

PRESIDENTIAL COMMISSION ON
THE SUPREME COURT OF THE UNITED STATES

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1ST PUBLIC MEETING

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WEDNESDAY
MAY 19, 2021

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The Commission met via Video
Teleconference, at 1:00 p.m. EDT, Robert Bauer
and Cristina Rodriguez, Co-Chairs, presiding.

PRESENT

ROBERT BAUER, New York University School of Law;
Chair

CRISTINA RODRIGUEZ, Yale Law School; Chair

MICHELLE ADAMS, Cardozo School of Law

KATE ANDRIAS, University of Michigan
(Rapporteur)

JACK M. BALKIN, Yale Law School

WILLIAM BAUDE, University of Chicago Law School

ELISE BODDIE, Rutgers University

GUY-URIEL E. CHARLES, Duke Law School

WALTER DELLINGER, Duke University

JUSTIN DRIVER, Yale Law School

RICHARD H. FALLON, JR., Harvard Law School

CAROLINE FREDRICKSON, Georgetown Law

HEATHER GERKEN, Yale Law School

NANCY GERTNER, Harvard Law School

JACK GOLDSMITH, Harvard Law School

THOMAS B. GRIFFITH, Hunton Andrews Kurth

TARA LEIGH GROVE, University of Alabama School
of Law

BERT I. HUANG, Columbia University

OLATUNDE JOHNSON, Columbia Law School

MICHAEL S. KANG, Northwestern Pritzker School of
Law

ALISON L. LaCROIX, University of Chicago Law
School

MARGARET H. LEMOS, Duke Law School

DAVID F. LEVI, Duke Law School

TREVOR W. MORRISON, NYU School of Law

CALEB NELSON, University of Virginia School of
Law

RICHARD H. PILDES, New York University School of
Law

MICHAEL D. RAMSEY, University of San Diego
School of Law

KERMIT ROOSEVELT, University of Pennsylvania
Carey Law School

BERTRALL ROSS, University of California,
Berkeley School of Law

DAVID A. STRAUSS, University of Chicago

MICHAEL WALDMAN, NYU School of Law

ADAM WHITE, George Mason University Antonin
Scalia Law School

KEITH E. WHITTINGTON, Princeton University

DANA FOWLER, Designated Federal Official

P-R-O-C-E-E-D-I-N-G-S

(1:00 p.m.)

MS. FOWLER: Good afternoon, and welcome to first meeting of the Presidential Commission on the Supreme Court of the United States. My name is Dana Fowler, and I am the Designated Federal Officer for this advisory committee.

I would like to thank all of our presenters, attendees, and stakeholders for joining us today, including those who provided public comments. Public comments submitted to our inbox, info@pcscotus.gov and from our website have been provided to Commissioners.

Before we start, there are a few things you should know. This meeting is being recorded via videoconference and is also being streamed live on our website at www.whitehouse.gov/pcscotus.

This Commission is considered a federal advisory committee and is governed by the requirements under the Federal Advisory Committee

1 Act, or FACA. My role as the DFO is to manage
2 the day-to-day administration -- administrative
3 operations of the Committee, attend all committee
4 meetings, and ensure the committee operates in
5 compliance with FACA.

6 The majority of the work of this
7 Commission will be performed by designated
8 working groups, who will produce analysis to be
9 deliberated over by the full Commission for
10 incorporation into its final report.

11 All of our Commissioners have received
12 training regarding FACA requirements and their
13 ethics obligations as special government
14 employees. In addition, each Commissioner has
15 completed a financial disclosure report that has
16 been reviewed by ethics attorneys to identify any
17 potential conflicts of interest.

18 Now, in order to begin, in order for
19 the Commissioners to begin their work, they need
20 to be sworn in. Before we do so, I want to note
21 that attendance has been reviewed and we do have
22 a quorum established.

1 With that, let's swear in the
2 Commission members to begin their official
3 duties. Will the Commissioners, and only the
4 Commissioners, please unmute yourself, raise your
5 right hand, and repeat after me:

6 I, insert name, do solemnly swear that
7 I will support and defend the Constitution of the
8 United States against all enemies foreign and
9 domestic, that I'll bear true faith and
10 allegiance to the same, that I take this
11 obligation freely without any mental reservation
12 or purpose of evasion, and that I will well and
13 faithfully discharge the duties of the office on
14 which I am about to enter, so help me God.

15 (Commissioners sworn.)

16 MS. FOWLER: Congratulations,
17 Commissioners. You can mute yourself again.
18 Thank you in advance for your service, and good
19 luck with the work ahead.

20 And now I'll turn these proceedings
21 over to the Commission's Co-Chairs, Bob Bauer and
22 Cristina Rodriguez.

1 CHAIR RODRIGUEZ: Good afternoon,
2 everyone. I am really delighted that we are now
3 convened as a Commission. And I know Bob and I
4 are both looking forward to the work that we will
5 do together as the Presidential Commission on the
6 Supreme Court of the United States.

7 This is the first of what will be
8 several public meetings of this Commission to be
9 held over the next six months. And the purpose
10 of this meeting is to describe the process by
11 which the Commission will do our work that we've
12 been charged to do, and to articulate our
13 conception of the research and investigation that
14 that work requires, and to explain how we will
15 ensure that we will hear from a wide array of
16 diverse voices as we do this research and draft a
17 report for the President.

18 In his executive order on April 9,
19 2021, President Biden established this
20 Commission, as you all know, and he charged us
21 with producing a report within 180 days of this
22 meeting that provides an account, in the words of

1 the order, of the contemporary commentary and
2 debate about the role of the Supreme Court in our
3 system of government.

4 We're not charged with making specific
5 recommendations, but rather we are to provide an
6 evaluation of the merits and legality of
7 particular reform proposals being debated today,
8 many of which have historical antecedents. And
9 so we will do some of that research as well,
10 considering other periods in US history when the
11 Supreme Court's role and calls for its reform
12 have been prominent. That's a specific charge of
13 the executive order.

14 And we'll actually assess the calls
15 for reform themselves to assess the arguments for
16 why reform is pressing, as well as why it might
17 not be.

18 In conducting our analysis, we should
19 all remember that it's crucial that we are not
20 just to summarize familiar arguments or rehash
21 debates that are in academic literature or
22 political or public commentary. But instead that

1 we are to critically evaluate arguments and
2 claims. And in that process, the President has
3 expressly charged us with considering a broad
4 spectrum of ideas.

5 And to highlight how we plan to making
6 sure that that is the case, so that we produce
7 the most rigorous and helpful report possible, I
8 want to hand it to my very esteemed Co-Chair, Bob
9 Bauer, to describe a little bit of our process.

10 CHAIR BAUER: Thank you very much,
11 Commissioner Rodriguez. So we want to emphasize
12 that we expect and we're going to be encouraging
13 very broad public participation. This is a
14 commitment on the part of the Commissioners and
15 all the individual Commissioners. And we will be
16 regularly restating our interest in having all
17 points of view available and bearing upon our
18 work.

19 That's the President's expectation,
20 clearly reflected in the executive order that
21 Commissioner Rodriguez just reviewed with you,
22 and that really do not believe that we can do

1 this work without the benefit of the broadest
2 diversity of perspectives on the issues that
3 we're going to be considering.

4 And we're also going to be wanting to
5 share the perspectives that come our way very
6 broadly, and that's going to be the function of
7 our public meetings and testimony and also
8 through the sharing of information on our
9 website, which I'll have a chance to talk about a
10 little bit later as well.

11 But many of you no doubt saw the
12 information on the screen at the beginning of the
13 meeting, and we'll repeat the location of the
14 website where you can find the information, and
15 we'll talk further about the details that you'll
16 be able to find there about our work.

17 In any event, this broad diversity of
18 perspective that we plan to bring to bear on the
19 work is absolutely critical for a topic this
20 complex. That's the President's expectation, and
21 we are all very committed to fulfilling it.

22 With that, I am going to return it to

1 Commissioner Rodriguez for a discussion of our
2 bylaws.

3 CHAIR RODRIGUEZ: In a moment, I will
4 call on everyone, through a roll call, to vote on
5 the adoption of the bylaws which were circulated
6 to you before this meeting. The bylaws
7 essentially lay out our charge as reflected in
8 the executive order in the terms that I initially
9 described. They affirm, as our DFO, Dana Fowler
10 underscored, that we're governed by the Federal
11 Advisory Committee Act.

12 They provide for our DFO and staff
13 assistance from the General Services
14 Administration, for which we are extremely
15 grateful. And they establish that we will meet
16 on six occasions in convenings open to the
17 public, and that we will provide notice of those
18 convenings 15 days in advance, in the Federal
19 Register.

20 They establish our quorum requirements
21 and our voting rules and affirm that we are
22 authorized under FACA to create subcommittees as

1 necessary to support our work. This Commission
2 will terminate within 30 days of submitting our
3 report to the President, which is due 180 days
4 from today, consistent with the executive order.

5 So the Commissioners have all read
6 these bylaws, and I am now open to entertain a
7 motion to adopt them.

8 Commissioner Driver, do you have such
9 a motion?

10 COMMISSIONER DRIVER: Yeah, I'd like to
11 make a motion that we vote to adopt the bylaws.

12 CHAIR RODRIGUEZ: Thank you. So I
13 will call you in alphabetical order, and please
14 unmute so that we can record your voice vote in
15 favor of the bylaws.

16 Michelle Adams.

17 COMMISSIONER ADAMS: Yes.

18 COMMISSIONER ANDRIAS: Kate Andrias.

19 COMMISSIONER ANDRIAS: Yes.

20 CHAIR RODRIGUEZ: Jack Balkin.

21 COMMISSIONER BALKIN: Yes.

22 CHAIR RODRIGUEZ: Bob Bauer. Bob

1 Bauer, are you muted?

2 CHAIR BAUER: Yes, and yes.

3 CHAIR RODRIGUEZ: Will Baude.

4 COMMISSIONER BAUDE: Aye.

5 CHAIR RODRIGUEZ: Elise Boddie.

6 COMMISSIONER BODDIE: Yes.

7 CHAIR RODRIGUEZ: Guy-Uriel Charles.

8 COMMISSIONER CHARLES: Yes.

9 CHAIR RODRIGUEZ: Andrew Crespo.

10 Commissioner Crespo had a conflict today, so
11 we'll record that he was not here and did not
12 respond.

13 Walter Dellinger.

14 COMMISSIONER DELLINGER: Yes.

15 CHAIR RODRIGUEZ: Justin Driver.

16 COMMISSIONER DRIVER: Yes.

17 CHAIR RODRIGUEZ: Richard Fallon.

18 COMMISSIONER FALLON: Yes.

19 CHAIR RODRIGUEZ: Caroline
20 Fredrickson. Muted?

21 COMMISSIONER FREDRICKSON: Yes, sorry.

22 Yes.

1 CHAIR RODRIGUEZ: Heather Gerken.

2 COMMISSIONER GERKEN: Yes.

3 CHAIR RODRIGUEZ: Nancy Gertner.

4 COMMISSIONER GERTNER: Yes.

5 CHAIR RODRIGUEZ: Jack Goldsmith.

6 COMMISSIONER GOLDSMITH: Yes.

7 CHAIR RODRIGUEZ: Thomas Griffith.

8 COMMISSIONER GRIFFITH: Yes.

9 CHAIR RODRIGUEZ: Tara Leigh Grove.

10 COMMISSIONER GROVE: Yes.

11 CHAIR RODRIGUEZ: Bert Huang.

12 COMMISSIONER HUANG: Yes.

13 CHAIR RODRIGUEZ: Sherrilynn Ifill.

14 I believe Sherrilynn is not here today, so we
15 will note her as not voting.

16 Olatunde Johnson.

17 COMMISSIONER JOHNSON: Yes.

18 CHAIR RODRIGUEZ: Michael Kang.

19 COMMISSIONER KANG: Yes.

20 CHAIR RODRIGUEZ: Alison LaCroix.

21 COMMISSIONER LaCROIX: Yes.

22 CHAIR RODRIGUEZ: Margaret Lemos.

1 COMMISSIONER LEMOS: Yes.

2 CHAIR RODRIGUEZ: David Levi.

3 COMMISSIONER LEVI: Yes.

4 CHAIR RODRIGUEZ: Trevor Morrison.

5 COMMISSIONER MORRISON: Yes.

6 CHAIR RODRIGUEZ: Caleb Nelson.

7 COMMISSIONER NELSON: Yes.

8 CHAIR RODRIGUEZ: Rick Pildes.

9 COMMISSIONER PILDES: Yes.

10 CHAIR RODRIGUEZ: Michael Ramsey.

11 COMMISSIONER RAMSEY: Yes.

12 CHAIR RODRIGUEZ: I vote yes, Cristina
13 Rodriguez.

14 Kermit Roosevelt.

15 COMMISSIONER ROOSEVELT: Yes.

16 CHAIR RODRIGUEZ: Bertrall Ross.

17 COMMISSIONER ROSS: Yes.

18 CHAIR RODRIGUEZ: David Strauss.

19 COMMISSIONER STRAUSS: Yes.

20 CHAIR RODRIGUEZ: Laurence Tribe. Is
21 Commissioner Tribe here? We'll record him as
22 also not voting.

1 Michael Waldman.

2 COMMISSIONER WALDMAN: Yes.

3 CHAIR RODRIGUEZ: Adam White.

4 COMMISSIONER WHITE: Yes.

5 CHAIR RODRIGUEZ: Keith Whittington.

6 COMMISSIONER WHITTINGTON: Yes.

7 CHAIR RODRIGUEZ: Wonderful. I
8 believe that means our bylaws are adopted and we
9 can begin our operations.

10 So I'm going to hand it back to Bob
11 now, who's going to discuss our Commission
12 meetings that I mentioned at the outset and the
13 format that they will follow.

14 CHAIR BAUER: Thank you very much. So
15 as you heard also in the review of the bylaws
16 that Commissioner Rodriguez just completed, we
17 are going to have a number of days of Commission
18 meetings, six in all, and two of them are going
19 to be meetings of public testimony. We will have
20 testimony in the morning and the afternoon, full
21 panels and as many as 24 witnesses over those
22 two-day periods.

1 Our expectation is that the first such
2 meeting, and Cristina let you know that we will
3 in fact have notices in the Federal Register with
4 these dates specified, but our first such meeting
5 we expect to have in late June, that is to say
6 public testimony. And then again in late July.

7 We will ask witnesses to submit brief
8 written statements, which they can summarize at
9 the outset of their oral testimony, and then
10 respond to questions from the Commissioners.

11 We'll also have a series of public
12 meetings thereafter in which the Commission will
13 deliberate on its analysis. It'll take up the
14 drafts that it is developing and discuss them.
15 And those drafts will be posted publicly to our
16 website prior to those meetings.

17 We expect that many people will want
18 to offer their testimony and their comments to
19 the Commission, and as I said earlier, we're
20 going to encourage it. So all throughout this
21 process we're looking for written comments, and
22 they will be in fact reviewed and taken into

1 account by the Commissioners.

2 But we encourage members of the public
3 to submit their comments by August 15, 2021 to
4 ensure that we have ample time in which to
5 consider them. And our website will host a space
6 where comments will be posted for the public to
7 see.

8 So throughout the process, we're going
9 to reiterate this call for written testimony for
10 all those who have views that they would like to
11 share with the Commission.

12 Now, at the beginning of this meeting,
13 many of you saw on the screen displayed by the
14 General Services Administration the addresses to
15 which written comments should be directed. Let
16 me repeat again that those comments should go to
17 info@pscscotus.gov. And our website, which is now
18 live, can be found at
19 www.whitehouse.gov/pscscotus.

20 Again, that will have a host of
21 information on it. That includes that testimony
22 that we'll receive, the recordings of our

1 meetings, information and agendas for upcoming
2 meetings, and materials that will be prepared for
3 full Commission deliberation at the Commission
4 meetings for that purpose that I mentioned that
5 will be occurring subsequent to our public
6 meetings in June and July. That is to say in the
7 fall.

8 So with that, that's a rough sketch of
9 how we propose to proceed. And now I'd like to
10 call on Kate Andrias, the Commission Rapporteur,
11 to discuss the areas of focus for our research.

12 COMMISSIONER ANDRIAS: Thank you. The
13 Commission will engage in five areas of research.
14 The first area of research will set the stage for
15 the Commission's work by considering the genesis
16 of the reform debate and by defining the
17 Commission's mission. The Commission will
18 consider why reforming the Supreme Court has been
19 a subject of debate throughout the nation's
20 history and what factors contribute to the debate
21 of late.

22 I'll pause here for elaboration from

1 Commissioner Rick Pildes.

2 COMMISSIONER PILDES: Thanks, Kate.

3 And yes, as an initial matter, we'll consider a
4 range of overarching questions that will shape
5 our assessment of the more specific proposals.

6 Among these questions will be what
7 problems, if any, would and should Court reform
8 be designed to address; what are the thoughtful
9 objections to any such reform proposals; how
10 might we critically evaluate the arguments pro
11 and con regarding Court reform or specific
12 proposals.

13 And we also want to assess these
14 issues in a broader historical context, as our
15 Co-Chair, Professor Rodriguez, mentioned. So
16 over the course of the nation's history, what
17 issues or events have prompted serious calls for
18 Court reform, and how do we assess the arguments
19 that were made back then for and against various
20 Court reforms at these earlier moments in
21 American history, and how should that affect our
22 deliberations now.

1 COMMISSIONER ANDRIAS: Thank you,
2 Rick. The second area of focus will be the
3 Court's role in the constitutional system. To
4 that end, the Commission will examine debates
5 about the scope of judicial review and the
6 authority of the Court to invalidate the acts of
7 the other branches of government.

8 Commissioner Will Baude.

9 COMMISSIONER BAUDE: Thanks. So we
10 will elaborate -- evaluate how proposals to
11 reform the scope of judicial review would affect
12 the Court's role in relation to the other
13 branches of government, the separation of powers,
14 essentially. Consider the consequences of
15 proposals that affect the scope of the Court's
16 authority, such as stripping the Court's
17 jurisdiction, requiring it to use a super
18 majority when it votes to invalidate a
19 congressional action or other government action.
20 Creating a procedure for Congress to override
21 Supreme Court decisions, and other proposals.

22 COMMISSIONER ANDRIAS: Thank you. The

1 third area of focus will be the length of service
2 and turnover of justices on the Court.
3 Commissioner Olatunde Johnson, could you please
4 elaborate on this one?

5 COMMISSIONER JOHNSON: Yeah, thanks,
6 Kate. We're going to look at the Justices'
7 length of services and how frequently the Court's
8 membership should turn over. And this is going
9 to include proposals for term limits and
10 mandatory retirement.

11 We'll look at arguments for particular
12 proposals, the strengths and weaknesses of these
13 proposals, and some of the practical and
14 constitutional questions they raise. So thank
15 you.

16 COMMISSIONER ANDRIAS: Thanks,
17 Olatunde. So the fourth area of research is to
18 consider proposals regarding the membership and
19 size of the Court. We will consider debates
20 about whether to expand the size of the Court or
21 otherwise reform how it is constituted.

22 Commissioner Nancy Gertner, could you

1 elaborate on this one?

2 COMMISSIONER GERTNER: Thank you,
3 Kate. We're going to consider these proposals,
4 as you suggested, for the membership and size of
5 the Court and the strengths and weaknesses of the
6 various proposals.

7 We plan to look, as others have
8 indicated, not only at current proposals, but
9 also proposals about membership and size that
10 have been floated at other times in American
11 history, including the eighteenth century,
12 shortly after the Constitution was adopted,
13 nineteenth century reforms, and twentieth
14 century. What do these proposals teach us about
15 what we should be doing at this time?

16 And then we'll look at current
17 proposals to expand the scope -- expand the
18 membership and size of the Supreme Court and
19 whether those proposals require other reforms.
20 An expanded Court, for example, might require a
21 panel system for deciding cases. An expanded
22 Court couldn't possibly sit on all cases all the

1 time.

2 We'll evaluate proposals to change the
3 composition of the Court, including a proposal
4 for a lottery of judges in rotating panels drawn
5 from appellate court judges. Obviously we are all
6 working together, so we'll consider how these
7 proposals about membership and size relate to
8 other proposals concerning the turnover of of
9 Justices or term limits.

10 So thank you, Kate.

11 COMMISSIONER ANDRIAS: Thank you.
12 Finally, the Commission will consider issues
13 around the Supreme Court's case selection and
14 review, its docket rules and practices. So the
15 Commission will analyze debate surrounding the
16 Court's workload and processes for selecting,
17 deciding, and hearing cases, as well as its
18 interactions with the public.

19 Commissioner Bert Huang, could you
20 please elaborate.

21 COMMISSIONER HUANG: Thanks, Kate. We
22 will consider concerns that have been raised

1 about what is sometimes called the shadow docket,
2 including emergency orders and summary decisions
3 dealing with important issues, but without full
4 briefing and argument.

5 We will also consider a range of
6 perspectives about the Court's discretionary
7 power to decide which cases to hear, about other
8 aspects of the certiorari process or merits-stage
9 briefing and argument, and about transparency in
10 the work of the Court, as well as the ethical
11 norms that govern its work.

12 COMMISSIONER ANDRIAS: Thank you. So
13 as several others have noted, as we consider
14 these various issues and other issues raised by
15 public comment, we will engage in historical
16 research, conduct comparative analysis, and
17 consider parallel matters within state judicial
18 systems.

19 We will consider whether reform would
20 require legislation, constitutional amendment, or
21 reinterpretation of doctrine, or would otherwise
22 raise legal concerns. And we will consider the

1 relationship between reform proposals and debates
2 about the confirmation process.

3 So with that, Cristina, I will turn
4 things back over to you.

5 CHAIR RODRIGUEZ: Thank you very much,
6 Kate. We definitely have our work cut out for
7 us, but I'm glad that we have a number of
8 extremely talented and committed people. And we
9 look forward to benefitting as much as we can
10 from members of the public and others who are
11 interested in this very weighty subject at this
12 moment in time.

13 I want to pause here before we
14 adjourn, since we have completed our business, to
15 allow anyone to ask a question they might have.

16 Seeing no questions, we will adjourn
17 until our next public meeting, at which we will
18 hear testimony about how to think about Supreme
19 Court reform. Thank you for your time, and I'll
20 see you soon.

21 (Whereupon, the above-entitled matter
22 went off the record.)

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MATTER: Presidential Commission on the
Supreme Court of the United States
1st Public Meeting

DATE: 05-19-21

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