's focused on promoting transparency in Supreme Court proceedings through the use of live audio and, more preferably, live video. While the Supreme Court has taken steps to increase transparency in recent years (e.g., providing delayed audio of oral argument, identifying Justices in transcripts), it was only in response to the COVID-19 pandemic that the Supreme Court began providing live audio of oral arguments. Ms. Howe noted the most pressing transparency issue facing the Supreme Court is whether live oral argument will continue to be available post-COVID. Despite concerns that live audio/video could lead to "grandstanding" or misuse of recordings, Ms. Howe cited the recent successful use of live audio. Ms. Howe concluded that without live audio/video oral argument, the Supreme Court is not generally accessible to the public, given the limited and exclusive capacity of the courtroom

[Allison Orr Larsen](#)

[Written Testimony](#)

[Opening Remarks:](#)

Professor Larsen's testimony focused on Supreme Court amicus briefs (briefs provided to assist the Supreme Court by offering information, expertise, or insight that have bearing on issues in a case). Professor Larsen argued that over the past 30 years, there has been a significant increase in the number of amicus briefs provided to the Supreme Court, the number of entities providing them, and the frequency with which they are cited by Justices in their opinions. Professor Larsen stated that this matters because the kind of amicus briefs that Justices rely on the most are briefs that provide generalized facts, and these briefs are primarily provided by motivated actors, not independent parties. Professor Larsen did *not* advocate for the elimination of the amicus process, instead proposing that reforms promoting transparency, such as disclosure rules, be pursued.

[Judith Resnik](#)

[Written Testimony](#)

[Opening Remarks:](#)

Professor Resnik expressed optimism at the prospect of making changes to the Supreme Court, as the Supreme Court has undergone many changes throughout its history. She argued that modern reforms are necessary to account for the growing disjuncture in the conversation that has been created over time between the Supreme Court and court of appeals as the size and caseload of the lower courts has increased. Professor Resnik also pointed out that the powers of the Chief Justice have grown

substantially over the past 100 years as Congress has given the role increasingly broad authority. Professor Resnik concluded that there are many proposals that could be undertaken both voluntarily by the Supreme Court and through congressional statute which would balance the Court's power in relation to the other branches, such as: rotating the Chief Justice position, adopting a better rulemaking system, implementing a rotating panel system, or changes to the certiorari process.

[Russell Wheeler](#)

[Written Testimony](#)

[Opening Remarks:](#)

Professor Wheeler's testimony revolved around the Supreme Court's code of conduct and recusal practices. Professor Wheeler noted three competing arguments that are often raised in debates about monitoring the Supreme Court's conduct:

1 - **A code of conduct.** Some argue that there are many sources of information that Justices can turn to when they face an ethical problem. One argument in response is that there is symbolic value in committing to a set of rules.

2 - **A mechanism for receiving complaints and imposing sanctions against Justices.** Professor Wheeler remarked that Supreme Court Justices have been uniformly opposed to this idea, as they don't think that lower court judges should be evaluating complaints about the conduct of Supreme Court Justices. A counter argument has been that under the Judicial Conduct Act, lower court judges already review the conduct of state supreme court Justices, and it has worked well.

3 - **Recusals.** Federal judges currently decide for themselves whether or not to recuse, and Professor Wheeler remarked that the Supreme Court has generally indicated that they want to retain the practice of deciding for themselves. It could also potentially violate the "One Supreme Court" mandate of the constitution, as disqualification is a judicial decision, not an administrative decision.

4 - **Transparency around recusals.** Supreme Court Justices are not required to explain *why* they are recusing themselves. Proponents argue that explaining recusals would increase transparency and encourage judges to more thoroughly consider their reasons for denying a motion. A counter-argument has been that recusals are often done for personal family reasons that they should not have to put on the record, and that being forced to do so would discourage them from recusing.

Questions from Commissioners

Q: Mr. Gupta, your testimony raised concerns that a relatively small group of elite lawyers plays an outsized role in the cases heard by the Supreme Court. What effect do you think that has on the Supreme Court and its decision-making?

Mr. Gupta argued that the elite Supreme Court bar (expert advocates that are repeat players in front of the Supreme Court) have an outsized effect on the Court and its docket. Mr. Gupta cited an example noted Professor Richard Lazarus, in which Carter Phillips (a highly respected Supreme Court practitioner) was able to get the Supreme Court to review minor questions on tort liability that they otherwise would likely not have taken up. Mr. Gupta expressed concern that the interests of a small group of elite players have become the central focus of the Supreme Court's docket, with other interests ultimately becoming neglected.

Q: Professor Resnik, your testimony expresses concerns about the Supreme Court's sole discretion on the cases that it hears, arguing that lower court judges should play a role in selecting cases for Supreme Court review. Can you say more about what you think the problems with the Supreme Court's current certiorari processes are and how working with lower court judges on case selection would be an improvement?

Professor Resnik stated that many cases determined to be unimportant by the court of appeals are taken up by the Supreme Court and that such a dynamic between these courts places too much discretionary power in the hands of Supreme Court Justices. Professor Resnik noted that there are a range of options that diffuse the Supreme Court's power and repair dysfunction between the courts, such as an internal policy of inviting more information from the court of appeals or a larger structural change involving lower court judges rotating onto the Supreme Court.

Q: Mr. Gupta, your testimony calls for disclosure of Justices' votes on certiorari, largely for reasons of transparency. A similar proposal has called for the disclosure of cases that make it onto the Supreme Court's 'discuss list.' Can you say more about how voting information would benefit the legal system or serve the interests of the public and can you comment on the 'discuss list' proposal?

Mr. Gupta emphasized that he is not advocating for any legislation, but rather raising transparency reforms that the Supreme Court should consider. Mr. Gupta favors reforms that would disclose both certiorari votes and the list of cases that will be discussed, as they are complementary and would prevent mistaken inferences about the denial of certiorari. Mr. Gupta noted that lower courts have many kinds of discretionary review decisions in which votes are disclosed, and that such disclosure has not been found to harm deliberations or public perceptions of the legitimacy of those courts.

Q: Professor Larsen, has your research on amici shown any evidence that there are certain interests that are not represented well through the amicus process?

Professor Larsen's research has indicated that while that seems to be the case, there is an important distinction between the merits side and the certiorari side of that argument. Professor Larsen argued that on the merits side, it is not difficult to find a Supreme Court specialist to take your case for free once certiorari is granted, so you often see very qualified and specialized lawyers on both sides of cases. In contrast, Professor Larsen argued that there is an imbalance on the certiorari side that can in part be attributed to amicus briefs, as amicus briefs are costly to file and at the point of filing it is uncertain if the Supreme Court will hear the case.

Q: Mr. Gupta, getting back to Supreme Court transparency, do you have suggestions for making announced standards around certiorari more transparent or for otherwise improving the process?

Mr. Gupta responded that because standards are so discretionary, much of the content is beyond written standards. Mr. Gupta continued that the Supreme Court should (and sometimes does) publicly state why it is or is not taking a case, but noted skepticism that written standards will fix any imbalances. Instead, Mr. Gupta argued, balancing Supreme Court expertise through more diverse selection of law clerks (many of whom go on to be Supreme Court practitioners) would be a more effective approach.

Q: Ms. Howe, your testimony emphasizes the importance of televised coverage of oral arguments and the success of live audio. What is the added advantage of video coverage over audio coverage?

Ms. Howe expressed the view on the basis of her experience covering Supreme Court that oral arguments in person have revealed nuances and context, such as body language, that cannot be captured through audio but serve as telling responses to questions.

Q: Ms. Howe, following up on your previous response, one of the concerns Justices have raised with video coverage is that the additional nuances you mentioned could add outsized importance to oral arguments and lead viewers to make undue inferences. There have also been concerns raised about the privacy of Supreme Court Justices and litigants appearing before them. How would you address those arguments?

Ms. Howe restated that people whose lives are impacted by Supreme Court decisions want to see oral arguments, and should be able to do so, as oral arguments are supposedly available to the public. However, Ms. Howe has found that the limited number of seats offered to the public are in reality often taken by people who can pay others to stand in line for them. As for the matter of privacy, Supreme Court Justices are

easily identifiable as members of the highest court in the U.S., and litigants, who often approach the press on their own, would not necessarily have to be shown on video if live video were to be implemented.

Q: Ms. Howe, your testimony references other transparency aimed reforms as well, such as financial disclosure and a lack of reporting on Justices' public appearances. Can you say more about those transparency concerns?

Ms. Howe's argued that even if Justices are not required to explain their reasoning behind recusals, it would be beneficial to make disclosure of financials easily accessible and to require disclosure of public activities to help the public and press make inferences about why Justices are recusing themselves from cases. While Justices are currently required to submit financial disclosures, this information is not easily accessible and not available in real-time.

Q: Professor Larsen, what would you say caused the recent growth in amicus briefs?

Professor Larsen noted several factors contributing to the substantial growth in amicus briefs over the past 30 years:

- 1 - Professor Larsen stated that the increased importance of cases the Court takes is drawing wider interest in submitting amicus briefs on issues.
- 2 - Technological advances allow amici to gather vast amounts of information and submit briefs in a quick fashion.
- 3 - As the Supreme Court takes fewer cases and its docket shrinks, practitioners that want to appear before the Supreme Court have fewer opportunities to do so, leading them to more consistently file amicus briefs when possible.

Q: Professor Larsen, has your research shown a real difference between amicus briefs and virtual briefing that happens as Justices gather information?

Professor Larsen views both information channels as worrisome for different reasons, but favors amicus briefs. Professor Larsen noted concern that online briefing (via online blogs and Twitter) may not properly portray both sides of competing arguments. Amicus briefs expose Justices to competing arguments that challenge their thinking.

Q: Ms. Howe, would you say that there is concern that those attending oral arguments in person can get access to market sensitive information that is not otherwise publicly accessible?

Ms. Howe acknowledged that her research did not explore this topic, but went on to note that prior to 10 years ago, there was a gap between the time that opinions were

released and when they were published online that may have made acting on that information possible; however, no such gap exists today, making it unlikely that someone could act on information obtained during Supreme Court oral arguments before it was made publicly available.

Q: Professor Resnik, your testimony argued that the Supreme Court grants certiorari in a significant number of cases where the court of appeals noted the case as “not for publication.” Can you elaborate on that?

Professor Resnik clarified that when the court of appeals marks a ruling as “not for publication”, they are conveying that the ruling is not meant to set precedents for future decisions. However, Professor Resnik’s research has found that more than 14% of the cases in which the Supreme Court grants certiorari come from decisions marked by appellate courts as “not for publication.” Professor Resnik regards this as problematic because it shows divergent views on the function, impact, and quality of rulings among courts. This ties to Professor Resnik’s previous proposal that the lower courts should have more input into the Supreme Court’s docket.

Q: Professor Wheeler, as you know, the consequences for a Supreme Court recusal are greater than lower courts, since a Supreme Court Justice cannot be replaced on a case. Are there constitutional limits to Congress’ ability to prescribe Supreme Court rules around recusal?

Professor Wheeler pointed out that the Judicial Disqualification Statute provides guidelines for all judges to use when determining whether they need to recuse or not, and Supreme Court Justices have shown a commitment to complying with those guidelines. While Congress has never tested imposing those guidelines onto the Supreme Court, Professor Wheeler was confident that Congress could constitutionally do so.

Q: Professor Wheeler, some Justices agree that when they recuse for personal reasons, they ought not to file a statement because it would feel as if they were lobbying other Justices in some way. How would you respond to those concerns?

Professor Wheeler felt that the question posed would be better answered by a Justice, but did note that states have successfully fashioned a variety of rules and requirements around recusals and disqualifications that could serve as valuable reference for Supreme Court ethics rules.

Q: Professor Wheeler, continuing on your response, would you say that at a minimum Justices should generally identify whether the recusal is a matter of a financial conflict, prior service conflict, or another personal reason?

Professor Wheeler agreed that listing general reasons on the record might be beneficial for transparency and ethical reasons.

Q: Professor Wheeler, following up on your reference to state systems for recusal, Texas seems like a helpful model as their state supreme court recusal decisions are made initially by an individual Justice, but if the Justice denies the motion to recuse, the matter is voted on by the entire court. Is that correct?

Professor Wheeler stated that in under the Texas procedure, the relevant Justice either grants it and steps aside, or refers it to the rest of the Justices to decide (without the participation of the Justice in question)

Q: Professor Wheeler, you note in your testimony that the Judicial Conference's code of conduct used by the courts is broad and aspirational, with no direct enforcement mechanism. Considering the fact that the code of conduct is aspirational, would it make a difference for the Supreme Court to formally adopt the Judicial Conference's code of conduct?

Professor Wheeler stated that it would likely impact the Supreme Court in the same way that it currently impacts the lower courts, which is that it would allow Justices to say that they are abiding by guidelines. Professor Wheeler noted that in 2019, the Supreme Court indicated that it was considering adopting a code of conduct. Professor Wheeler concluded by stating that one of the difficult considerations is determining enforcement of standards, rather than enforcement of the code.

Q: Professor Wheeler, in regards to enforcement, lower court federal judges are subject to complaint procedures that have the potential to result in sanctions. Your written testimony cautions that a system of complaints and sanctions in the Supreme Court would have the potential to be weaponized. Can you elaborate on that concern?

Professor Wheeler noted that members of Congress on occasion file complaints against judges, and in some cases try to use the complaint system to stir political controversy. Professor Wheeler cautioned that a similar complaint procedure in a body with high visibility such as the Supreme Court would give members of Congress and interest groups an incentive to use high profile cases to abuse the complaint procedure in an attempt to generate publicity.

Adjourn

Commissioner Bauer adjourned the meeting, with thanks to Commissioners and witnesses. Members of the public were advised that while the Commission accepts public comment until November 15th, 2021, comment is most useful if submitted prior to the October 15th deliberative meeting. The next public meeting is scheduled for July 20th, 2021, and will cover the topics below:

Panel 1 - Perspectives from Supreme Court Practitioners and Views on the Confirmation Process

Panel 2 - Perspectives on Supreme Court Reform I

Panel 3 - Perspectives on Supreme Court Reform II

Panel 4 - Term Limits and Turnover on the Supreme Court

Panel 5 - Composition of the Supreme Court

Panel 6 - Closing Reflections on the Supreme Court and Constitutional Governance

Tentative Timeline:

July 20th, 2021 - Public Meeting 3

October 15th, 2021 - Public Meeting 4

November 10th, 2021 - Public Meeting 5

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

September 27, 2021

Appendix A: Commissioners in Attendance

Attendance of Commission members was taken at various points throughout the public meeting. Quorum (simple majority) was maintained throughout the day and all members of the Commission were present for at least half of the meeting.

Michelle Adams
Kate Andrias (Rapporteur)
Jack M. Balkin
William Baude
Bob Bauer (Co-Chair)
Elise Boddie
Guy-Uriel E. Charles
Andrew Manuel Crespo
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
Sherrilyn Ifill
Olatunde Johnson
Michael S. Kang
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
Laurence H. Tribe
Michael Waldman
Adam White
Keith E. Whittington

Commissioners Absent:

None