

PRESIDENTIAL COMMISSION ON
THE SUPREME COURT OF THE UNITED STATES

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2ND PUBLIC MEETING

+ + + + +

WEDNESDAY
JUNE 30, 2021

+ + + + +

The Commission met via Video Teleconference, at 9:00 a.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

ANDREW MANUEL CRESPO, Harvard University

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

SHERRILYNN IFILL, NAACP Legal Defense and
Educational Fund, Inc.

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

LAURENCE H. TRIBE, Harvard University

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

ALSO PRESENT*PANEL 1*

NIKO BOWIE, Harvard Law School
NOAH FELDMAN, Harvard Law School
LAURA KALMAN, University of California Santa
Barbara
MICHAEL McCONNELL, Stanford Law School
KIM SCHEPPELE, Princeton School of Public and
International Affairs

PANEL 2

ROSALIND DIXON, University of New South Wales
SAM MOYN, Yale School of Law
MAYA SEN, Harvard University John F. Kennedy
School of Government
ILAN WURMAN, Arizona State University

PANEL 3

SAM BRAY, Notre Dame Law School
MICHAEL DREEBEN, O'Melveny & Myers, LLP
STEVE VLADECK, University of Texas School of Law

PANEL 4

DEEPAK GUPTA, Gupta Wessler, PLLC
AMY HOWE, SCOTUSblog
ALLISON ORR LARSEN, William and Mary Law School
JUDITH RESNIK, Yale Law School
RUSSELL WHEELER, Brookings Institution

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

(9:00 a.m.)

1
2
3 MS. FOWLER: Good morning. Welcome to
4 the second meeting of the Presidential Commission
5 on the Supreme Court of the United States. My
6 name is Dana Fowler, and I am the designated
7 federal officer for this advisory committee. We
8 would like to thank all of our speakers, our
9 public attendees, and stakeholders for joining us
10 today, including those who provided us public
11 comment.

12 Before we begin hearing from our
13 speakers, I have a few reminders. This meeting
14 is being recorded via videoconference, and also
15 is being streamed live at
16 www.whitehouse.gov/pcscotus. The Commission is
17 considered a federal advisory committee and is
18 governed by the requirements under the Federal
19 Advisory Committee Act, or FACA.

20 My role as the DFO is to manage the
21 day-to-day administrative operations of the
22 committee, attend all the committee meetings, and

1 ensure the committee operates in compliance with
2 FACA.

3 All of our Commissioners have received
4 training regarding FACA requirements and their
5 ethics obligations as special government
6 employees. In addition, each Commissioner has
7 completed a financial disclosure report that has
8 been reviewed by ethics attorneys to identify any
9 potential conflicts of interest.

10 Commissioners, if you would now please
11 turn on your cameras, I will now take roll call.
12 Please unmute when you hear your name and respond
13 with a response of here to indicate you're
14 present.

15 Michelle Adams.

16 (No response.)

17 MS. FOWLER: Cate Andreas.

18 COMMISSIONER ANDREAS: Here.

19 MS. FOWLER: Jack Balkin.

20 COMMISSIONER BALKIN: Here.

21 MS. FOWLER: Bob Bauer.

22 CHAIR BAUER: Here.

1 MS. FOWLER: Will Baude.
2 COMMISSIONER BAUDE: Here.
3 MS. FOWLER: Elise Boddie.
4 COMMISSIONER BODDIE: Here.
5 MS. FOWLER: Guy Uriel Charles.
6 COMMISSIONER CHARLES: Here.
7 MS. FOWLER: Andrew Crespo.
8 COMMISSIONER CRESPO: Here.
9 MS. FOWLER: Walter Dellinger.
10 COMMISSIONER DELLINGER: I'm here.
11 MS. FOWLER: Justin Driver.
12 COMMISSIONER DRIVER: Here.
13 MS. FOWLER: Dick Fallon.
14 COMMISSIONER FALLON: Here
15 MS. FOWLER: Thank you. Caroline
16 Fredrickson.
17 COMMISSIONER FREDRICKSON: Here.
18 MS. FOWLER: Heather Gerkin.
19 COMMISSIONER GERKIN: Here.
20 MS. FOWLER: Nancy Gertner.
21 COMMISSIONER GERTNER: Here.
22 MS. FOWLER: Jack Goldsmith.

1 COMMISSIONER GOLDSMITH: Here.

2 MS. FOWLER: Tom Griffith.

3 COMMISSIONER GRIFFITH: Here.

4 MS. FOWLER: Terrilee Grove.

5 COMMISSIONER GROVE: Here.

6 MS. FOWLER: Burt Huang.

7 COMMISSIONER HUANG: Here.

8 MS. FOWLER: Sherilynn Ifill.

9 COMMISSIONER IFILL: Here.

10 MS. FOWLER: Alatee Johnson.

11 COMMISSIONER JOHNSON: Here.

12 MS. FOWLER: Michael Kang.

13 COMMISSIONER KANG: Here.

14 MS. FOWLER: Alison LaCroix.

15 COMMISSIONER LACROIX: Here.

16 MS. FOWLER: Maggie Lemos.

17 COMMISSIONER LEMOS: Here.

18 MS. FOWLER: David Levy.

19 COMMISSIONER LEVY: Here.

20 MS. FOWLER: Trevor Morrison.

21 COMMISSIONER MORRISON: Here.

22 MS. FOWLER: Caleb Nelson. Caleb will

1 be joining us later today.

2 Rick Pildes.

3 COMMISSIONER PILDES: Here.

4 MS. FOWLER: Michael Ramsey.

5 COMMISSIONER RAMSEY: Here.

6 MS. FOWLER: Cristina Rodriguez.

7 CHAIR RODRIGUEZ: Here.

8 MS. FOWLER: Kermit Roosevelt.

9 COMMISSIONER ROOSEVELT: Here.

10 MS. FOWLER: Bertrall Ross.

11 Commissioner Ross will also be joining
12 us later today I believe.

13 David Strauss.

14 COMMISSIONER STRAUSS: Here.

15 MS. FOWLER: Larry Tribe.

16 COMMISSIONER TRIBE: Here.

17 MS. FOWLER: Michael Waldman.

18 COMMISSIONER WALDMAN: Here.

19 MS. FOWLER: Adam White.

20 COMMISSIONER WHITE: Here.

21 MS. FOWLER: Keith Whittington.

22 COMMISSIONER WHITTINGTON: Here.

1 MS. FOWLER: Thank you, Commissioners.
2 You may now all turn off your cameras.

3 PARTICIPANT: I'm actually here right
4 now. Sorry.

5 MS. FOWLER: Fantastic. You may all
6 turn off your cameras. I now have the distinct
7 pleasure of introducing Commissioner Rodriguez,
8 our Co-Chair, for opening remarks.

9 CHAIR RODRIGUEZ: Thank you very much,
10 Ms. Fowler.

11 Good morning, everybody. Welcome to
12 the Commissioners who are all assembled, and
13 members of the public who are watching today.
14 This is the second public meeting of the
15 Presidential Commission on the Supreme Court of
16 the United States.

17 My Co-Chair Bob Bauer and I are
18 delighted that we are convened today to hear from
19 a list of very distinguished witnesses who are
20 going to speak throughout the day to the matters
21 under our consideration.

22 On April 9, 2021, President Biden

1 issued an executive order establishing this
2 Commission, and tasked us with producing a report
3 to be submitted to him with 180 days of our first
4 public meeting, which took place on May 19, 2021.

5 The order tasks us with providing
6 various things in the report: an account of the
7 contemporary public debate over the role of the
8 Supreme Court in our constitutional system; an
9 analysis of the principal arguments for and
10 against reforming the Court; and an assessment of
11 the legality, the likely efficacy, and the
12 potential consequences for our system of
13 government of the leading proposals for reform,
14 many of which we will discuss throughout the day
15 and we hope to explore these kinds of questions;
16 legality, efficacy, and consequences.

17 We've been asked by the President to
18 draw from a broad range of views and to assess a
19 broad spectrum of ideas. We are not charged with
20 making specific recommendations, but rather with
21 providing a rigorous analysis and appraisal of
22 the arguments and proposals that are animating

1 today's debates.

2 Before we begin our testimony with our
3 first distinguished panel, I first want to
4 acknowledge that many comments that we received
5 from the public through our info box and now
6 through regulations.gov.

7 Since we were chartered in April,
8 we've received over 170 unique comments and they
9 continue to come in. These comments have come
10 from members of Congress, from other public
11 officials at the federal and state levels, from
12 advocacy organizations, from subject matter
13 experts, and from members of the general public.

14 The comments have been wide-ranging,
15 and the Commissioners all have the comments also
16 available for the public to view. The comments
17 make a variety of suggestions and
18 recommendations. Some of them favor legislation
19 that would expand the size of the Supreme Court.

20 Many of the comments also support
21 eliminating life tenure for Supreme Court
22 Justices and setting term limits for the

1 Justices' tenure between 10 and 22 years. Others
2 of the comments advocate for maintaining the
3 status quo, for not reforming or changing the
4 Court's structure or operations and for
5 sustaining the Court's role as it exists in
6 today's system. And these comments also support
7 legislation that has been introduced in Congress
8 that would amend the Constitution to fix the
9 number of Justices at nine.

10 Some of the comments raise concerns
11 about the Supreme Court's susceptibility to
12 special interests through orchestrated campaigns
13 to submit briefs to the Court, or to otherwise
14 intervene in the nomination and confirmation
15 process. Many of the comments called for reforms
16 that would insulate the Court from
17 politicization.

18 We welcome further comments from the
19 public and other officials, anyone with an
20 interest in the role of the Court in our system
21 of government, and we'll be receiving them
22 throughout the life of the Commission, until

1 approximately November 14, 2021. You may submit
2 comments to the Commission via our web portal,
3 regulations.gov. And we will also make them
4 available there to the public.

5 To find these comments, if you're
6 interested in viewing the public observations on
7 the Court, you may go to the Commission's
8 website, where the relevant links are posted, or
9 you can go directly to regulations.gov and search
10 for PCSCOTUS, that's President Commission on the
11 Supreme Court of the United States, or PCSCOTUS.

12 With that, I'd like to turn to our
13 first panel of witnesses and ask that the five of
14 them now join us by turning on their cameras.
15 Nikolas Bowie, Noah Feldman, Laura Kalman,
16 Michael McConnell, and Kim Scheppele, please turn
17 on your cameras. We can begin.

18 Okay, I see everybody in the view.
19 Our first panel for the day is on the subject of
20 a contemporary debate over Supreme Court reform,
21 origins, and perspectives. We've asked each of
22 these witnesses to address matters such as the

1 causes of the current public debate over
2 reforming the Supreme Court, the competing
3 arguments for and against reform at this time,
4 and the standards by which we as a Commission
5 should evaluate those arguments.

6 Each of our witnesses will have three
7 to five minutes to provide opening statements,
8 after which we'll turn to a panel of five
9 Commissioners for questioning. There will be a
10 clock in one of the camera boxes that will count
11 down five minutes for each of you so you are able
12 to keep track.

13 We'll proceed in alphabetical order,
14 and that means we begin with Nikolas Bowie,
15 Assistant Professor of Law at Harvard Law School.

16 Professor Bowie, the floor is yours.

17 MR. BOWIE: Thank you. Members of the
18 Commission, thank you for inviting me to testify.
19 My name is Nikolas Bowie and I'm an Assistant
20 Professor of Law at Harvard Law School. The
21 public debate over reforming the Supreme Court
22 began at least 150 years ago, when the Supreme

1 Court held that Congress had no power to limit
2 the spread of slavery.

3 Abraham Lincoln responded to the
4 decision by insisting that no democracy could
5 tolerate giving Judges the supreme power to
6 define the scope of our fundamental law. He and
7 Congress disagreed with the Court about the
8 constitutionality of restricting slavery, and
9 Lincoln warned that if the Court's interpretation
10 triumphed, the people will have ceased to be
11 their own rulers. He and Congress, therefore,
12 repudiated the Court and passed laws restricting
13 slavery anyway.

14 After the Civil War, Congress proposed
15 the 13th, 14th, and 15th Amendments to build
16 multi-racial democracy in this country for the
17 first time. A century before the Civil Rights
18 Act and Voting Rights Act of the 1960s, Congress
19 also enacted statutes banning racial
20 discrimination and protecting the right to vote.

21 But in a series of decisions that
22 remain good law, the Supreme Court deprived this

1 federal legislation of nearly all its strength.
2 The Court not only held that Congress had no
3 power to ban racial discrimination, but it also
4 presided over the birth of Jim Crow.

5 Generations later, the Court
6 temporarily reversed course with *Brown v. Board*
7 of Education. It later permitted Congress to
8 resurrect its old civil rights legislation, but
9 its deference did not last. Over the past 50
10 years, the Court has resumed in validating
11 federal civil rights laws, tightening a chain of
12 precedent around American democracy.

13 All this puts into context the
14 problem; the Supreme Court is an anti-democratic
15 institution. The main problem is judicial
16 review, where the power of the Court to decline
17 to enforce a federal law when a majority of the
18 Justices disagree with a majority of Congress
19 about the law's constitutionality.

20 The question presented by judicial
21 review is not whether the Constitution should be
22 enforced. Rather, the question is what should

1 happen when the President, over 500 members of
2 Congress, and four Justices of the Court
3 interpret the Constitution to permit a particular
4 law, yet five Justices of the Court disagree and
5 think the law is unconstitutional.

6 This was the scenario in 2013 when the
7 Supreme Court voted five to four to invalidate
8 the Voting Rights Act of 1965, decades after an
9 earlier court first ratified it and seven years
10 after Congress and the President nearly
11 unanimously reauthorized it.

12 I elaborate on the problem with the
13 judicial review of federal law in my written
14 testimony. I encourage you to advocate for
15 reforms that will abolish the practice. I will
16 only add here that it was not easy for me to
17 criticize the Supreme Court in my written
18 testimony, just as I imagine it will not be easy
19 for any of you to criticize the Court in your
20 final recommendation.

21 As members of the elite, as academics
22 and as lawyers, our influence with our students

1 and our clients currently depends on our ability
2 to maintain close connections with federal
3 judges. It harms our careers to alienate judges
4 and it helps our careers to praise them.

5 In this respect, asking lawyers and
6 law professors to testify about reforming the
7 Supreme Court is like asking a worker to testify
8 about whether their boss is doing a good job.
9 They look over their shoulder and say everything
10 is fine. I can understand their hesitation.

11 But I think our commitment to
12 democracy demands that we be honest about the
13 harm the Supreme Court as an institution causes.
14 We are all harmed when some of us can't afford
15 healthcare because the Court declared the
16 expansion of Medicaid unconstitutional.

17 We are all harmed when some of us
18 cannot vote because the Court rendered the Voting
19 Rights Act ineffective. We are all harmed when
20 some of our younger colleagues are harassed at
21 the beginning of their legal careers by judges to
22 whom no one ever says no.

1 It is time for us to raise our
2 expectations for how democratic our country and
3 our profession can become. We must not be afraid
4 of alienating our social betters or fear how the
5 people might rule without them. We must take
6 inspiration from democracies the United States
7 once inspired, but which have taken our ideals
8 far beyond what we allow ourselves.
9 Democratizing the Supreme Court will be hard, but
10 we must do it.

11 CHAIR RODRIGUEZ: Thank you, Professor
12 Bowie. We appreciate those remarks greatly.

13 Our next witness will be Noah Feldman,
14 who is the Felix Frankfurter Professor of Law at
15 Harvard Law School.

16 Professor Feldman, the floor is yours.

17 MR. FELDMAN: Thank you, Commissioner
18 Rodriguez. Thank you very much to all of the
19 members of the Commission for this opportunity.
20 It's an honor to appear before you and an honor
21 to appear with this distinguished panel.

22 I want to begin by noting that the

1 current debate over Supreme Court reform is not,
2 unlike some past debates, occasioned by a
3 particular decision or set of decisions by the
4 Supreme Court, but rather by a change in the
5 unwritten norms surrounding confirmation that
6 have taken place in recent years. I think that
7 should be relevant to our analysis.

8 I think in order for us to answer the
9 question of how and whether to reform the Supreme
10 Court we need to ask two questions. First, what
11 is the Supreme Court good for, in the sense that
12 under our current system, it plays a set of roles
13 and functions and we must evaluate what the value
14 associated with those is.

15 Second, are proposed reforms likely to
16 improve or enhance the positive aspect of those
17 functions and are they capable of curtailing or
18 cutting down on negative features of the role
19 that the Supreme Court presently plays?

20 I would like to offer an account of
21 the answers to those questions, and begin by
22 saying that the Supreme Court plays three central

1 roles in our currently existing constitutional
2 system. I want to be clear that these roles have
3 evolved over time in important ways. This is not
4 your Founding Fathers' Supreme Court and it's
5 distinct from what it was, perhaps, in 1787 as
6 imagined by the Founders.

7 The first feature, which is the
8 protection of the rule of law which, in my view,
9 which is part of the core function of the Supreme
10 Court today, was present at the founding.
11 Alexander Hamilton lays it out pretty clearly in
12 Federalist #78, and judicial independence is the
13 crucial feature of institutional design that
14 facilitates and allows that.

15 The second job and function that the
16 Supreme Court currently plays emerged in the
17 aftermath of the 13th, 14th, and 15th Amendments,
18 and that is the role of protecting fundamental
19 rights in the United States, including rights to
20 equality and rights to liberty.

21 I want to be very clear that no part
22 of my observation entails the statement that the

1 Supreme Court has always gotten it right in its
2 protection of those rights and liberties. With
3 Professor Bowie and others, I am very well aware
4 of the many disastrous circumstances where the
5 Supreme Court has gotten it wrong, and of some
6 inspiring significant cases in which the Supreme
7 Court has gotten it right and has managed to
8 effectuate the values of the Constitution.

9 The question before us is not whether
10 we will always agree with decisions of the
11 Supreme Court or if they will always get it
12 right. By hypothesis we won't and by hypothesis
13 they won't always get it right. The question
14 rather is whether on the whole the function of
15 the Supreme Court with respect to these values
16 that I'm describing justifies continuing the
17 institution under current procedures or requires
18 reform.

19 The third component is in some ways
20 historically later than the others, and that is
21 the function of the Supreme Court as engaged in
22 oversight of democratic processes. We could have

1 a long discussion about when and where that
2 began. Some Justices were skeptical of it over
3 time. It remains controversial but it is, I
4 think, broadly accepted today as a function of
5 the Supreme Court.

6 Now, the argument that I wish to make
7 to you in the time that I have remaining is
8 simply the following. It's that as the Supreme
9 Court has evolved, it has become an integral and
10 irreplaceable constitutional institution within
11 the framework of our constitutional democracy.

12 The point is not that we couldn't have
13 evolved different institutions, or that other
14 countries couldn't do it differently. We could
15 have evolved differently, and perhaps other
16 countries can do it differently.

17 The question is whether under our
18 current circumstances, weakening the Court
19 through substantial reform, and I have in mind
20 court-packing and most form of jurisdiction
21 stripping, would enhance or undermine the
22 institutional legitimacy of the Court, which

1 legitimacy enables it to fulfill these functions.
2 In my view, those sorts of reforms would be
3 disastrous for the capacity of the Supreme Court
4 to engage in these roles that it currently
5 engages in.

6 Again, I want to conclude by saying
7 that we should not assume lightly that other
8 institutions would emerge -- unspecified
9 institutions would emerge to cover the functions
10 of protecting a rule of law, ensuring fundamental
11 rights, and overseeing the democratic process.

12 I would urge each Commissioner and
13 each citizen to ask himself or herself, do you
14 think that there is some other institution that
15 can do these jobs, can play these fundamental
16 constitutional roles? If there isn't, then even
17 though the Supreme Court will decide plenty of
18 cases not in the way that you would like, you are
19 still much better off, and we are still much
20 better off, with the Supreme Court than without
21 it. Thank you.

22 CHAIR RODRIGUEZ: Thank you very much,

1 Professor Feldman.

2 Our next witness is Laura Kalman, who
3 is a distinguished research professor at the
4 University of California, Santa Barbara.

5 Professor Kalman, you have the floor.

6 MS. KALMAN: Co-Chairs Bauer and
7 Rodriguez, and distinguished Commission members,
8 thank you very much for your kind invitation to
9 testify. I teach 20th Century U.S. political and
10 legal history at the University of California,
11 Santa Barbara.

12 In my forthcoming book, The Court
13 Fight: A Political History of FDR's Court-Packing
14 Plan, I argue that the memory of the Court-
15 Packing Plan of '37 as a disastrous defeat for
16 Roosevelt is undeserved. To facilitate your
17 process, I have provided Commission members with
18 a copy, so fear not, I will not try to read all
19 550 pages into the record.

20 More than 80 years after FDR proposed,
21 court-packing, the manipulation of the Court's
22 size to change its ideological composition is

1 again making news. After winning the greatest
2 electoral college and popular victory ever in
3 '36, an election in which popular dissatisfaction
4 with the conservative Court figured heavily,
5 Roosevelt stunned the country in February '37.

6 He proposed adding up to six new
7 Justices to the Supreme Court for every Justice
8 who reached the age of 70 and did not retire. He
9 did so under the stated guise of helping out
10 elderly Justices. His real reason was that they
11 blocked his program. He had not had a single
12 vacancy on the Court, six of whose members were
13 over 70. Five of the six were conservatives who
14 struck down the New Deal, often by razor-thin
15 margins.

16 A fire storm exploded. FDR was
17 accused of court-packing, dictatorial ambitions,
18 and political trickery, of undermining the rule
19 of law, and undercutting judicial independence.
20 The overwhelmingly Democratic Senate recommitted
21 to its bill in July. The magnitude of its defeat
22 made it look really foolish. And, indeed,

1 scholars have portrayed the 1937 court bill as
2 the ill-fated, idiotic brainchild of a President
3 made overbold by his 1936 victory.

4 In the 80-plus years since, court-
5 packing has, thus, become unthinkable, the
6 Court's current size an entrenched norm.
7 According to the consensus, FDR suffered from the
8 pride that goeth before a fall after 1936, which
9 led to his tragic error of trying to pack the
10 Court that was doomed to a trouncing from the
11 outset.

12 I challenge the conventional wisdom.
13 In my view, hubris did not explain Roosevelt's
14 action. He was displaying, rather, the same
15 acumen that enable him to win re-election in 1936
16 despite an antagonistic press and bitter elites.
17 Far from erring tragically from the beginning, he
18 came very close to getting between two and six
19 additional Justices. When FDR surprised Congress
20 with his Court bill in February, most thought its
21 victory pre-ordained.

22 Into March, the original bill looked

1 strong. For all of March, members of Congress
2 would have happily given him at least two extra
3 Justices. In April, the chances of some success
4 remained excellent. In May, offers of a deal
5 from the opposition abounded. Those offers
6 continued to arrive at the White House until the
7 Senate voted to recommit.

8 Indeed, in July it looked as if FDR
9 would get five additional Justices. As his
10 Attorney General said, the Court fight should
11 have been settled many times by compromise. But
12 from FDR's vantage point, playing constitutional
13 hardball by refusing to back down for so long was
14 a good gamble.

15 It enabled him to win the war despite
16 losing the battle. Justices couldn't be sure
17 that Congress would nix his plan and some of them
18 changed course to be sure there were emanating
19 plausible doctrinal reasons for their journey.

20 Yet, like Roosevelt, I think that his
21 Court enlargement bill with his 1936 win and with
22 the obvious unpopularity of the earlier

1 decisions, helped move the Court to the more
2 liberal interpretations of the commerce clause,
3 the taxing and spending power, and the due
4 process clause that constitutionalized the New
5 Deal.

6 Given that success, I conclude by
7 asking, why should FDR's court-packing plan, and
8 by implication all attempts by elected branches
9 to expand the Court, to alter lifetime tenure, or
10 to otherwise constrain judicial power be
11 remembered or portrayed as foolish?

12 The possibility of Court expansion
13 changed the political conditions under which the
14 Court created legal doctrine. It may have
15 affected key Justices' calculations about whether
16 they needed to take advantage of the play or
17 flexibility in existing doctrine to defuse the
18 threat and to preserve the Court's long-term
19 nonpartisan authority.

20 The 1937 precedent, then, suggests
21 that a statute or constitutional amendment
22 proposing a change in the Court might give the

1 Justices reason to consider whether their present
2 course is endangering the institution and its
3 vital role in a liberal democracy. Thank you.

4 CHAIR RODRIGUEZ: Thank you, Professor
5 Kalman.

6 Our next witness is Michael McConnell,
7 who is the Richard and Frances Mallery Professor
8 of Law at Stanford Law School and a former judge
9 on the U.S. Court of Appeals for the 10th
10 Circuit.

11 Professor McConnell, please proceed.

12 MR. MCCONNELL: Thank you very much.
13 Thanks to the Commission for having me here
14 today. The immediate cause of this debate in
15 this Commission were events in the last election
16 during which candidate Joseph Biden was pressed
17 by members of his party to support some version
18 of a court-packing plan.

19 Joe Biden was wise enough not to try
20 to resolve a question of that significance, so
21 solemn a question, so important to our
22 constitutional system, in the midst of a hard-

1 fought political campaign, and decided instead to
2 appoint a bipartisan Commission of distinguished
3 persons, yourselves. I think that was for a very
4 good reason, which is that he wanted a
5 dispassionate, not a partisan, answer to these
6 questions, or approach to these questions, maybe
7 not an answer.

8 And thus, I think that the Commission
9 really has an historic opportunity to make
10 service to the nation in two ways. First, the
11 Commission, I think, can and should reaffirm the
12 principle of the independence of the judiciary
13 which, as Noah explained before and I won't
14 repeat him, is so central to the institution of
15 our constitutional system, to reaffirm the
16 independence of the Court and to strengthen, not
17 undermine, the institution of the Supreme Court.

18 Secondly, I believe that the
19 Commission can explore ways to reduce rather than
20 to inflame partisan tensions over Supreme Court,
21 and perhaps even other judicial appointments.

22 Now, there are many proposals before

1 this Commission, and they will be discussed.
2 Some of them, I think, are constructive and
3 practical and some are not. The most central
4 proposal is the one which caused President Biden
5 to want to have a Commission to begin with, which
6 is the idea of expanding the Court.

7 This particular proposal, I believe,
8 is contrary to both of the purposes which I
9 outlined before. It would certainly inflame --
10 further inflame partisan tensions. I don't think
11 there's any doubt that it would be viewed,
12 rightly or wrongly, I think rightly, by all
13 Republicans as an illegitimate move, a
14 manipulation, and an abuse of power, and an
15 attempt to undermine our constitutional system.
16 I suspect that the public would come around to
17 that point of view as well. Whether that's true
18 or not, there is certainly no doubt that it would
19 lead to further partisan, poisonous, mutual
20 acrimony.

21 Secondly, it would certainly undermine
22 rather than support the independence of the

1 Supreme Court. If Congress can simply add new
2 Justices when it does not approve of the
3 jurisprudential direction of the Court, the
4 institution will become little more than an arm
5 of the legislature.

6 Make no mistake, if the Democrats do
7 it this time, Republicans will do it at their
8 first opportunity and they will probably up the
9 ante in some way that would seem as out of the
10 question today as court-packing did just a year
11 or so previously.

12 Now, the Constitution obviously does
13 not specify the number of Supreme Court Justices,
14 and so Congress is free to do this
15 constitutionally, but for the last 150 years, the
16 number of Supreme Court Justices has been fixed
17 at nine. The only period -- the only episode in
18 which there was a serious effort to enlarge the
19 Court for partisan purposes, which Laura Kalman
20 has just been discussing, it was roundly
21 rejected.

22 I personally don't much care whether

1 Roosevelt was being foolish. What matters is
2 that there was a conclusive determination by the
3 end of the debate, by the representatives of the
4 American people, that this was an improper and
5 illegitimate act. As Laura said, as a result of
6 this, the verdict of history has been that there
7 is now an entrenched norm of the number nine.

8 Now, the number nine itself is not
9 magic. It's the fixing of the particular number
10 in making it impervious to political manipulation
11 that really matters. But I would say this: based
12 upon my experience on the courts, both arguing
13 before them and being on courts, a number larger
14 than nine I think would seriously undermine the
15 functioning of the Court.

16 I think most practitioners and judges
17 will tell you that when you get any larger than
18 that, the process of oral argument and
19 deliberation seriously breaks down and becomes
20 more chaotic. We should look to the experience
21 of State Supreme Courts in this matter.

22 No State Supreme Court, no drafters of

1 any state constitution, have ever adopted a
2 Supreme Court larger than nine, and most of them
3 have adopted courts considerably smaller than
4 that number: seven, or in some cases, five. I
5 think there are no good reasons for enlarging the
6 Court that are independent of what I think is an
7 illegitimate purpose of effecting its decisions.
8 Thank you very much.

9 CHAIR RODRIGUEZ: Thank you, Professor
10 McConnell.

11 Our final witness will be Professor
12 Kim Scheppele, who is the Lawrence S. Rockefeller
13 Professor of Sociology and International Affairs
14 at Princeton University.

15 Professor Scheppele, the floor is
16 yours.

17 MS. SCHEPPELE: Thanks so much, and
18 thanks to the Commission for the opportunity to
19 speak to these questions. My role on this panel,
20 I think, is to put the American debate in kind of
21 a global perspective. I've worked as a
22 researcher in multiple constitutional courts,

1 I've interviewed judges for decades, and I've
2 been teaching comparative constitutional law for
3 more than 30 years.

4 What is so striking, of course, about
5 the American case is that the U.S., with some
6 pride, has the oldest continuing constitution and
7 the oldest system of judicial review in the
8 world. The problem is, it shows. So many of our
9 peer democracies have actually updated and
10 renovated their systems.

11 What I bring to the table is some
12 sense of what's happened in these other places,
13 which may not be copied here exactly, but which
14 might actually serve as some kind of framework
15 for thinking about how some of the dilemmas that
16 our present Court confronts might be solved.

17 So the first question, and I think
18 it's the question of our panel, is why is the
19 U.S. Supreme Court under such pressure, and why
20 is there a need for a Commission to think about
21 reforming it? The answer, I think, lies in the
22 role of the Supreme Court in our constitutional

1 system.

2 There's a kind of fatal flaw built
3 into the U.S. constitutional order, and that is
4 that the U.S. has a very powerful Court combined
5 with a Constitution that is virtually impossible
6 to amend. If you look around the world, it turns
7 out that most of the other countries that have
8 extremely powerful peak courts, they sit in
9 systems where it's possible to amend the
10 constitution much more easily than here.

11 So the problem is the Court then
12 structurally becomes the only way to modernize a
13 very old Constitution. Also, our Court has the
14 last word on constitutional questions, because
15 it's almost impossible for anyone else in the
16 political system to override the Court.

17 The question is, when the Court
18 generates a political fire storm, the only way to
19 change a decision is to change the Court and, in
20 particular, to change the judges who sit on that
21 Court. Once you're in a system of extreme
22 political polarization, as we are now, then you

1 get the problems that we have.

2 I just want to start by saying maybe
3 we should think more broadly about the role of
4 the Court in our political system. There are a
5 couple of ways to fix this. One is to make the
6 Constitution easier to amend. Now of course,
7 that would take an amendment which is nearly
8 impossible, so that would take a kind of
9 overwhelming political support, but this is not
10 necessarily something that has a clear partisan
11 effect one way or another.

12 I can think of different systems. You
13 could imagine what many of our constitutional
14 peers do, which is a two-thirds vote of both
15 houses of the legislature. We can think about
16 how to build the Senate into a way of getting
17 state input into that process. But thinking
18 about an easier amendment rule strikes me as
19 being key to taking the Supreme Court off the
20 hook in some way.

21 The other mechanism which we see in a
22 lot of our peer democracies is something like an

1 override mechanism.

2 Here in my testimony, I explain at
3 some length the system being used in Canada where
4 if the legislature, either the national or the
5 state, the sort of provincial legislatures
6 disagree with the ruling of a court, they can re-
7 enact a law that's been declared
8 unconstitutional, as long as they declare they
9 know it's unconstitutional, they re-enact it for
10 a limited period of time, and it has to be
11 continually renewed with the declaration that
12 they know what they're doing in order to override
13 a court decision.

14 What that's produced in Canada is that
15 the court is way more popular than legislatures,
16 which is true pretty much everywhere in the U.S.
17 as well. And so when the court issues a
18 decision, there's really a kind of presumptive
19 notion that should not be changed.

20 This does not de-stabilize the system
21 in Canada. So I think thinking of ways to make
22 the Court not the only or the final interpreter

1 of the U.S. Constitution would be a big plus in
2 taking the Court out from under this political
3 pressure.

4 The other thing I might suggest is
5 that our peer, you know, sort of constitutional
6 systems, in particular, other common law systems
7 where there is a very similar method of judicial
8 appointment, have taken pressures off the Court
9 by making a non-partisan judicial confirmation
10 process, by creating a kind of, you know,
11 judicial selection committee composed of judges,
12 members of the bar, professors from law schools,
13 members of the Justice Ministry, and members of
14 the public to screen nominees in order to present
15 a list of acceptable nominees to the executive
16 for their nomination.

17 That can be done without changing the
18 Constitution because in all the other systems
19 that have these non-partisan selection
20 committees, they never change the surface level
21 appointment procedure. What they changed was the
22 input into the executive decision.

1 And so as these opinions have become
2 flash points, as they have become more
3 politically polarized, moving to some kind of
4 expert consultation for screening nominees would,
5 I think, give the public more confidence this is
6 not such a political process.

7 Just to conclude, I want to say that
8 if you look globally at other examples, you may
9 find some ways out of our current difficulties
10 and I hope my written testimony and the
11 conversations we'll have here will get you to
12 look more broadly than just at the U.S. Thank
13 you.

14 CHAIR RODRIGUEZ: Thank you so much,
15 Professor Scheppele.

16 Thanks again to all of the witnesses.
17 Each person has submitted an excellent written
18 statement that's posted on the Commission's
19 website, and I commend those statements, clearly
20 to the Commissioners themselves, but to the
21 general public who seek to learn more about the
22 features that are driving our contemporary debate

1 and how to think about the way we should assess
2 that debate.

3 At this time we'll proceed to a
4 question period. I now invite the five
5 Commissioners who will be posing questions to
6 join us by turning on their cameras. Each of
7 these Commissioners will have 10 minutes to begin
8 with to ask questions. They are here
9 representing the Commission as a whole, asking
10 questions on behalf of all of the Commissioners
11 to aid us in our deliberations.

12 So our first Commissioner to pose
13 questions to the panel is Commissioner Lawrence
14 Tribe, the Carl M. Loeb Professor, University
15 Professor and Professor of Constitutional Law
16 Emeritus at Harvard University.

17 Commissioner Tribe, please proceed.

18 COMMISSIONER TRIBE: Thank you,
19 Professor Rodriguez.

20 Professor Feldman, as I understand
21 your testimony, you don't deny Professor Bowie's
22 account of the fundamentally anti-Democratic

1 character of the Supreme Court's judicial review
2 role, but you do argue that stripping it of that
3 role, or cutting that role back with some form of
4 supermajority requirement for invalidating acts
5 of Congress would break the Court's institutional
6 legitimacy which you argue would leave, in the
7 words of your prepared statement, no
8 institutional actor capable of protecting the
9 rule of law, fundamental rights, or the structure
10 of democracy and motivated to play that role.

11 Now, given that Congress, not an
12 unspecified institution, passed the Ku Klux Klan
13 Act, that decisions like Brown V. Board of
14 Education and the compulsory pledge case, West
15 Virginia Board v. Barnette, enforced, and the
16 Voting Rights Act provisions and others that the
17 Supreme Court structure down, I'm curious why you
18 believe that Congress, in a reconfigured system,
19 would be less protective of liberty and equality,
20 the rule of law, and constitutional democracy
21 than the Court is likely to be over time and
22 unbalanced.

1 MR. FELDMAN: Thank you, Professor
2 Tribe, for that fascinating and important
3 question. Nothing in what I said should be
4 construed to denigrate the capacities of
5 Congress, but I do want to insist on some realism
6 about the motives and about the institutional
7 role of the democratically-elected body like
8 Congress.

9 Sometimes Congress will enact laws
10 that are designed to maximize and enable the
11 quality and the principles that are established
12 under the 14th and 15th Amendments. In some of
13 the instances you mentioned, they did so.
14 Congress did so. The Courts acted, in my view,
15 incorrectly in constraining, limiting, or
16 striking down those laws.

17 In many, many other contexts Congress,
18 like other elected bodies including state
19 legislatures, has an incentive to serve the
20 interests of the people who elect it. As you
21 have noted many times, Professor Tribe, our
22 Congress is not a democratic body itself fully,

1 in the sense that the Senate is structured on
2 non-democratic principles, or largely non-
3 democratic principles.

4 Under those circumstances, it will
5 simply be the interest of each individual
6 legislature, and so, therefore, in the interest
7 of the collective legislature, to do what its
8 members perceive that their voters wanted to do.

9 That ill-places Congress to engage in
10 any form of meaningful check on the rule of law
11 when Congress thinks the rule of law is not
12 leading to the right outcome; on fundamental
13 rights when it believes that those fundamental
14 rights ought not to be respected; and also on the
15 electoral process, where Congress, of course, has
16 a crucial constitutional role in implementing the
17 14th and 15 Amendments, but in which its very
18 partisan makeup renders it extremely challenging
19 for Congress to be, and to be perceived to be,
20 even-handed with respect to the enactment of
21 processes for overseeing democracy.

22 And, you know, to me the way that each

1 person should answer this question for himself or
2 herself is just to imagine a world where a
3 question of fundamental rights is in play, not in
4 every moment in our shameful past, partly
5 shameful past, but also in our somewhat better,
6 in certain respects, present.

7 Or a moment where the democratic
8 process is in play and the question of how an
9 election should turn out has to be decided by
10 some institutional actor, and ask would you
11 rather that Congress did this, and not in that
12 question, imagine a Congress controlled by your
13 preferred party, but imagine a Congress
14 controlled by the other party. I think in almost
15 every instance, we would conclude that we benefit
16 from the presence of an institution that is not
17 Congress who made these decisions.

18 COMMISSIONER TRIBE: Thank you,
19 Professor Feldman.

20 I am curious before I ask a question
21 I have for Professor McConnell, I wonder,
22 Professor Bowie, whether you would want to answer

1 Professor Feldman, because I think that most
2 fundamental clash that I understand in the
3 testimony we've heard so far is a kind of
4 unbalanced comparison of who you were rather have
5 in control in a democratic system; a
6 democratically, or almost democratically elected
7 Congress, or an elite Supreme Court. What is
8 your response to Professor Feldman?

9 Briefly, perhaps, so I can ask
10 Professor McConnell a question.

11 MR. BOWIE: Thank you for the
12 question, Professor Tribe. My response would be
13 to consult Professor Scheppele. I think that her
14 testimony regarding international comparison
15 provides a really great alternative. If we want
16 to see what a democracy looks like absent a
17 Supreme Court with the superweapon of strong
18 judicial review, we should look at democracies in
19 which their Supreme Courts lack the superweapon
20 of strong judicial review.

21 I think if the United States could
22 aspire to be as democratic as New Zealand, or

1 even the United Kingdom in this respect, we would
2 all be better off. That's not to say that other
3 countries have answered these questions of
4 balancing the judiciary with the legislature
5 universally more correctly than us, or that we
6 should abandon American tradition, but just to
7 the extent that this ultimately comes down to
8 speculation about what would Congress do if it
9 enforced the Constitution as the Constitution
10 asks Congress to do. The 14th and 15th Amendment
11 give Congress the authority to enforce its terms.
12 I think we could imagine a more democratic system
13 and we can see that these sorts of systems work.
14 We can look across the border at Canada where
15 there's legislative override. We can look across
16 the ocean at the United Kingdom where the courts
17 lack this power. You can look at other countries
18 in which democracies work.

19 COMMISSIONER TRIBE: Thank you,
20 Professor Bowie.

21 Professor McConnell, in your
22 testimony today, you spoke about the danger of

1 expanding the Court, but in your written
2 testimony, you argue that a different proposal,
3 namely staggered 18-year terms, would have some
4 important salutary effects, including, as you put
5 it, making the political balance of the Court
6 reflect the opinions of the people over time as
7 expressed in their choice of presidents and
8 senators, rather than the happenstance of health
9 or accident or the strategic timing of Justices
10 in resigning.

11 Just playing the devil's advocate for
12 a moment, I would ask why settle for what the
13 late Justice Ruth Bader Ginsburg might have
14 called skim milk democracy, rather than going for
15 the real thing by giving Congress the final word,
16 subject to the amendment process, on the
17 constitutionality of federal laws as Professor
18 Bowie proposes.

19 MR. MCCONNELL: Thank you, Professor
20 Tribe, for that interesting question. Two
21 reasons. One is that there is a difference
22 between the momentary passions of democracy and

1 the very long term multi -- actually, you know,
2 multi-generational, according to my proposal,
3 workings out of democracy. It's a slow -- this
4 enables the Courts to be insulated from the
5 passions of the moment. I think all of us can
6 recognize times in history when that was a
7 valuable function for the Courts.

8 The second point about this is that
9 the -- this is where I would just like to take
10 issue with Professor Bowie. Of course he's right
11 that our system is less democratic. The question
12 is whether being less democratic is bad or good.

13 Everyone can identify decisions of the
14 Supreme Court that they think were terrible, but
15 most people also identify decisions of the
16 Supreme Court that they think were excellent and
17 that helped move the country in ways that would
18 not have happened in the absence of a Court where
19 purely democratic processes would not have come
20 to anywhere near as good an outcome.

21 So it's seems to me it's a very
22 different proposition to have a Court, which is

1 going to act as a Court, but affected over time
2 by politics, by political selection, and having
3 unbridled democracy.

4 COMMISSIONER TRIBE: Thank you,
5 Professor McConnell. Speaking of unbridled
6 democracy, I wonder, in the time I have left, if
7 I could ask Professor Bowie to reflect on an
8 image that his testimony presents. He says that
9 the Court's relationship to Congress is best
10 understood as that of an umpire, and not that of
11 an umpire overseeing the batter but the rider
12 overseeing a horse. That is, even when the
13 reigns aren't tightened, the horse knows that the
14 rider is in control.

15 Professor Bowie, you seem to assume
16 that if we have a riderless horse, and take the
17 rider and the reigns off, that the history of a
18 Congress more protective of individual rights and
19 equality than the rider has been would simply
20 continue. Why would not a riderless horse run
21 roughshod in moments of passion over individual
22 rights of equality and leave us worse off?

1 MR. BOWIE: Thank you for the
2 question. So I guess I have two responses. The
3 first is that removing the supreme power of the
4 Court to interpret the Constitution does not
5 render the United States riderless, any less than
6 it renders any other democracy riderless.

7 We control our government. The ideal
8 of a democracy is rule by the people. I'm not
9 recommending that we create a dictatorship. I'm
10 recommending that we enhance our democracy. I
11 agree with, Professor Feldman alluded to past
12 comments you've made about how Congress is not
13 sufficiently democratic. I agree with that. I
14 think Congress should be far more democratic than
15 it is right now. But I strongly disagree with
16 Professor McConnell that the problem with our
17 system is too much democracy, or that the level
18 of democracy in our system is adequate. I would
19 like to see far more to ensure that our rights
20 are protected by us.

21 In response to the very classic since
22 Plato argument against democracy that it will

1 lead to mob rule, I just disagree. I think
2 democratic theory has advanced considerably in
3 the past two millennia, far from just rule by
4 referendum, or even ruled by representation.

5 I think there are many, many
6 alternatives to ensure that the people police
7 themselves, rather than asking for people to
8 remove themselves from the political process and
9 server as our guardians.

10 COMMISSIONER TRIBE: Thank you,
11 Professor Bowie.

12 I wish I had time to ask Professor
13 Scheppele and Professor Kalman some questions,
14 but my fellow Commissioners I'm sure will have
15 good questions for them.

16 CHAIR RODRIGUEZ: Thank you,
17 Commissioner Tribe.

18 Our next questioner is Commissioner
19 Alison LaCroix, who is the Robert Newton Reid
20 Professor of Law at the University of Chicago Law
21 School.

22 Professor LaCroix, please proceed.

1 COMMISSIONER LACROIX: Thank you very
2 much. And thanks to our panelists for being here
3 today. I'd like to start with Professor Kalman.

4 Professor Kalman, thank you very much
5 for being here today and for your testimony.
6 Given the richness of your scholarship, there are
7 many, many questions on which I'd like to hear
8 your thoughts, but because our time today is
9 limited, I'll just ask a few.

10 The first question is this, and this
11 ties into some of the discussion that we've just
12 been having. As you know, the phrase, the
13 countermajoritarian difficulty, is a critique of
14 the Supreme Court that was articulated in many
15 fashions, but most famously by Alexander Bickel
16 in 1962.

17 It refers to this apparent tension
18 between judicial review, courts reviewing and, in
19 some cases, striking down acts of the
20 legislature, and the democratic process. My
21 question for you is, is the Court, and in your
22 opinion should the Court be, a

1 countermajoritarian institution?

2 MS. KALMAN: Thank you for the
3 question. I do think that it all depends on what
4 era we're talking about the Court in. Bickel
5 wrote that critique just as the Warren Court was
6 about to shift into high gear, and most people
7 would apply that critique to the Warren Court.

8 But I believe that recent scholarship
9 by Corinna Lain and Barry Friedman and others
10 suggest that the Court, even the Warren Court,
11 which is supposedly our liberal
12 countermajoritarian Court, was following popular
13 opinion.

14 COMMISSIONER LACROIX: And so in other
15 eras then you would say it depends because the
16 Court might not be following popular opinion, if
17 I'm following your train of thought?

18 MS. KALMAN: Yes.

19 COMMISSIONER LACROIX: Okay. And then
20 another question. Referring to your 2005
21 American Historical Review article, the title of
22 which is the Constitution, the Supreme Court, and

1 the New Deal, you examine what some commentators
2 have termed the constitutional revolution of
3 1937, and you identify a few key factors that you
4 argue, and you alluded some of these in your
5 testimony, that you argue led the Supreme Court
6 to shift its constitutional doctrine in 1937 in
7 such a way that it began upholding New Deal
8 programs supported by the Roosevelt
9 administration. You identify a number of factors,
10 some within the Court, its own doctrine, and some
11 outside the Court.

12 Again, you alluded to some of these,
13 so discussions of a constitutional amendment to
14 limit the Court's power, a sense that the
15 Justices had become out of touch due to lack of
16 turnover, and momentum in Congress to limit the
17 Court's jurisdiction or change its case selection
18 procedures. Then in your account, then we talk
19 about the presidents. So the Roosevelt court-
20 packing plan and, indeed, the electoral victory
21 enter in addition to those other factors.

22 Based on these factors you argue the

1 New Deal didn't reconstruct constitutional law
2 out of thin air, but the doctrinal revolution
3 would not have happened without sustained
4 presidential leadership. So I'm wondering, in
5 your view, what the relationship is between
6 internal change in the Court's own doctrines,
7 external pressure from the President, and
8 Congress. This is both a question about 1937,
9 but perhaps more generally.

10 MS. KALMAN: I think that the Court
11 over time has shown that it is very sensitive to
12 public criticism. In this instance, I think that
13 the cudgel of the court-packing plan, the threat
14 of the court-packing plan, helped the Court to
15 take advantage of the flexibility in existing
16 doctrine that it had, as people like Corwin had
17 pointed out, it had in 1934 in the Twilight of
18 the Supreme Court to take advantage of that
19 flexibility to begin reaching results that were
20 more in accord with Roosevelt's preferences, and
21 also in accord with popular will.

22 COMMISSIONER LACROIX: So would you

1 say there was a constitutional revolution in
2 1937? Again, another of these phases that is
3 often thrown around.

4 MS. KALMAN: Over the years that I
5 have worked on this question, I have very much
6 come around to the view of Barry Cushman and
7 other internalists that the constitutional
8 revolution began in 1934 and continued into the
9 '40s.

10 Nevertheless, I think that 1937 moment
11 is key to keeping that revolution ongoing. I
12 think that the tone of the Court's decisions,
13 beginning in the spring of 1937, shifted
14 dramatically, possibly as a result of Roosevelt's
15 victory in November '36, when we begin to see a
16 flight of decisions upholding the New Deal,
17 possibly as a result of the earlier outcry
18 against the minimum wage decision, and possibly
19 as a result of the court-packing plan.

20 COMMISSIONER LACROIX: And would you
21 -- building on that point, do you regard the
22 story of 1937 and, as you know, sometimes it's

1 much more about what we remember 1937 to be than
2 what it was historically, but in your view, is
3 the story of 1937 a story about the Court
4 switching its views, in which case one might say
5 President Roosevelt lost?

6 Is it a story about the President
7 versus the Court more institutionally, in which
8 one might say the President won or, at least, had
9 some qualified victory? At what level should we
10 think about this 1937 story?

11 MS. KALMAN: Well, it's difficult to
12 know whether Roosevelt was rationalizing his
13 defeat or not. He always said that it would be a
14 little naive to think that there was no
15 relationship between the court-packing plan and
16 the spring '37 issues upholding the minimum wage,
17 upholding the National Labor Relations Act, and
18 upholding Social Security. I think that's quite
19 possibly correct.

20 COMMISSIONER LACROIX: So in that
21 sense, it sounds like it's a story more about the
22 President or the institutions at the level of the

1 different institutions in the federal government;
2 the President, the Court, Congress in the
3 background.

4 MS. KALMAN: Yes.

5 COMMISSIONER LACROIX: Okay. Then I
6 have a related question, I think for Professor
7 Feldman, which is thinking about your comments
8 and your testimony here about who would be the
9 better institution, sort of think about the
10 system we have, and thinking about the lessons of
11 1937 as well, so I take your point to be the
12 court-packing plan in 1937 took expansion of the
13 Court off the table in some sense.

14 Should we though think about 1937 as
15 a story about separation of powers perhaps in a
16 Madisonian sense, where we saw the President
17 pushing back, Congress pushing back on the Court,
18 and that that is an illustrative example going
19 forward?

20 MR. FELDMAN: Thank you, Professor
21 LaCroix. I partly agree with that formulation of
22 what I said, and partly -- slightly would change

1 the emphasis and I would say the following. I do
2 think that in a system of checks and balances
3 which we do indeed have, checks and balances that
4 are not exactly the ones envisioned in 1787, the
5 Court does function as a crucial check on both
6 Congress and on the executive. I think we've
7 seen that extremely clearly, especially with
8 respect to the executive in recent years.

9 Simultaneously I think that the
10 experience of the Roosevelt court-packing plan is
11 a reminder to us that there is another check in
12 play here, and that is actually the implicit
13 threat that under some circumstances it is within
14 the constitutional power of Congress and the
15 President to pack the Court or to engage in
16 jurisdiction stripping or other forms of
17 transformative reform.

18 That functions as a check on the
19 impulses of the Justices of the Supreme Court
20 when it comes to issuing decisions, let's
21 imagine, over an extended period of time that are
22 deeply and fundamentally out of step with the

1 overwhelming set of views of the great majority
2 of Americans.

3 In this sense, this is meant to be
4 responsive to Professor Bowie's point, his
5 important point, about the Supreme Court not
6 being treated as an institution that is unchecked
7 itself, there is a check in the constitutional
8 system, not merely for the possibility of
9 amendment, but through the extreme and unlikely
10 possibility of Court Packing.

11 To me the take away of the Roosevelt
12 Court Packing is not merely that it failed. I
13 agree with Professor Kalman, and have so argued
14 in my own writing, that it was, in fact, pretty
15 successful in certain respects. Its success was
16 to send a message to the Supreme Court. If you
17 go so far outside of the overwhelming consensus
18 of the American people, there will be
19 consequences for your institution. That, I
20 think, is functional and actually somewhat
21 helpful to have in the system as well.

22 COMMISSIONER LACROIX: Thank you very

1 much, Professors Kalman and Feldman.

2 CHAIR RODRIGUEZ: Thank you,
3 Commissioner LaCroix.

4 Our next Commissioner to pose
5 questions is Thomas Griffith, the former Judge on
6 the U.S. Court of Appeal for the D.C. Circuit,
7 and now counsel at Hunton Andrews and Kurth.

8 Commissioner Griffith, the floor is
9 yours.

10 COMMISSIONER GRIFFITH: Thank you very
11 much, Commissioner Rodriguez.

12 Thank you to all the panelists for
13 your written statements and oral statements here.
14 And thank you to the members of the public and
15 others who submitted statements. I can't think
16 of anything more invigorating or important for us
17 to discuss than how we might all as citizens work
18 to make the Constitution achieve its goal of
19 becoming a more perfect union.

20 Professor McConnell, if I could direct
21 my first question to you. In your opening
22 statement, you made, as you know, the purpose of

1 this session is to describe the origins of the
2 contemporary debate and to provide some
3 perspective on this debate.

4 I noticed in your opening statement as
5 you were describing how this Commission came to
6 be, what the nature of the present debate is, you
7 refer to arguments that norms were violated or
8 abridged in the recent Supreme Court nomination
9 process. Could you be a little bit more specific
10 about that, what you were referring to? And then
11 could you give us some perspective on how those
12 particular norms have been treated by various
13 players over time?

14 MR. McCONNELL: Thank you, Judge
15 Griffith. Certainly, norms have been violated
16 over -- I would date the norm violating to really
17 begin with the nomination of Robert Bork in
18 which, I mean, just a few years before, Antonin
19 Scalia was confirmed 98 to nothing. There was an
20 unprecedented ideological assault on Bork which
21 had not happened before.

22 That violated a certain norm of

1 confirmations. And after a brief respite, that
2 sort of returned to become the new normal. There
3 are also certainly norms violated with respect to
4 Court of Appeals nominations.

5 They also used to be rather rapid and
6 consensual. And at a certain point, in fact, in
7 2003 just after I was confirmed to the 10th
8 Circuit, the party opposite to the President
9 decided to start filibustering Court of Appeals
10 nominees. And then that same party when the same
11 device was used against them decided to eliminate
12 the filibuster. So the norms were broken twice.

13 The particular norm that is under
14 discussion now has to do with confirmation,
15 whether Merrick Garland's nomination by President
16 Obama in the presidential year -- presidential
17 election year was a violation of the norm. I
18 would say not. I personally wish that all
19 nominees, including Garland, would receive prompt
20 hearings and a vote, and an up or down vote.

21 In my idea world, that would happen
22 for everyone. Unfortunately, that was not -- I

1 don't think that has been an established norm.
2 In 1992, Joe Biden himself said that they would
3 not consider any nomination made by President
4 George H. W. Bush in a presidential year. I
5 think -- and President Obama's White House
6 counsel herself said that she would have done the
7 same thing.

8 The real norm right now with respect
9 to nominations in a presidential year is not to
10 treat them well, not to treat them the way I wish
11 that they were treated. So I don't actually -- I
12 think there's a lot of rhetoric flying around
13 about norm breaking. But what we really have had
14 is a series of tit-for-tat escalations in
15 partisan manipulation and partisan tactics over
16 judicial nominations that have led us to this
17 place.

18 COMMISSIONER GRIFFITH: Okay. And
19 just to follow up. And we're talking about
20 origins and perspectives of the contemporary
21 debate. Do you have views as to why this
22 stretching of norms and this tit-for-tat began?

1 I think you identified it as have starting or
2 being accelerated with Judge Bork's nomination to
3 the Supreme Court. But what was it or what is it
4 about the present political moment that has
5 created this tit-for-tat in your view?

6 MR. McCONNELL: Well, I think it's a
7 combination of two things. One is the increasing
8 polarization of American life which is extending
9 to virtually every corner of our culture and has
10 become, I think, quite poisonous and has -- it's
11 not a new thing. It's been happening over the
12 last several decades.

13 But you combine that with the fact
14 that the courts do have what I would -- I agree
15 with Mr. -- with Professor Bowie, an oversized
16 role in our national decision making. I don't
17 they should be eliminated from it. But I do wish
18 that the courts were more restrained and less a
19 substitute for politics in America.

20 But when you have very important
21 courts in a hyperpolarized political environment,
22 then every single seat looks like it is

1 definitive for the fate of the country. And I
2 can think back. I think almost every Supreme
3 Court nomination in recent decades, people say
4 well, this is the most important. This -- the
5 Court -- this will determine the course of the
6 Court for generations.

7 And when that's true, then the
8 happenstance of the timing of departures from the
9 Court becomes extremely important. And every one
10 of them becomes a very big fight. That's why my
11 proposal that I thank Professor Tribe for
12 bringing me back to that since I didn't have time
13 for it in my opening statement.

14 The proposal of 18-year terms was --
15 on a staggered basis would, I think, ameliorate
16 that because it would smooth things out. It
17 would mean that it doesn't really -- the stakes
18 would just be so much lower and they would be
19 more predictable. They would be less arbitrary
20 and less manipulable, and I think that would be a
21 good thing. I do urge this Commission as you're
22 looking at various proposals to apply as one of

1 your criteria will this lower the political
2 temperature over the judicial selection process.

3 COMMISSIONER GRIFFITH: I just want to
4 ask you one quick question to take advantage of
5 your experience as a federal appeals court judge.
6 It seems to me that much of the debate
7 surrounding the Court today and its role makes an
8 assumption that judges or Justices act as
9 partisan players. As a judge on the 10th Circuit
10 and as a scholar of the judiciary, how accurate
11 is that assumption in your experience and in your
12 view?

13 MR. McCONNELL: Well, I think the
14 judiciary performs as a legal institution
15 remarkably well in the vast proportion of cases.
16 That was my personal experience, and that's my
17 observation of the Supreme Court and other courts
18 as well. You look at the Supreme Court recently,
19 and in a world where people are so divided on so
20 many issues, the Court comes to unanimous
21 decisions in very difficult cases.

22 Like, for example, the Philadelphia

1 case about the exclusion of Catholic social
2 services from the foster care program was a
3 unanimous decision. Decisions protecting
4 churches' ability to hire ministers without
5 governmental interference, that was a unanimous
6 decision. The Court, despite being -- having a
7 majority dominated by Republicans rebuffed what I
8 thought was a quite silly challenge to Obamacare.

9 But it also struck down President
10 Trump's reversal of President Obama's orders
11 having to do with -- the DACA orders, having to
12 do with immigration. So it is not as -- it is
13 nowhere near as partisan an institution as I
14 think the press sometimes portrays it. I do
15 think that in a small number of hot-button,
16 highly controversial questions that the Court
17 does seem to revert to a more ideological and
18 ideologically predictable mode. But I do think
19 that's a relatively small part of the docket.

20 COMMISSIONER GRIFFITH: Thank you.
21 I'd love to ask other questions of the other
22 panelists, but my time is up. Thank you very

1 much.

2 CHAIR RODRIGUEZ: Thank you,
3 Commissioner Griffith. Now we turn to
4 Commissioner Trevor Morrison, who's the Dean and
5 Eric M. and Laurie B. Roth Professor of Law at
6 the NYU School of Law. Commissioner Morrison,
7 please proceed.

8 COMMISSIONER MORRISON: Thank you,
9 Commissioner Rodriguez. Thanks to all of our
10 panelists, both for your remarks this morning and
11 for your written testimony which has been very
12 helpful. I wanted to start with Professor Bowie
13 if I might.

14 Professors Feldman and McConnell in
15 particular have raised concerns about any kind of
16 reform of the Court that would threaten the
17 independence of the Supreme Court, the
18 independence of the judiciary generally, but in
19 particular the Supreme Court, the fear being that
20 the Court's independence is the key ingredient of
21 its institutional legitimacy. And if that
22 institutional legitimacy is sapped, then the

1 Court will be less effective in playing its roles
2 with respect to the preservation of the rule of
3 law, fundamental rights, and democracy itself.
4 I'm interested to hear from you on this question
5 about the value of independence.

6 Do you agree that the Supreme Court's
7 independence is an important value? Or in
8 advocating for a greater direct attention to
9 democracy, is it your picture that perhaps not
10 only the role of the Court on key issues of
11 democracy should be smaller but that the Court
12 itself should be more enmeshed in democratic
13 politics and therefore that you would wish to
14 decrease the independence of the Court? In other
15 words, do you see reduction of the Supreme
16 Court's independence as a cost you would be
17 willing to pay in return for enhanced democracy?
18 Or do you see it actually as a goal that we
19 should be seeking for its own sake?

20 MR. BOWIE: Thanks so much for the
21 question, Dean Morrison. So I do not recommend
22 the abolition of courts. I do not recommend the

1 abolition of judicial independence.

2 I think that courts will always play
3 an important role in ensuring that the laws
4 passed by Congress are administered impartially
5 without fear or favor. But I don't think that
6 judicial independence or the rule of law requires
7 using undemocratic methods to resolve the most
8 fundamental disagreements about what the rule of
9 law requires or how to balance fundamental
10 rights. So for example, for what I imagine of a
11 world with judicial independence in which
12 Congress is still the supreme interpreter of the
13 Constitution, take Shelby County.

14 So in the aftermath of the Civil War,
15 Congress, I think correctly, believed that the
16 rule of law required it to commandeer state
17 governments and demand that they adopt state
18 constitutions that enfranchised Black people.
19 Congress ratified its own actions with the 14th
20 and 15th Amendments. And white reactionaries
21 opposed all of this on grounds of federalism. I
22 think judicial independence would require courts

1 when enforcing Congress' enforcement of the 14th
2 and 15th Amendment, to do so in a way in which
3 they don't just favor certain plaintiffs or base
4 their decisions on partisan values.

5 I don't think that partisanship is a
6 great value for judges, although I think that it
7 is an inevitable quality. But I think that
8 judicial independence is totally compatible with
9 enforcing federal law and maintaining the rule of
10 law. And I think that the Supreme Court when it,
11 150 years later, vindicated the people who
12 opposed Reconstruction by holding that Congress'
13 power to oversee voting rights legislation was
14 limited to the Court's own discretion about what
15 is a reasonable response to a problem, is really
16 antithetical both to judicial independence and
17 the rule of law.

18 There's just no definition of the rule
19 of law that requires that outcome. There's no
20 definition of judicial independence that says
21 that we must defer to these nine people about
22 whether Congress can pass a voting rights act.

1 So I think if the Court had reached that same
2 conclusion from Shelby County in the 1870s,
3 multiracial democracy would not have been
4 possible. And to the extent that there is a
5 conflict between judicial independence and
6 multiracial democracy, I would pick the latter
7 every time.

8 COMMISSIONER MORRISON: Thank you.

9 Just one additional question about free press, if
10 I might. To the extent that the position you've
11 described today and in your written testimony is
12 really about a kind of prediction of which
13 institution is likely to do best with respect to
14 advancing a set of core values of democracy, and
15 to the extent that the population of the Supreme
16 Court at any given point in time is itself, as
17 Professor Feldman noted in his written testimony,
18 a function of chance since we don't have 18-year
19 terms with a kind of regularized vacancy and
20 appointment process, is it possible that if the
21 last 50 years had gone differently and if the
22 chance of particular retirements or deaths of

1 Justices, the timing of that had happened
2 differently and so certain presidents got in even
3 four-year terms three nominations as opposed to
4 none that we would have very different personnel
5 on the Court and that you might favor a more
6 central role for the Court as compared to
7 Congress on the basis of a prediction that that
8 Court with those different people on it would be
9 better when it came to democracy?

10 MR. BOWIE: Yes, so I think you raise
11 a valid point. The problem that I am identifying
12 with the Supreme Court is that judicial review is
13 an anti-democratic super weapon. If that super
14 weapon has to exist, then yes, I would like to
15 see it distributed equitably instead of our
16 current system in which the Republican party had
17 -- has controlled of the Supreme Court for the
18 past 50 years.

19 Or at least Justices appointed by
20 Republican presidents have been the majority of
21 the Supreme Court since 1970. So do I think that
22 if the personnel had been distributed more

1 equitably over the past 50 years so that it was
2 not single party control for my entire life?
3 Yeah, I think I would prefer that world.

4 I would prefer a world in which the
5 super weapon were wielded by my political allies,
6 I would prefer a world in which the super weapon
7 were wielded responsibly in an pro-democratic
8 way. But for the same reason why I don't support
9 dictatorships, even if the dictator might have
10 some good ideas and even if the dictator might
11 look at the polls and the dictator will still be
12 checked because they don't want a revolution so
13 they'll try to keep their decisions within the
14 mainstream, I would still oppose a dictatorship
15 because it violates my own fundamental values
16 about the importance of democracy. And so I
17 think better than -- a better solution to the
18 problem of the Supreme Court is not to mess
19 around with personnel or hope that the dice roll
20 in our favor in the future.

21 I think the better solution is to
22 disarm the Court. I think that would resolve a

1 lot of the tension that Professor McConnell
2 identified as far as what are the norms that have
3 been violated over the past 30 years. I think if
4 the Court were disarmed, then the problem of
5 increased polarization over judicial appointments
6 would also be resolved in some sense.

7 I think there will always be an
8 important role for judges. There will always be
9 disputes over how judges apply the law. But
10 given that judges currently define the
11 fundamental law for all of us, I think it's
12 inevitable that we're going to fight over who
13 gets to make those decisions.

14 COMMISSIONER MORRISON: Thank you very
15 much. Professor Feldman, in your written
16 testimony and in your remarks this morning, you
17 talked a lot about the worry that certain kind of
18 Court reform proposals, in particular, court-
19 packing, would threaten the independence and
20 therefore the legitimacy of the Court. You also
21 allow, I think, that it's at least conceivable
22 that the Court could itself by its own actions

1 threaten its legitimacy.

2 And near the end of your written
3 remarks, you sort of hypothesize a scenario where
4 the Court wielding the Constitution as a sword
5 strikes down major legislation favored by a large
6 majority of the public over an extended period of
7 time where the result is that a large majority of
8 the public comes to see the Court as just
9 exercising its own will rather than any
10 legitimate power. And in that circumstance, my
11 first question is am I right in understanding you
12 that if that were to come to pass, you might be
13 prepared to say that not just the threat of
14 court-packing but actually legislation to adjust
15 the size of the Supreme Court would be
16 defensible?

17 And then the second related question
18 is what if a very significant portion of the
19 American people today think that, not so much
20 because of the Court's own actions but because of
21 how various nominations have been handled in
22 recent years, the Court's legitimacy is seriously

1 threatened now?

2 What if, just as an empirical matter,
3 that is the view that a very large fraction of
4 the American people have? I'm not suggesting
5 that necessarily that's the case. But if it
6 were, would your view on the advisability of
7 Court reform legislation change?

8 MR. FELDMAN: Thank you, Dean
9 Morrison, for those terrific questions. To
10 answer them together, let me frame the answer by
11 beginning by noting that we should not fall into
12 the habit of assuming that judicial review is,
13 quote, anti-democratic. Now judicial review is
14 counter-majoritarian in the sense that the
15 Supreme Court Justices are not directly elected.
16 So they don't reflect an immediate majority.

17 But if one believes that the
18 definition of democracy includes constitutional
19 democracy, that is builds in principles of
20 equality and principles of liberty, then whatever
21 institution we choose to protect equality, to
22 protect liberty, and to protect a democratic

1 process is a democratic institution. That's a
2 point that was made many, many times by the late,
3 great Ron Dworkin of the NYU Law School. And
4 it's a point that I think we really need to
5 remember here because it's very different to say
6 the Court is counter-majoritarian than it is to
7 say the Court is undemocratic or anti-democratic.

8 The reason that matters in responding
9 to your points, Dean Morrison, is with respect to
10 the first. I see the idea of breaking the
11 legitimacy of the Supreme Court through court-
12 packing as a break-glass measure for
13 circumstances where ultimately we the people who
14 are the ultimate sovereign in the American
15 constitutional theory think that the Supreme
16 Court has through a consistent pattern of
17 behavior ceased to defend the principles of
18 liberty, equality, and democracy in ways that we
19 recognize as supporting those principles.

20 And I say that because reasonable
21 people could differ about what those principles
22 should entail. And very often, we will disagree

1 with what the Supreme Court says in a given case.
2 But if overwhelming majorities of people continue
3 to disagree with that over time, there is this
4 break-glass measure. And it ought to be there
5 for those extreme circumstances, and it ought
6 never to be used if it works in the way that it
7 is supposed to work.

8 Now with respect to your second point
9 about whether we are presently in a crisis of
10 legitimacy of the Supreme Court, my own empirical
11 view is that we are not in such a crisis of
12 legitimacy. We're, I think, in a moment now
13 where many progressives love some recent
14 decisions of the Supreme Court, including most
15 recently the Obergefell decision on
16 constitutional affairs ensuring a right to gay
17 marriage.

18 The Court's statutory decision, we
19 haven't spoken much about statutory decisions,
20 but the Court's statutory interpretation decision
21 in Bostock, these are very popular cases, the
22 Title VII case for gay and trans people's rights.

1 These are very important decisions that many
2 progressives like. And then there are important
3 decisions that conservatives have appreciated,
4 including religious liberty decisions, some of
5 which have been unanimous, and a range of other
6 decisions, and some of which progressives don't
7 like.

8 I think we're in a mode where
9 increased polarization means that people on each
10 side of the spectrum think oh, no, what if the
11 Court were to consistently decide cases against
12 me? That would be terrible. And that's
13 understandable, but it is built into the
14 structure of judicial review.

15 And my last thought on that is simply
16 that I don't think of judicial review as a super
17 weapon. It is not a superpower. It is a power
18 that structurally has emerged as a mechanism of
19 checking legislative and executive action that is
20 itself subject to structural checks over the long
21 term.

22 COMMISSIONER MORRISON: Thank you.

1 CHAIR RODRIGUEZ: Our final
2 Commissioner to ask questions is Commissioner
3 Elise Boddie, Professor of Law and Judge Robert
4 L. Carter Scholar at Rutgers University.
5 Professor Boddie, the floor is yours.

6 COMMISSIONER BODDIE: First of all,
7 I'd like to thank all of our panelists for your
8 testimony today and for being here. I'm going to
9 turn to Dr. Scheppele. And thank you, Dr.
10 Scheppele, for being here. And just to sort of
11 refresh everyone's recollection, in your
12 testimony and in your remarks today, you've
13 pointed to certain tensions in our constitutional
14 system, namely the fact that the Court can
15 nullify federal legislation combined with the
16 fact that it's very difficult to amend our
17 Constitution. And those two factors combined put
18 enormous pressure on the confirmation process.

19 You've identified a framework for
20 thinking about possible reforms by pointing to
21 mechanisms in other constitutional democracies
22 and have urged us to sort of think about those

1 other mechanisms as alternative ways to approach
2 our constitutional democracy. So just as you've
3 noted in your work, our country is also very
4 polarized. Given that, how should we think about
5 Court reform and the various possibilities that
6 you've identified for rethinking our
7 constitutional system?

8 MS. SCHEPPELE: So thank you for the
9 question. And I think that in a very polarized
10 system, it's very hard to do any kind of reform.
11 But the more I listen to the debate as it's
12 evolved on the panel, the more I think that one
13 of my proposals which might have looked extreme
14 when I made it looks more reasonable in light of
15 the alternatives which is the idea of giving
16 Congress an override on judicial decisions the
17 way it has an override on presidential vetoes
18 because what that would enable -- I mean that as
19 a way of balancing out the power of the Supreme
20 Court, would mean that the Congress and the
21 motivated and outraged parts of the public
22 wouldn't just try to break the Court, right, by

1 court-packing or changing its rules or doing
2 something to the Court's role in the system in
3 general.

4 But that way, Congress could come in
5 and object to specific decisions and do so in the
6 complete light of day in congressional debate on
7 the floor of both houses. And that would signal
8 -- that's also a kind of deterrent to the Court
9 issuing decisions that might be overridden. But
10 it would also limit Congress' attack on the power
11 of the Court to specific decisions and not to the
12 institution as a whole.

13 I'm actually in favor of strong
14 courts. I think every democracy needs them for
15 some of the reasons that Noah Feldman just
16 indicated. The question is when the Court
17 becomes so powerful and so hard to override that
18 all of the pressures go into who's on the Court,
19 how are the judges nominated, and every single
20 confirmation process becomes this drama that
21 we've seen in the U.S. So the question is how to
22 take that political energy kind of out of

1 pressure on the nominations process and into some
2 other forum. And I think the democratic thing to
3 do is to channel it back to Congress and see if a
4 decision is that unpopular, whether you can get
5 super majorities in both houses to override a
6 decision.

7 COMMISSIONER BODDIE: So I'm wondering
8 how you assess or whether you think there are
9 risks to Court reform. And I think you partly
10 answered that question in your response about
11 sort of the shape that Court reform might take.
12 But are there risks to not pursuing Court reform?

13 MS. SCHEPPELE: Absolutely. And I
14 think we see them every time there's an opening
15 on the Court for the reasons that Professor
16 McConnell identified. Every judicial
17 confirmation process has now become one of the
18 most lightning-rod, polarized discussions. I
19 spend a lot of my time talking to judges in other
20 countries. And they keep saying to me, like, I'm
21 so glad we don't have to go through that.

22 And so one thing it does, the

1 confirmation process discourages some of the most
2 worthy candidates from even putting themselves
3 through it. The process of the initial
4 nomination is quite opaque. All of that seems to
5 me to have generated a kind of dysfunctional
6 nominations process that threatens the legitimacy
7 of the Court itself.

8 So I do think that something urgent
9 needs to be done actually. The question is how
10 to do that without damaging the Court itself and
11 how to do that while still preserving a sense
12 that I think many Americans have, as do many
13 citizens in democracies around the world, that
14 the democratic process itself needs judicial
15 checks. But in a system of checks and balances,
16 the judicial check itself needs a check.

17 So the question is how to do that, and
18 making constitutional amendment easier is one of
19 them. I think giving the legislature a power of
20 override is another. And strengthening the
21 nonpartisan quality of the judicial screening
22 process for nominations to the Court would be a

1 third way to do it. But I think if we don't do
2 something, we're in serious trouble as we already
3 are.

4 COMMISSIONER BODDIE: So one
5 justification for judicial review in the United
6 States as you know is that it allows federal
7 courts to protect groups of people who cannot,
8 for various reasons, protect themselves in the
9 political process. Do you have a sense of how
10 the rights of minority populations, racial,
11 ethnic, religious, language, et cetera, have
12 fared in the constitutional systems that you
13 describe in your testimony, Germany, South
14 Africa, and Canada, for example?

15 MS. SCHEPPELE: Yeah, so I think in
16 all of those systems, frankly, those courts have
17 a better track record than ours do partly because
18 they have different constitutions I should say.
19 So when I say that the U.S. system is old and it
20 shows, one of the ways it shows is that the
21 rights that are built into the Constitution are
22 the rights that people would have thought of in

1 the 18th and 19th centuries. And so modern
2 constitutions have much more expansive lists of
3 rights.

4 So if you look at how these other
5 courts have decided cases, they're relying on
6 constitutional language that gives them the
7 permission to be more expansive in the way in
8 which they protect minority rights. That said,
9 one of the reasons why I'm a fan of a strong
10 Court is that majoritarian political processes
11 are pretty tough on two things. One is the
12 protection of minority rights because they are
13 majoritarian processes, and the other is in
14 actually protecting the framework of democratic
15 decision making because, of course, every party
16 wants to benefit itself in the long run and you
17 need to have some kind of checks on that
18 particular kind of authority.

19 So I think that we need strong courts
20 for precisely those reasons. That said, if you
21 wind up with a Court that's making decisions
22 against either -- against a very vocal political

1 minority or against a majority opinion, if you
2 don't have some democratic outlet for that
3 outrage to be channeled, then all of the outrage
4 comes onto the Court and onto the legitimacy of
5 its decisions. And that threatens to destroy
6 that important check in the system which is
7 essential for both minority rights protection and
8 for protection of the democratic process.

9 COMMISSIONER BODDIE: Thank you very
10 much. Professor Feldman, if I could turn to you.
11 I have two questions which I'll just ask and then
12 you can respond however you deem appropriate.
13 The first is that I perceive some tension in your
14 testimony.

15 On the one hand, I interpret you to
16 say that we should protect the institutional
17 legitimacy of the Court which I take you to refer
18 to its independence. On the other hand, you
19 suggest on page 10 of your testimony that a
20 credible threat of Court reform could have some
21 desirable effects. You've talked about this a
22 little bit in your colloquy with Dean Morrison.

1 So how do we know when we've arrived
2 at that point where there is a credible threat
3 that would justify some form of Court reform?
4 You do indicate that if the Court were to strike
5 down major legislation that's favored by a large
6 majority of the public over an extended period of
7 time that that would trigger possibly the need
8 for reform. And so how do we know when we've
9 arrived at that moment? That's the first
10 question.

11 And then the second question again
12 refers to your point about the importance of
13 protecting the Court's institutional legitimacy.
14 But how do -- sort of who decides when and
15 whether legitimacy is threatened? And sort of
16 how do we measure when its legitimacy is
17 threatened?

18 MR. FELDMAN: Thank you, Professor
19 Boddie, for those question. The tension that you
20 identify is the structure of checks and balances.
21 I mean, checks and balances are, by very
22 definition, a form of tension.

1 We constitutionally confer power on
2 one body, and we confer a competing power on
3 another body. And under the Madisonian scheme
4 with all of its flaws and all of its values, that
5 tension is meant to work itself out in a balance.
6 So how do we know that the balance is
7 fundamentally broken?

8 My view is that we would know that
9 under the circumstances that I specified that you
10 just quoted where the Court over an extended
11 period of time consistently decides cases in a
12 way that the will of a large democratic majority
13 or supermajority on questions of the
14 interpretation of the Constitution in the end
15 creates a fundamental problem that requires
16 resolution because the Constitution may have a
17 meaning different from that ascribed to it by the
18 overwhelming majority of the people. That's, in
19 principle, possible that the people could be
20 wrong. But in order for the Constitution to
21 continue to function in the real world as the
22 unifying blueprint that we collectively as

1 citizens live under, the Constitution has to
2 ultimately take on the meaning that is ascribed
3 to it by the overwhelming majority of the people.

4 And where the people are fundamentally
5 split on the meaning of the Constitution, we have
6 two choices. Choice 1 is to break ourselves
7 apart. We did that in a civil war which is in
8 many ways a fundamentally constitutional
9 conflict.

10 There were two fundamentally
11 incompatible moral visions about what the nature
12 of our system ought to be, and only war was able
13 to resolve it tragically but necessarily. Or we
14 can assign to some institution or set of
15 institutions the responsibility for trying to
16 work out our deep disagreements. The way our
17 system has evolved in the post-Civil War period
18 is for the Supreme Court to take on this role,
19 partly on its own motion as it were and partly on
20 the basis of other institutions gradually ceding
21 greater authority and power to it.

22 And so that is what leads to the

1 structure that we have in which lots of people
2 disagree with different decisions by the Supreme
3 Court, no matter which way they go. And lots of
4 people agree with them because our collective
5 disagreements about the meaning of the
6 Constitution are being worked out by the Court
7 itself. When we see that the Court is no longer
8 doing that, it's no longer reflecting existing
9 national disagreements but is adopting a single
10 view consistently and over time that is
11 repudiated by the great majority of people, we
12 will see that the system is broken and we'll see
13 change.

14 Who decides? Ultimately, that
15 decision that I'm describing is a collective
16 political decision which rests in the hands of
17 broadly speaking those who vote for our elected
18 representatives. As all of us have noted,
19 jurisdiction stripping possibly and court-packing
20 certainly lie within the constitutional authority
21 of Congress and the President acting together.

22 So the decision ultimately will rest

1 with them. What we are able to do as witnesses,
2 what you, the Commissioners, are able to do is to
3 offer our advice and counsel to those actors,
4 including to the people as a whole, and to
5 suggest that the circumstance where that decision
6 should be made in that way will arise under those
7 circumstances where not you and I don't like the
8 outcome of a Supreme Court case but where over an
9 extended period of time the Court is acting in
10 ways that repudiate the constitutional values of
11 the overwhelming majority of the people.

12 COMMISSIONER BODDIE: Thank you.

13 CHAIR RODRIGUEZ: We're at the end of
14 our time for this panel. On behalf of all of the
15 Commissioners, I'd like to extend a heartfelt
16 thanks to the witnesses. You've really
17 underscored this morning the importance and the
18 difficulty of the questions that we face. And we
19 greatly appreciate your time.

20 All of the witnesses' testimony is on
21 our website. And the witnesses themselves are
22 invited to submit further statements in writing

1 if they so wish to follow up on this
2 conversation. And Commissioners also may follow
3 up with you at a later date to continue the
4 conversation.

5 We now have a break of about 18
6 minutes, and we will resume at 11:00 o'clock with
7 our second panel entitled the Court's Role in our
8 Constitutional System where I predict we'll
9 continue to discuss many of the same themes that
10 were surfaced this morning. Thanks to the
11 Commissioners who participated. And thank you
12 once again to the witnesses.

13 (Whereupon, the above-entitled matter
14 went off the record and resumed following a brief
15 recess.)

16 CHAIR BAUER: Hello again. This is
17 Bob Bauer. I'm the co-chair with Professor
18 Cristina Rodriguez of the Presidential Commission
19 on the Supreme Court of the United States. And
20 I'm here to introduce and help moderate our next
21 panel which is devoted to questions about the
22 Court's role in our constitutional system.

1 And it will pick up on a number of
2 issues that relate to that, such as proposals for
3 supermajority voting, congressional override, and
4 jurisdiction stripping. But the witnesses will
5 address at their discretion any of the issues
6 that are raised in the executive order by which
7 President Biden established this Commission. As
8 we have previously, we're going to set this up
9 with witnesses each having three to five minutes
10 to present testimony which has been previously
11 submitted in writing.

12 After that, we will have questioners
13 who will have ten minutes each to question the
14 witnesses. And so with that, we will begin. And
15 we'll begin with Professor Rosalind Dixon of the
16 University of New South Wales on the Faculty of
17 Law there. Professor Dixon, you have the floor.

18 MS. DIXON: Commissioner, thank you
19 very much. I want to say thank you very much to
20 you and Commissioner Rodriguez and all of your
21 fellow Commissioners for the opportunity. It's a
22 special privilege to be doing this from Sydney.

1 And I want to start by underscoring what
2 Professor Scheppele said which is I do think
3 there is value to a comparative perspective on
4 these issues. And I'm particularly honored to be
5 asked to provide them.

6 I want to divide my five minutes into
7 three very brief sections. The first is the
8 criteria I think the Commission should be
9 adopting in its work. The second is the range of
10 options available to you in making
11 recommendations to the President. And the third
12 is to focus on what I regard to be the most
13 pragmatic and likely areas or sources of reform.

14 The first is, I think, important to
15 start out with criteria. I was very interested
16 to hear Professor Feldman echo what I would start
17 out by saying which is that fundamental rights,
18 rule of law, and democracy should be the lodestar
19 for the Commission as it should be for the
20 Supreme Court. Of course, those commitments are
21 from time to time in tension with each other. As
22 Dean Morrison was pressing some of the panelists

1 earlier, they can also be complementary. And I
2 think it is important for them to be the
3 beginning and the lodestar for your work.

4 I also want to stress that it is
5 important that those criteria be considered not
6 just within the United States but globally. One
7 of the things that I think is especially welcome
8 about the orientation of the Biden Administration
9 is that it is regaining the sense of the United
10 States as a key player on the global stage and an
11 advocate for the rule of law and democracy on a
12 global stage. And whatever happens in Washington
13 will be watched in Warsaw, in Caracas, in
14 Nairobi.

15 And if this Commission recommends that
16 there should be an increase in the size of the
17 Supreme Court or an alteration in voting rules
18 for the U.S. Supreme Court, I think it's
19 important to bear in mind that it is very likely
20 that that will be emulated elsewhere and often
21 for reasons and rationales that are far less pro-
22 democratic than are animating the work of this

1 Commission and that you will set an example which
2 may be a troubling example when it's used
3 elsewhere, even if primarily your work must
4 inevitably focus on the United States.

5 Second point is about the range of
6 options. As I note in my written submission, the
7 options available to you are, in fact, very broad
8 at a theoretical level. They could involve the
9 kind of formal mechanisms outlined by Professor
10 Scheppele and Professor Bowie. They could
11 involve a range of informal mechanisms, some of
12 which you've alluded to, Commissioner Bauer, in
13 your opening statement, changes that pertain to
14 voting rules, the way in which courts are
15 resourced and supported and implemented. Some of
16 those have venerated departmentalist origins,
17 others less so.

18 And of course, Professor Moyn will
19 talk some more about jurisdiction stripping and
20 limitation measures as potential complements to
21 that swath of options. The Court itself can
22 choose to temper the finality of its decisions in

1 a range of ways. And I sit somewhere in between
2 the set of panelists you've heard so far in
3 thinking that reform is appropriate and justified
4 but only within limits, and that it is very
5 important to consider the balance of arguments
6 based on the particularities of the former.

7 A third point I want to stress is that
8 I think that the polarization that affects the
9 Supreme Court also affects American politics in
10 the ways that Professor McConnell has suggested.
11 And therefore even though I agree with the
12 suggestion that a legislative override with
13 appropriate limits administered by Congress would
14 be a democratically desirable reform going all
15 the way back to Professor Book's (phonetic)
16 proposal of that kind. I do not see how it could
17 be implemented effectively without constitutional
18 amendment, and I personally do not see
19 constitutional amendment as a viable or likely
20 reform given the problem of polarization to which
21 this Commission is responding.

22 So I want to focus my suggestions on

1 two things: one, to add my voice to others
2 including Professor McConnell's. Of course,
3 Justice Breyer has spoken publicly, as have many
4 others, about the value of judicial term limits.
5 United States is alone among constitutional
6 democracies worldwide in having effectively
7 unlimited judicial terms, unlimited as to either
8 the retirement age or the term.

9 And I think that is something that
10 could be changed consistent with the commitment
11 to both judicial independence, the rule of law,
12 and democracy in the ways that Professor
13 McConnell has articulately suggested. I do want
14 to stress, however, that 18 years is a very long
15 time. And that had gained currency in U.S.
16 circles of late.

17 But as I note in my written
18 submission, no other constitutional democracy has
19 such a long term limit. The next closest is
20 Azerbaijan, not company the United States
21 generally seeks in these contexts. And the next
22 longest after that is 12 years. I would strongly

1 urge the Commission not only to consider that as
2 an option that may be consistent with Article III
3 but to consider putting on the table a shorter
4 term limit, closer to the 12 years that the
5 constitutional court of Germany, South Africa,
6 and other leading courts worldwide adopt.

7 The second thing I want to suggest is
8 that it would be open to this Commission to
9 recommend to the Solicitor General of the United
10 States that in the course of argument that the
11 United States government should urge the Supreme
12 Court from time to time or even as a matter of
13 preference in certain cases to rely on what are
14 known globally as suspended declarations of
15 invalidity or inconsistency. This will have
16 resonance for the federal court scholars among
17 the Commission in cases like Northern Pipeline,
18 unless it be seen as having a tainted origin by
19 virtue of Brown and Brown II in particular. I
20 would suggest that the earlier debate we've been
21 having about cases like Shelby County underscore
22 the value of remanding an issue to Congress with

1 a specific time frame and a way in which the
2 Court makes amendment and re-enactment of
3 legislation focal for Congress in ways that do
4 effectively temper the finality of judicial
5 review, even if only in modest ways.

6 So in conclusion, I want to just add
7 something in response to what I thought was the
8 excellent question from Commissioner Boddie to
9 Professor Feldman. How do we know when it's a
10 break-glass moment? My own view is we are not
11 there yet, but it is entirely conceivable that
12 the United States will face that in coming years.
13 And therefore, my question -- or my response, if
14 you like, to Professor Feldman and Commissioner
15 Boddie would be to say that the Commission should
16 reserve all options as on the table in the future
17 without suggesting that they should be used at
18 this time.

19 So my own view is that it is not
20 appropriate at this time to consider expanding
21 the size of the Court or to radically cut back
22 its jurisdiction. But I do not suggest that the

1 Commission should remove those options from the
2 future arsenal available to the Executive Branch
3 or Congress should it be necessary to realign the
4 Court's jurisprudence with the most basic
5 fundamental democratic understandings and
6 commitments. Thank you, Commissioner Bauer.

7 CHAIR BAUER: Thank you very much,
8 Professor Dixon. Our next witness is Professor
9 Samuel Moyn. He's Henry R. Luce Professor of
10 Jurisprudence and Professor of History at Yale.
11 Professor Moyn, you have the floor.

12 MR. MOYN: Thank you very much,
13 Commissioner. So I'd like to begin with two
14 points. The first is very simply that Supreme
15 Court reform is a political matter.

16 By this, I mean that preferring one or
17 more reforms or denying the need for any is
18 really a matter of envisioning one American
19 future and rejecting others. Legal expertise as
20 such provides almost no basis for guiding and
21 none for preempting this fundamentally political
22 choice. Now as I argue in the written testimony

1 I submitted, this is even true when it comes to
2 the claim that one or more of the reforms we've
3 been discussing are legally infirm.

4 With the possible exception of term
5 limitation, none is so clearly unlawful as to
6 forbid Congress, to which the Constitution
7 assigns the role of designing the judiciary, from
8 choosing it, alone or with other reforms. Now
9 what this first point means is that while the
10 President himself is entitled to his view, a
11 potentially very important one since he's a prime
12 political actor, his decision to consult legal
13 experts, Commissioners or witnesses, should not
14 imply that their advice transcends ordinary
15 political opinion. Constitutional or legal
16 expertise, however rigorous, turns out to have
17 little authority in this particular debate
18 because the Constitution places almost no
19 relevant constraints on our choice of one
20 collective future over another, nor should we
21 restrict democratic experimentalism in this
22 regard to break-glass moments.

1 Here then second is my opinion about
2 Court reform, for what it's worth. The ideal
3 reforms are, I believe, those that disempower the
4 Supreme Court in various ways. In my written
5 testimony, I review, as you've requested,
6 possibilities like jurisdiction stripping, a
7 supermajority rule for the invalidation of
8 federal legislation, or subsequent legislative
9 override.

10 All three and possibly others we could
11 imagine answer to the prime criterion that I
12 believe should drive citizen discussion and
13 political choice about the future of the Supreme
14 Court in our political order, namely whether the
15 extent of its current powers is compatible with
16 democratic arrangements. I don't believe it is,
17 and I think the effects of its excesses have
18 driven the country to the point of serious
19 reconsideration. The disempowering reforms that
20 I review are clearly designed to attack and
21 directly likely to remedy a democratic deficit in
22 our constitutional law rather than pretending

1 that we can leave the Supreme Court's power as-is
2 and restore its feigned posture and sometime
3 reputation for neutrality above politics.

4 Other kinds of reforms that aim at
5 restoring so-called legitimacy, aside from
6 ignoring the main problem, I believe, can't put
7 the genie back in the bottle or elevate the
8 Supreme Court with its current powers to a plane
9 beyond partisan contest. At the same time, I
10 want to stress it's false to pose disempowerment
11 as coming in the end to a binary choice between
12 having and not having a Supreme Court, as a prior
13 witness suggested which, to me, is hyperbolic
14 rhetoric. The question ought to be rather how to
15 fine tune the Supreme Court's power so that it's
16 neither too great nor too little.

17 No legal concerns rule out what I'm
18 calling disempowering reforms of jurisdiction
19 stripping, supermajority rule, or legislative
20 override. Which to choose, including them all,
21 is a political matter that requires some mixture
22 of accountability, consensus building, passion,

1 risk tolerance, vision, and wisdom. These are
2 all political virtues.

3 So in conclusion, the first and second
4 points I've made are intended at least to fit
5 together. Supreme Court reform is a political
6 choice. The Constitution leaves it up to us not
7 on this Zoom call but as a people always
8 experimenting with what it should mean to rule
9 ourselves instead of letting others do so, even
10 when it saves ourselves some trouble. Pending
11 enough political support, the choice to rule
12 ourselves more democratically rather than
13 continuing to transfer excessive power to the
14 Supreme Court is our best choice. Thank you.

15 CHAIR BAUER: Thank you very much,
16 Professor Moyn. Our next witness is Professor
17 Maya Sen, Professor of Public Policy at Harvard
18 University's John F. Kennedy School of
19 Government. Professor Sen, you have the floor.

20 MS. SEN: So thank you so much for
21 inviting me to be here today. The topic of this
22 panel is the Court's role in our constitutional

1 system. And I took this as an opportunity to
2 consider the political forces currently buffeting
3 the Court with an eye toward commenting on
4 avenues of reform like so many have this morning.

5 So let me state the problem as I see
6 it as simply as I can. The Court and its
7 appointments have become severely politicized in
8 recent years. So for historical context,
9 Justices Scalia and Ginsburg were confirmed 98 to
10 zero and 96 to 3, respectively. That would be
11 unheard of today.

12 Scalia's replacement, Justice Gorsuch,
13 was confirmed 54 to 45 while Ginsburg's
14 replacement, Justice Barrett, was confirmed 52 to
15 48. And there's now a real possibility that one
16 party will simply refuse to even hold hearings on
17 the other party's nominees. Now of course, the
18 Court is fundamentally a political institution as
19 was just said. I do not dispute that.

20 However, the trends make clear that
21 the appointments process is increasingly being
22 exploited for partisan gain. And my concern is

1 that left unchecked, these forces risk giving us
2 a Court that is increasingly ideologically in
3 conflict with the American mainstream. So where
4 does this leave us?

5 I strongly urge this Commission to
6 consider a reform proposal that many of us have
7 discussed and written about which are term limits
8 for the Supreme Court Justices. As someone just
9 said, the United States is the only major
10 democracy without term limits for its highest
11 court. Of all 50 states, there's only one that
12 does not have some sort of term limits in place
13 for its high court.

14 Now why should this Commission
15 seriously consider term limits? So first, term
16 limits eliminate many political incentives that
17 over time have led to partisans trying to
18 manipulate the system. With two appointments per
19 presidential term, term limits eliminate the
20 ability of politicians to hold vacancies open for
21 purposes of gaining partisan advantage.

22 They eliminate the incentive to

1 appoint young and more ideologically rigid
2 individuals. And by making vacancies
3 predictable, they reduce the states associated
4 with any one appointment, something that at this
5 point is essential to de-escalate the
6 politicization of the appointments process.
7 Second and perhaps more importantly, term limits
8 would ensure that the Court does not swing so far
9 out of the American mainstream.

10 So in support of this, I draw the
11 Commission's attention to a forthcoming Southern
12 California Law Review article that I co-authored
13 with Adam Chilton, Dan Epps, and Kyle Rozema. So
14 in that article, we make simple assumptions about
15 political patterns and use those to simulate what
16 the Court might look like under different term
17 limits proposals. Our analyses in that paper
18 show that under the status quo of lifetime
19 appointments, the Court has been lopsided.

20 That is, one party has held 75 percent
21 or more of seats about 60 percent of the time in
22 the past 80 years. However, a term limited Court

1 would be less frequently so lopsided. For
2 example, under the term limits bill under
3 consideration in Congress, one party would hold
4 75 percent or more of the seats only about 30
5 percent of the time, so about half as much.

6 And this would result in a Court that
7 is less likely to be so out of step with
8 Americans' views. Now term limits would also
9 reduce poor incentives for the Justices
10 themselves. Now a growing concern that I have
11 concerns strategic retirements or the tendency of
12 Justices to retire only when there's an
13 ideological ally in the White House.

14 Now when appointments of both parties
15 follow this practice, then we mostly keep the
16 status quo and it's okay. But when one party's
17 appointments retire strategically and not the
18 other party's appointments, the Court will become
19 lopsided. Term limits eliminate the incentives
20 for Justices to try to game the system and for
21 them to try to manipulate the Court's future
22 composition.

1 And third and perhaps most
2 importantly, term limits address the
3 fundamentally undemocratic nature of lifetime
4 tenure. Now here there's no question that
5 Americans oppose lifetime tenure for governmental
6 officials, and the Supreme Court is no exception
7 here. Poll after poll has found wide bipartisan
8 support for term limits.

9 So to give you an example, an October
10 2019 poll found that 72 percent of Americans
11 support term limits for Justices with no
12 differences between Republicans and Democrats in
13 terms of their support. This makes sense to me.
14 Why shouldn't people be skeptical of an
15 institution where two Justices were named by a
16 President who won the state of Florida by 500
17 votes, basically a coin flip, over 20 years ago?

18 Three other Justices, a third of the
19 Court, were named by a one-term President who won
20 his election by just 100,000 votes. That's about
21 the number of people who fit inside Michigan's
22 football stadium. It feels very idiosyncratic.

1 So to conclude my remarks here, in an
2 age of increasing political polarization, there's
3 no question that Supreme Court nominations have
4 become an almost entirely partisan affair. And
5 this is going to potentially cause grave harm to
6 the Court's legitimacy. And I strongly encourage
7 members of this Commission to consider term
8 limits which could represent a powerful tool to
9 reverse this trend. Thank you.

10 CHAIR BAUER: Thank you very much,
11 Professor Sen. Our next witness is Professor
12 Ilan Wurman at the Arizona State University
13 College of Law, Sandra Day O'Connor College of
14 Law. Professor Wurman, you have the floor.

15 MR. WURMAN: Thank you. Good morning,
16 and thank you for having me here today. As the
17 chair just mentioned, my name is Ilan Wurman.
18 I'm an Associate Professor of Law at the Sandra
19 Day O'Connor College of Law at Arizona State
20 University.

21 In my written remarks, I make three
22 overarching points, the third of which involves a

1 proposal for 18-year staggered term limits. But
2 today, I'd like to limit my spoken remarks to my
3 first two points, the first being that a properly
4 originalist Supreme Court is not on the whole a
5 Court that needs to be feared. It is not a Court
6 that needs to be reformed.

7 Originalism, this idea that we should
8 interpret the Constitution with its original
9 meaning, at least when it's properly done, does
10 not have any particular political valence.
11 That's the thrust of my first claim. So for
12 example, originalism often means to the preferred
13 progressive result.

14 Now two obvious instances involve the
15 16th and 17th Amendments enacted in the
16 progressive era. Originalists can't just ignore
17 those amendments. To take another example,
18 Justice Scalia led his more liberal and other
19 colleagues in advancing a pro-defendant reading
20 of the confrontation clause.

21 Additionally, often originalism
22 doesn't have any particular political valence at

1 all in the originalist debate over the dormant
2 commerce clause or the doctrine of incorporation.
3 Finally, and here's a point that I really want to
4 emphasize, many criticize originalism as
5 conservative, even when the originalist
6 Constitution nearly leaves a hot-button social or
7 political issue to the democratic process. So
8 for example, even if the predominate originalist
9 view on same sex marriage were to prevail, all
10 that would mean is the issue is sent back to the
11 states where the people of the several states
12 would debate these issues and decide them for
13 themselves democratically.

14 Is that what people mean when they say
15 originalism leads to conservative results? If
16 so, then that is a strange conservatism to object
17 to. Indeed, much of the written testimony and
18 oral testimony before the Commission today
19 describes the anti-democratic or counter-
20 majoritarian quality of judicial review.

21 But it seems to me anyway that having
22 an originalist Court should significantly

1 diminish that concern, certainly compared to the
2 Court of 30 or 40 years ago. Now of course,
3 assuming that I haven't convinced anyone that an
4 originalist Court is not one in need of reform,
5 my second overarching point is that there is a
6 mechanism within our existing constitutional
7 framework to diminish the power of even an
8 originalist Supreme Court over controversial,
9 social, and political issues. This mechanism is
10 what some scholars have called departmentalism
11 and is the idea that the Supreme Court's
12 decisions need not necessarily be followed as a
13 political rule, although, of course, its
14 judgments are binding in particular cases.

15 Departmentalism does not challenge the
16 validity of *Marbury v. Madison* in judicial
17 review. Chief Justice Marshall held simply that
18 when judges engage in their judicial duty to
19 decide particular cases -- that's in his famous
20 passage, particular cases -- they have no choice
21 but to interpret the applicable laws and decide
22 which law applies in the event of a conflict.

1 That does not mean, however, that the Supreme
2 Court's interpretation in that decided case must
3 ever and always be followed by the other
4 political branches.

5 The point is obvious when the Supreme
6 Court upholds the constitutionality of the law,
7 in which case nothing prevents Congress from
8 repealing the law or the President from pardoning
9 individuals for offending against that law when
10 they nevertheless believe that law to be
11 unconstitutional. But even when the Supreme
12 Court holds that a congressional law or
13 government act is unconstitutional, that still
14 does not mean the political branches must
15 immediately and necessarily follow the reasoning
16 of the Court as a political rule. When the
17 Supreme Court in its willful --

18 (Simultaneous speaking.)

19 MR. WURMAN: Is my time over? Oh,
20 sorry.

21 CHAIR BAUER: No, it's not. Please
22 proceed, Mr. Wurman. We just got cut off.

1 MR. WURMAN: Sorry. So when the
2 Supreme Court in my view in its non-originalist
3 opinion in Dred Scott v. Sandford invalidated the
4 Missouri Compromise and held that no Black
5 Americans could be citizens, it was Stephen
6 Douglas who argued that the Supreme Court is the
7 final arbiter of the constitution's meaning and
8 that its decision in Dred Scott should be treated
9 as resolving the controversial question of
10 congressional power and Black citizenship that
11 were then threatening to rip the country asunder.
12 Abraham Lincoln disagreed. The judgment in that
13 case was, of course, binding on the parties
14 Lincoln argued.

15 But Congress, he said, may not follow
16 the reasoning of the Court as political. Nothing
17 should prevent Congress from continuing to
18 enforce the Missouri Compromise. And if anyone
19 has cause to complain about it, they need to
20 bring their own lawsuits. Lincoln argued that
21 only when a matter has been decided consistently
22 over a course of years in accordance with or at

1 least with the acquiesce of the political
2 departments and the people, only then would it be
3 revolutionary to ignore the Court's precedence.

4 On this view, judicial decisions are
5 merely one input in a greater constitutional
6 conversation. In conclusion, an originalist
7 Court in my view is not one in need of reform.
8 But we should nevertheless reinvigorate the
9 concept of departmentalism in our constitutional
10 and political culture to diminish the power of
11 the Court to shape and resolve modern
12 controversial social issues.

13 I know I'm out of time. Because an
14 18-year term limit seems to be a big point of
15 discussion, I want to point out that I think if
16 the Court -- if the Commission goes that route,
17 we would need to propose an amendment to the
18 confirmation process itself. And in my
19 testimony, I suggest some. And I think Professor
20 McConnell suggest some in his as well.

21 So the term limits can't operate
22 alone. They have to operate with a reform to the

1 confirmation mechanism itself. So I hope I get
2 an opportunity to speak about that. Thank you.

3 CHAIR BAUER: Thank you very much,
4 Professor Wurman. Very much appreciate it. And
5 we now have a series of Commissioners who will be
6 asking questions. Will the Commissioners who are
7 asking the questions please turn on your cameras?
8 And we will begin with Professor Richard Fallon
9 who's a Story Professor at Harvard Law who will
10 open. Professor Fallon?

11 COMMISSIONER FALLON: Thank you very
12 much, Chairman Bauer. Thank you to all the
13 witnesses for your wonderful testimony. I need
14 to apologize in advance that I am in Down East
15 Maine and my internet connection has been coming
16 and going. And if I fade out, it is not from a
17 want of interest you may be assured.

18 So I would like to begin my questions.
19 And I would love to be able to ask questions of
20 all of you. But I would begin with Professor
21 Moyn who presents very provocative, stimulating
22 testimony, both his written remarks and what he

1 said orally today.

2 And I'd like to begin with
3 jurisdiction stripping as a proposal. And just
4 to get into that, I would like to make sure we
5 all understand exactly what's being discussed.
6 And so as I understand it, Professor Moyn, what
7 you have in mind is something like the following.

8 Congress might pass a statute with a
9 Part A and a Part B. And A of the statute might
10 say, for example, and here I'm being provocative,
11 it's unlawful for anybody to possess anywhere in
12 the United States. Or alternatively, it is
13 unlawful for a doctor ever to perform in the
14 United States. That's Part A.

15 I'm going now to take my picture off
16 because I'm getting a sign saying my connection
17 is unstable. So that was Part A of the statute.
18 Part B of the statute says in no court of the
19 United States shall have jurisdiction to
20 entertain a challenge to the constitutionality of
21 Part A. So that's the kind of reform that you're
22 putting on the table. Is that correct?

1 MR. MOYN: It is, Commissioner.

2 COMMISSIONER FALLON: And so then the
3 thing that obviously comes to mind is this looks
4 in various ways like a potential --

5 CHAIR BAUER: Mr. Fallon, can you hear
6 us? We seem to have lost audio. Let's bear with
7 Professor Fallon one second to see whether or not
8 he can restore the connection.

9 MR. MOYN: I do have a sense of the
10 drift of the question if --

11 (Simultaneous speaking.)

12 CHAIR BAUER: -- proceeding and then
13 it will give us time to find out whether the
14 professor has been successful in sorting the
15 connection. So please do answer the question as
16 you understand it.

17 MR. MOYN: Well, I may have to
18 construe it first. But I'll just make a few
19 remarks to make it less dramatic. First, a
20 jurisdiction stripping approach which is not even
21 my favorite reform, but since it's on the table.

22 If it were statute by statute, we'd be

1 talking about a selective experiment with respect
2 to that statute. So imagine just hypothetically
3 that the Affordable Care Act had been immunized
4 in such a way. Well, then it wouldn't ever have
5 faced repeated challenge and millions of poor
6 people would have enjoyed expanded Medicaid which
7 Congress intended all along.

8 Now of course, there is the
9 hypothetical which Professor Fallon raised. And
10 the main point I want to make about it is not
11 that it's not scary but rather that it's not
12 legally preempted. So the question of the extent
13 of Congress' power to strip jurisdiction
14 including constitutional claims is itself a
15 matter of hypothesis and speculation in the
16 professional literature about which we know
17 little.

18 Even from the courts, there has not
19 been a political debate in the country to any
20 serious extent about how far we'd want that power
21 to be used, let along what it is. In the end, of
22 course, I have to acknowledge that there are

1 rifts on all sides and that many of the reforms
2 present risks and doing nothing presents risks.
3 I trust in the political process.

4 One of the Commissioners, Commissioner
5 Grove, I think, has beautifully shown that even
6 if available, jurisdiction stripping is
7 enormously unlikely to gain consensus. And yet
8 all that matters for you, I believe, as legal
9 experts is whether you can in good faith affirm
10 that it's legally off the table. And I don't
11 believe you can.

12 COMMISSIONER FALLON: So you're not
13 offering any advice to us or to Congress or to
14 the American people by way of recommendation
15 about when jurisdiction stripping would be
16 desirable?

17 MR. MOYN: I am, actually. And it's
18 in the spirit of a larger commitment to
19 democratic experimentalism. It's worth a try to
20 see what would result. And of course, it's most
21 likely to plausible in the case of a really
22 important statute, including one that might

1 accord new rights to the American people as the
2 legislature had repeatedly asked over history
3 only to be blocked by a judiciary that has been
4 assumed to have lots of power.

5 Now of course, there's a paradox that
6 it's precisely in the case of important statutes
7 of that kind that we might want there to be
8 jurisdiction, especially if you're going to
9 present a parade of horrors that invites us
10 into the nightmare scenario of some sort or
11 other. And I think that's completely fair.
12 That's why I think the other reforms might be
13 usefully be introduced concurrently with an
14 experiment in jurisdiction stripping.

15 So I personally favor advisory
16 jurisdiction for the Supreme Court if it were
17 able to say without lots of decisional power that
18 a particular statute has violated someone's
19 rights. It might make a political difference,
20 even if it's not conclusive and even if the
21 judiciary still has to apply that statute in
22 courts without ruling on its constitutionality.

1 COMMISSIONER FALLON: So if I could
2 ask you one more question. This would be one
3 that would compare jurisdiction stripping with
4 other proposals that have been made and that this
5 Commission might consider. In talking about some
6 of the other proposals in your written testimony,
7 you say -- and I believe I'm quoting directly
8 here.

9 It is an impossible mission to seek to
10 de-politicize a political Court. And so I wonder
11 if you could just clarify for us what you mean by
12 a political Court with the following distinction
13 perhaps in mind. One could think of a political
14 Court as a partisan Court.

15 That would be a Court that was setting
16 out to try to advantage one or the other
17 political party and its platform. Or one could
18 imagine political in the sense that a Court in
19 order to resolve constitutional indeterminacies
20 sometimes necessarily inherently needs to make
21 decisions about what would be better or worse for
22 the country going forward. When you use the

1 term, political, do you mean the first partisan
2 sense or do you mean something much weaker like
3 the second sense that I just articulated?

4 MR. MOYN: Well, I mean both, but
5 certainly the second because it seems to me that
6 no credible account of constitutional
7 interpretation including the originalist one that
8 what my fellow panelist has introduced can
9 plausibly suggest that when a Court like our
10 Supreme Court has so much power to interpret and
11 really make law, given gaps, conflicts,
12 ambiguities, can we say it's not political? It's
13 making policy. It's determining the meaning of
14 our most fundamental law and in the process
15 constraining political actors, including more
16 accountable and responsive ones from devising
17 their own interpretation of a very often
18 indeterminate Constitution.

19 And the irony here in our dialogue is
20 that the who issue of legal constraints, if any,
21 on Congress to jurisdiction strip or adopt any of
22 the other reforms is itself legally indeterminate

1 to some impressive extent. And therefore, it's a
2 political choice. So I want to suggest that it
3 would be wrong to restrict your deliberations to
4 the problem of a partisan or newly partisan Court
5 because if we imagine a Council of Elders or
6 platonic Guardians that were ruling on our stead
7 with our consent, it would not be compatible with
8 our democratic ideals. And yet that's what we
9 have.

10 COMMISSIONER FALLON: Mr. Chairman, I
11 have questions for every other panelist, but I
12 see my time is up. And so I assume --

13 CHAIR BAUER: Professor Fallon, given
14 that we had a little bit of an internet glitch
15 there, please feel free to ask an additional
16 question at this time.

17 COMMISSIONER FALLON: Yeah, okay.
18 Thank you so much, Mr. Chairman. So Professor
19 Sen, you're a very distinguished political
20 scientist. I wonder if you could comment for us
21 on the remarks that Professor Moyn made, both in
22 his written text about the Supreme Court as a

1 political institution in one or another sense.

2 MS. SEN: Yeah, so I actually very
3 much agree with what Professor Moyn just said.
4 When I think of the Court as political --
5 actually, let me rephrase that. If the Court
6 wasn't a political institution, I think we would
7 have a Justice Garland right now, right?

8 So we might quibble about the Court
9 being political or not. But all the political
10 actors in our ecosystem consider the Court to be
11 a political institution. And they're treating
12 every nomination as essentially a political
13 football. So we could try to kind of pretend the
14 Court isn't a political institution.

15 But the truth is that everyone else
16 sees it that way and they act in that way in
17 terms of pursuing certain appointments and
18 confirmation strategies. So not only do I agree
19 with what was just said, but I would actually
20 take it further and kind of consider the broader
21 political environment in which the Court operates
22 which is why so many of my comments, I think, try

1 to target the fact that the current confirmation
2 appointments process generates a lot of very
3 unhealthy incentives for political strategizing
4 and political gamesmanship that ultimately then
5 translate into dynamics on the Court. So I think
6 it's important to kind of consider the broader
7 political landscape as well.

8 COMMISSIONER FALLON: And do you think
9 that that landscape affects the way the Justices
10 do their job?

11 MS. SEN: Yeah. I mean, I think it
12 has to. I think one very noticeable way in which
13 it does is this idea of strategic retirements
14 where we sort of have established this pattern
15 where Justices will tend to retire primarily --
16 not always, but primarily when there's an
17 ideological ally in the White House. And one of
18 the things that's very troubling about that is --
19 well, first of all, it seems like it's --
20 Justices are actually trying to manipulate the
21 future composition of the Court which is kind of
22 troublesome.

1 But also if appointments made by one
2 party engage in that kind of behavior more so
3 than the other appointments, the other party's
4 appointments, the Court can very quickly become
5 ideologically very lopsided. So it's not just
6 that the Justices are kind of reflecting the
7 political environment and the political and
8 policy preferences of the individuals who appoint
9 them, but they're also engaging and strategizing
10 and gamesmanship that then affects the future
11 composition of the Court.

12 CHAIR BAUER: Thank you very much,
13 Professor Fallon. And we're now going to turn
14 for the next set of questions to Professor Tara
15 Grove who is the Charles E. Tweedy Endowed
16 Shareholder of Law and Director of the Program of
17 Constitutional Studies at the University of
18 Alabama Law School. Professor Grove, you have
19 the floor.

20 COMMISSIONER GROVE: Thank you so much
21 to all of you for presenting both your written
22 and your oral testimony. This has been so

1 helpful already. So actually, I'm going to start
2 with Professor Sen and the conversation that you
3 just had with Commissioner Fallon.

4 So I actually see some tension in what
5 you argued in your written testimony and what
6 Professor Moyn argued in his written testimony
7 and it's this. So one of the central questions
8 before this Commission is, what should be the
9 goal of any Supreme Court reform? And in your
10 written statement on the need for Supreme Court
11 reform, you emphasize that the Supreme Court's
12 public approval rating had gone down
13 significantly over the past several decades and
14 that it's very valuable for the Supreme Court to
15 have public acceptance, public confidence, what
16 some might call sociological legitimacy or
17 external legitimacy.

18 And in fact, in your oral statements
19 today, you emphasize that the confirmation
20 process had been a real -- a grave threat to the
21 Supreme Court's legitimacy. So I gather you
22 think the goal of any reform should be to restore

1 or preserve the Supreme Court's legitimacy. And
2 so I'd like you to say a little bit about why
3 that should be the goal and why we might want to
4 engage in reforms that serve that goal.

5 MS. SEN: Let me clarify a little bit.
6 I think that's one of the goals certainly. I
7 think the primary goal should be to reduce the
8 incentives for partisans to engage in
9 gamesmanship and strategizing over Court
10 appointments.

11 Now the way that I phrase that, if we
12 take care of that problem and those incentives
13 that are leading to every appointment being a
14 huge high stages, highly politicized event, if we
15 address the incentives that are leading to that,
16 then we will naturally and logically also kind of
17 address the reservations that the public is
18 increasingly expressing about the Supreme Court.
19 So first, we have to tackle the underlying
20 problems that are causing the symptoms. And the
21 underlying problems are, like, these incentives
22 that are leading politicians to basically jump on

1 any one vacancy.

2 They're so rare and they're so
3 politically important to basically engage in high
4 level political gamesmanship. If we address the
5 bad incentives that are causing that, then we
6 have a better chance at addressing public
7 dissatisfaction with the Supreme Court. And I
8 just want to say one more thing which is that my
9 written testimony focused on public
10 dissatisfaction with the Court which has been
11 increasing over time. One of the reasons why
12 that's a concern speaking to the Court's
13 legitimacy is that political leaders across the
14 country are very receptive to what the public
15 thinks.

16 And the more that the Court's standing
17 in the public deteriorates and the increased
18 skepticism that people express about Court
19 rulings, the more political leaders across the
20 country will have their ears perked up listening
21 to that. And that could actually lead to
22 situations where the Court's rulings are not

1 followed. We're not at that point yet, but the
2 two are inextricably linked. So eroding public
3 satisfaction with the Court is a problem kind of
4 in and of itself. But it could also be tied to
5 further political problems down the road.

6 COMMISSIONER GROVE: Right. So thank
7 you for that. Now in your oral testimony, you
8 talked a lot about term limits and I appreciate
9 your comments. In your written testimony, you
10 talked about expansion of the Court. And I
11 wonder -- or earlier today, Professor Feldman and
12 Professor McConnell both thought a potential
13 expansion of the Court would undermine the
14 Court's legitimacy which seems to be potentially
15 in tension with the goal that you set out, at
16 least in part, as a goal of reform. So could you
17 say a little bit about how Court expansion might
18 enhance the Supreme Court's legitimacy if you
19 think that's the case?

20 MS. SEN: Yeah, so I think it's
21 important to say with Court expansion, a big
22 argument against Court expansion has been this

1 idea that if the parties are going to engage in
2 Court expansion, they're just going to go tit-
3 for-tat. One party will expand and the other
4 party will expand. And eventually, the Supreme
5 Court is going to blow up.

6 And I just want to -- before getting
7 into this, I just want to say that we don't
8 really see evidence of that in the quantitative
9 work I've done with Adam Chilton, Dan Epps, and
10 Kyle Rozema. That concern is overblown we find.
11 Now that said, how would the public perceive
12 Court expansion?

13 And the truth, to answer your question
14 very bluntly, is that it's going to be filtered
15 through partisan concerns at the public opinion
16 level. So at the current moment with a
17 Democratic President and Democratic controlled
18 Senate, we would have probably a slim majority of
19 the population be very enthusiastic about Court
20 expansion. And we would have a slightly smaller
21 but very vocal, strongly led opposition with
22 Republican identifiers.

1 court-packing plan in 1937 has been used by other
2 leaders elsewhere. And you say that some
3 scholars, including your work, I gather, with
4 Professor David Landau, has worried about, quote,
5 the potential for renewed use of court-packing in
6 the U.S. to be seen as legitimating new and
7 expanded attempts at court-packing in a range of
8 democracies under threat, end quote. Can you say
9 a little bit about what you view as the risk
10 there?

11 MS. DIXON: Thank you for the question
12 Ms. Grove. I think it's important to stress that
13 this is not a disqualifying concern. If the
14 balance of democratic arguments in United States
15 favors Court expansion, I still think that is
16 dispositive.

17 But I think it needs to be a decision
18 taken with the world in view. The Hungarians
19 have expanded the size of their court. The
20 Polish context, they looked at it.

21 Some of the worst attacks on democracy
22 in the last decade have involved a chance to

1 expand the size of the Court. And the thing
2 that's been really notable about some of the
3 tactics used in Eastern Europe in particular is a
4 kind of gaslighting where at times people like
5 Orban and Kaczynski talk about the east. They
6 look to Russia, to China, and other systems that
7 are not liberal democratic and hold them up as
8 models.

9 But then other times, they pick the
10 worst of the west and say, well, see, we're just
11 like Germany or just like United States. And
12 they've used that tactic and tried to attempt to
13 legitimize tactics that I think everyone on this
14 Commission and Zoom call would agree are
15 problematic in context. So the danger, I think,
16 is that the U.S. at a renewed moment of being a
17 beacon for constitutional democracy around the
18 world.

19 I don't think it's a dispositive
20 factor. But I do think it's a consideration that
21 whatever tactics are used in Washington will be
22 emulated in good and bad faith elsewhere. It's

1 been done to some extent already. But I think
2 you should anticipate that it will be done more
3 and further depending on what decisions are made
4 by the Commission and the White House.

5 COMMISSIONER GROVE: Thank you. And
6 Professor Moyn, just to follow up on your
7 conversation with Commissioner Fallon, you argue
8 that when it comes to jurisdiction stripping and
9 potentially other Supreme Court reforms, the main
10 arguments are political, that there are legal
11 arguments on both sides and the scholars are
12 split on these issues. I just want to touch on
13 one thing.

14 Political actors in these debates over
15 jurisdiction stripping and other types of
16 political reforms have talked about not only
17 what's politically advisable but also what's
18 legal. And the Executive Branch when it comes to
19 jurisdiction stripping in particular for decades
20 and decades, both Democratic administrations and
21 Republican administrations has said that it's not
22 only unwise but unconstitutional for Congress to

1 take away the Supreme Court's jurisdiction to
2 review constitutional questions. And so can you
3 say a little bit about how you think that should
4 play out in our deliberations? Should we look at
5 that Executive Branch precedent as potentially
6 being of meaningful value?

7 MR. MOYN: I think it's a wonderful
8 question, Commissioner. Thank you. I think
9 there's a real place for legal experts to report
10 what they disagree about and don't know and
11 therefore what they leave to other kinds of
12 political actors or political actors if legal
13 experts don't count. And this seems like a
14 wonderful example because as I think we'd all
15 agree, although I defer to greater experts in
16 federal courts, there's just very little to go on
17 in -- from anyone other than scholars writing
18 dialogues and offering hypotheses and very often
19 insisting on the limits to jurisdiction.

20 But the truth is that that's not a lot
21 of evidence. And what evidence there is, is
22 pretty divided. And of course, it's changing

1 since new scholarship is taking other views than
2 may have been traditional on this question. So I
3 do want to acknowledge that it's the job of
4 experts not only to get things right legally but
5 also to explain when the division is so intense.
6 And that it's really up to political actors not
7 to make the mistake that they're limited by law
8 or constitutional law in particular.

9 COMMISSIONER GROVE: Thank you.

10 CHAIR BAUER: Thank you very much,
11 Professor Grove. Our next questioner is
12 Professor Nancy Gertner, formerly a United States
13 District Court judge who after leaving the bench
14 also taught at Harvard and is a visiting lecturer
15 at Yale. Professor Gertner, the floor is yours.

16 COMMISSIONER GERTNER: Thank you.
17 This has been a wonderful panel. Let me just
18 start by linking what Professor Scheppele said
19 with Professor Dixon's presentation, this
20 wonderful concept of our being the oldest Supreme
21 Court. And I don't know whether she used the
22 word, the most creaky, that is to say the oldest

1 and it shows.

2 You addressed in particular, Professor
3 Dixon, the issue of term limits. And the
4 question is whether the term limit discussion is
5 obviously less fraught than the composition of
6 the Court discussion. But what was interesting
7 about your written materials is that you thought
8 term limits were significant not only because we
9 were the only country in the world that didn't
10 have them or a retirement age but also because of
11 its impact on the other branches, that is to say
12 the relationship between the Court and the
13 legislature. Could you talk a little bit more
14 about that?

15 MS. DIXON: Thank you, Judge Gertner,
16 for the question. I think Professor Sen has also
17 made some very useful and relevant comments about
18 that interaction. I think when one thinks about
19 tempering the finality of the decisions of the
20 Supreme Court, as you know, term limits provide
21 one way of doing that, and they do it by creating
22 regular turnover of a predictable kind that de-

1 escalates the current partisan polarization
2 around appointments.

3 They also do see incentives for, as
4 Professor Sen said, very young, very ideological
5 hardline appointments. It also creates
6 predictability that I think facilitates
7 bargaining in a useful and pro-democratic way.
8 And it is one tool among many, but it's one of
9 the tools that I think is most available under
10 the current constitutional arrangement.

11 I'm not sure I agree with Professor
12 Moyn that everything else on the table and as
13 effective. I think it's consistent with Article
14 III and others with more expertise are readily
15 available and would have some significant
16 benefits. It would not be a panacea, but it
17 would have significant benefits in ways that as
18 you know have a kind of dynamic and interactive
19 effect.

20 And I think it is important when we
21 put all of these options on the table to pressure
22 test them, not just against what is

1 constitutional and what is political viable but
2 what works. One of my concerns, I was expecting
3 Professor Fallon to ask Professor Moyn his
4 classic federal courts question which is why do
5 you think jurisdiction stripping would work under
6 Article III? But of course, if we look at India,
7 it hasn't worked. If you look at the United
8 Kingdom, most statutes that limit jurisdiction
9 are read radically narrowly or read down by the
10 British Supreme Court.

11 The term limits are provisions that
12 are robust in New Zealand, of course, nationally.
13 That is not the case with all of the other
14 provisions that we're talking about. As I note
15 in my written submission, Canada while is
16 attractive but not perfect. And certainly
17 jurisdiction stripping is one where I think we
18 should be particularly cautious about thinking
19 that the comparative experience suggests that it
20 will work.

21 It's not worked with much -- I state
22 it's not been zero effective. I mean, Professor

1 Moyn is right. It's worth experimenting if you
2 believe using it as a constitutional tool of
3 reform, although I have graver doubts about its
4 efficacy in the United States.

5 But it's not a particularly resilient
6 model whereas elsewhere I would say that term
7 limits have had a very significant positive and
8 stable effect on tempering polarization and
9 finality there. And unlike Professor Sen, I
10 think in response to you, Professor Grove, I
11 would say it's both a matter of shoring up
12 legitimacy and especially the sociologic
13 legitimacy in the Supreme Court and tempering its
14 finality and limiting authority in the way that
15 Professor Moyn suggests. So we want the Court to
16 do a bit less in terms of finality.

17 But what it does do, we want it to do
18 in a way that is effective and complied with and
19 maintains the faith of the public. And in that
20 sense, I'm very much in disagreement with
21 Professor Wurman that departmentalism is the
22 appropriate response of the Commission to the

1 current challenges. I think if we ever had a
2 case for departmentalism after the Civil War,
3 January 6th should give us great pause as a
4 preferred reform tool, whether you think
5 historically or comparatively.

6 COMMISSIONER GERTNER: Let me follow-
7 up for a moment. Do you think that term limits
8 initiative in the United States would have the
9 same kind of impact? I believe you talked about
10 abusive borrowing in other countries. In other
11 words, would that send the wrong message to
12 authoritarian countries as you've described? Or
13 is that sort of a neutral --

14 MS. DIXON: It's built in. I mean, no
15 other country has unlimited judicial terms. And
16 so it cannot be borrowed in that way. And I
17 think there is no plausibility that term limits
18 in the United States would be shorter than in
19 countries that are looking to roll back judicial
20 independence.

21 Bear in mind, Colombian Constitutional
22 Court, one of the leading courts in the world,

1 has eight-year terms. No one is suggesting that
2 the Supreme Court of the United States would have
3 terms of anything like brevity. And so I'm not
4 at all worried about it being a tool that could
5 be abused in that same way. Everything can be
6 abused and saying it's especially low risk in
7 that context, although I do note that I think 18
8 years is too long.

9 COMMISSIONER GERTNER: You also in
10 your written materials made what I thought was a
11 fascinating suggestion that the Solicitor General
12 might in the next case in which the
13 constitutionality of some statute is questioned
14 suggest the suspension of invalidity. So in
15 other words, to suggest that the Court can make a
16 decision that they thought it was invalid but
17 suspend the implementation of that to give
18 Congress an opportunity to act. Can you talk
19 some more about that and to what degree does that
20 avoid the extraordinary polarization in American
21 politics today?

22 MS. DIXON: Well, thank you again for

1 that question, Commissioner. It's a tool that is
2 being developed comparatively and used in more
3 and more jurisdictions. So it was a matter of
4 implied power of the Supreme Court of Canada.

5 It's expressly recognized in the text
6 of the South African Constitution of 1996 as a
7 power of the constitutional court there. It's
8 been used in Germany, in Korea, in Taiwan, in
9 Hong Kong. It has been used in all leading
10 constitutional courts worldwide. Latin America,
11 you can extend the list.

12 And it is not a silver bullet. All it
13 does is provide two benefits. One is an
14 opportunity for Congress or a state legislature.
15 It could be equally applicable there to have the
16 opportunity to act without having to overcome the
17 inertia that often arises where a new legal
18 equilibrium has been created by a federal court.

19 So it allows Congress or state
20 legislatures to act absent a change in the law.
21 The inertia is therefore not present. And
22 secondly using the language of economics in my

1 sort of former faculty at the University of
2 Chicago, it creates a focal point of legislative
3 action.

4 So the time frame, it's very
5 interesting. You look at time frames around the
6 world where these one- or two-year delays has
7 been implemented. You often see a really strong
8 last minute push by the Congress to enact
9 legislation right around the Court's time frame.

10 And you saw that recently in Kenya in
11 relation to gender equality, Korea on abortion.
12 Sometimes it works. Sometimes it doesn't. But
13 my firm view is if you take -- as I said very
14 briefly earlier, Brown II makes it look very
15 unattractive.

16 Now if you think about Shelby County
17 and the support for the re-enactment of the VRA
18 but the inability to get Congress to focus on
19 updating the coverage formula. If that had been
20 remitted to Congress with a one-year or a two-
21 year deadline, my hope if not firm belief is that
22 time frame could've allowed for more of a focus

1 around bargaining and a re-enactment of at least
2 some part of it which would've withstood
3 constitutional scrutiny. So it's not a silver
4 bullet, but it is widely deployed and highly
5 effective in increasing the changes of successful
6 dialogue. And as I note in my submission, it's
7 something which the Commission has in its power
8 through the Executive Branch to achieve tomorrow.

9 COMMISSIONER GERTNER: Professor Moyn,
10 what do you think? Is that the kind of
11 experimentation that you think would be
12 appropriate, that is to say to have the Executive
13 enact the suspension of invalidity in the next
14 major constitutional case?

15 MR. MOYN: I agree with the sentiment
16 behind your question, Commissioner. It's an
17 experiment to try. And I think one point at this
18 early stage of thinking nationally about Supreme
19 Court reform is just to get the options out on
20 the table, partly though, never exclusively
21 through international comparison.

22 I just want to mention that in

1 relation to your earlier exchange with Professor
2 Dixon that we shouldn't think that only bad tools
3 can be abused by bad actors abroad. The main
4 question is whether the tool is good for us,
5 measuring all possible risks but making sure to
6 get it right for ourselves for our self-rule,
7 whether the tool advances it. And that should
8 be, I think, indeed the main question.

9 COMMISSIONER GERTNER: Although the
10 suspension of invalidity -- that obviously has
11 kind of changed. The next administration could
12 choose otherwise.

13 MR. MOYN: Right.

14 COMMISSIONER GERTNER: So the
15 proposals that, Professor Dixon, you talked about
16 -- not a proposal but rather the -- you talked a
17 considerable amount about the override provision
18 -- constitutional override provision in the
19 Canadian constitution. How do you see that
20 playing out in the United States which is under
21 what circumstances could Congress override the
22 constitutional decision of the Supreme Court?

1 What kinds of protections could be reserved for
2 what kinds of rights, especially when we're doing
3 that not as a matter of Constitution, if we do it
4 not by matter of constitutional amendment but by
5 legislation if any can be done? And you see that
6 playing out in the U.S.

7 MS. DIXON: Commissioner, am I right
8 that -- Commissioner Gertner -- oh, no. You just
9 come back. So I would support such a proposal,
10 although I am not as confident as some of the
11 other panelists that one could achieve an
12 effective override simply by way of statute as
13 opposed to an amendment to the Constitution
14 limiting power and override.

15 There has been quite a few attempts
16 comparatively to do the override simply by a way
17 of manner in formal restrictions. Obviously the
18 way in which Professor Moyn states the
19 jurisdiction stripping would be one such way.
20 But it's very hard in a system of constitutional
21 supremacy to have effective override absent being
22 empowered by the text of the written

1 Constitution.

2 So I'm skeptical, but override is an
3 easily available option because I think if it's
4 done by statute, it'll be large ineffectual. If
5 it were politically plausible that an Article V
6 amendment to introduce a notwithstanding clause
7 would pass, I would vote for it should I have the
8 right to vote in the United States. I do think,
9 however, that one should be very cautious about
10 thinking what it would achieve.

11 I think as you rightly suggest often
12 the worry is that it will do too much to temper
13 the finality of the Supreme Court. The reality
14 in Canada is it's done too little. From the
15 perspective of most progressives is that it's
16 been rarely used.

17 It has, in some ways, become seen as
18 a kind of political convention, not to use it.
19 It is extremely hard to imagine in the United
20 States and the filibuster that it would ever
21 really be used with great effect. I think it
22 would be an improvement because it is regularly

1 cabined, it is consistent with the rule of law,
2 there are political costs to its use, it's
3 usually time limited, and it has to re-enacted
4 when it lapses.

5 In the interim in Canada, it lapses up
6 to five years. In some countries, the view is
7 you shouldn't be able to do it retrospectively
8 but only prospectively, although the Supreme
9 Court of Canada disagree about that. I do think
10 a rule of law and fundamental rights concerns.

11 But I think if I was honest, I would
12 suggest that the greater concern that we may put
13 too much faith in it, not that it is too potent
14 as a tool for tempering judicial finality which
15 is why I think Professor Moyn is right to say we
16 need to look at a range, a suite of options and
17 it should be one if it is seen as politically
18 plausible. But I personally can't see how it
19 could or would be effective absent amendment.
20 And if amendment is on the table, there are other
21 things we would do first, I think.

22 COMMISSIONER GERTNER: Professor Moyn,

1 do you have a position on this?

2 MR. MOYN: Well, on the main issue,
3 agree with Professor Dixon. I mean, I think in
4 generally, the predicate for this conversation
5 was in the origins of the Commission to survey
6 options was a moment when not only was there a
7 perception of misbehavior on one side, but the
8 other side expected to enjoy a much greater
9 majority in Congress and to have a relatively
10 freer hand than it might right now to consider
11 reforms. And I think you should treat that as a
12 blessing in disguise to multiply the ideas for a
13 future conversation. And I personally very much
14 thing not only a statutory form of legislative
15 override is compatible with the law, but that it
16 might work. And it would be -- particularly in
17 the face of this sheer difficulty of amending the
18 U.S. Constitution, something that we might want
19 as Americans to take more seriously rather than
20 less simply because of the experience of other
21 countries may not be germane to us in that
22 regard.

1 (Simultaneous speaking.)

2 COMMISSIONER GERTNER: Although --
3 yeah, okay.

4 CHAIR BAUER: I'm sorry.

5 COMMISSIONER GERTNER: I have many
6 more questions, but I will stop.

7 CHAIR BAUER: Thank you very much,
8 Professor Gertner. We're now going to have as
9 our next questioner Professor Michael Ramsey.
10 He's the Hugh and Hazel Darling Foundation
11 Professor of Law at the University of San Diego
12 School of Law. And Professor Ramsey, the floor
13 is yours.

14 COMMISSIONER RAMSEY: Well, thank you
15 very much. And thank you to all the panelists
16 for sharing their very interesting thoughts
17 today. I wanted to begin by following up with
18 Professor Wurman a little bit about an
19 originalist's perspective on this, the questions
20 before us. And in particular, Professor Wurman,
21 I want to start by asking when you think about
22 sort of the original design and where the courts

1 fit into the original design, if you look in the
2 founding materials, you can find various
3 statements by leading founders such as Hamilton
4 and Marshall that the courts would only overturn
5 statutes if there was some sort of clear
6 irreconcilability between the statutes and the
7 Constitution.

8 And it's phrased in various ways, but
9 something like a clear error rule. Now so my
10 question is, do you think -- in terms of the role
11 of the courts that we see today in constitutional
12 adjudication, have they assumed an outsized role
13 compared to what was envisioned in the founding
14 era with respect to Constitution adjudication?
15 And this is not a question about originalist
16 versus non-originalist interpretation so much as
17 a question about how much deference is accorded
18 by the courts -- accorded or not accorded by the
19 courts to the political branches.

20 MR. WURMAN: Thank you for the
21 question, and that's a great question. And one
22 of my favorite professors and sparring partners

1 is Eric Segall at the Georgia. And he raises
2 this point from Hamilton where he says, only when
3 it's contrary to the manifest tenor of the
4 Constitution will the Court strike it down.

5 I'm not sure I read it the same way as
6 Professor Segall does. I think when a judge has
7 a duty to enter judgment in a particular case,
8 that judge has to decide for him or herself what
9 that judge believes the law to be. And there are
10 many rules of construction that are used to avoid
11 striking down or holding invalid, I should say, a
12 law of Congress, whether implied repeals are
13 disfavor. There's constitutional avoidance.

14 But at the end of the day, if the
15 judge is convinced the Constitution -- that the
16 statute is unconstitutional, then I think that
17 judge has to vote against that statute. Now
18 there could be contradictory evidence on what the
19 Constitution means. And so the real question is,
20 what is the confidence threshold here? If I'm a
21 judge, am I 55 percent confident versus 45
22 percent confident? Will I strike it down?

1 I don't think Alexander Hamilton was
2 saying a judge has to be 90 percent sure that
3 it's the right answer. I think the judge has to
4 be convinced it's the right answer based on the
5 evidence before the judge. So that's how I would
6 respond to that question.

7 COMMISSIONER RAMSEY: Well, thanks for
8 that. And as a follow-up, even if you hold that
9 view as to adjudication based on original
10 meaning, we don't have an original. And you said
11 that an originalist Court is restrained by the
12 nature of originalism.

13 But we don't have an originalist
14 Court, or at least not a wholly originalist Court
15 at this point. So should originalists be
16 concerned about the role of the Court in the
17 current system? And so I guess there's then a
18 two-part question, a follow up on that.

19 First is, do you see any structural
20 ways that Congress or other political actors can
21 encourage development of an originalist Court?
22 And then maybe this is really my payoff question

1 is if they can't, isn't a -- aren't reforms to
2 reduce the power of the Court, potentially at
3 least a compromise that should be attractive to
4 originalists as well as non-originalists who are
5 concerned about overreaching by the Court if
6 indeed you agree that the Court has gotten to a
7 point beyond what was envisioned by the founders
8 for its role?

9 MR. WURMAN: Well, I agree that the
10 Supreme Court today is not as originalist as it
11 should be. And I'll give an example, Shelby
12 County v. Holder. I think Shelby County v.
13 Holder was wrong.

14 I just wrote a book on the 14th
15 Amendment, and there is not equal sovereignty
16 principle in the 14th Amendment. If Congress
17 wants, it could enact the Mississippi Enforcement
18 Act and worry about Georgia's problems or
19 Arizona's problems for another day. And I think
20 what's striking about Shelby County is at least
21 it seems to me that the Court wasn't reporting to
22 an originalist analysis.

1 I mean, there were some elements of
2 originalism. But for the most part, it wasn't a
3 close analysis of text or history in my view. So
4 I think everyone should be concerned when the
5 Court uses interpretive ideologies, whether they
6 be living constitutionalism, originalism for
7 political purposes.

8 And my view is that an originalist
9 Court would do it less. It would do it less.
10 I'm not saying it's not going to be political,
11 but it would do it less.

12 And Shelby County is an example of
13 where I think the progressive answer should have
14 won the day. To answer your question, is there
15 something Congress can do, I guess because it
16 wasn't really the focus of my written remarks.
17 What I will say is some of the proposals today,
18 I'm skeptical about.

19 The suspension of power, for example,
20 I'm not sure -- again, if judicial power is the
21 power to render judgments in particular cases, I
22 don't see how a judge can sort of suspend that

1 judgment to give Congress a chance to change the
2 law. At the end of the day, the judges decide
3 under existing law and render judgment in cases
4 under existing law. Having said that, though, a
5 departmentalist approach would solve that problem
6 because the law is still on the books.

7 Under departmentalist approach, the
8 Voting Rights Act would still be on the books.
9 In fact, I think it is. I think it's still there
10 and the statutes at large. And Congress and the
11 Executive continue enforcing it.

12 So I don't know what departmentalism,
13 what suspension to use that departmentalism
14 wouldn't already achieve. And departmentalism is
15 already sort of a part or a possible feature of
16 our constitutional system. And I think there's
17 more to your question, but I see the clock
18 running and out and wanted to throw it back to
19 you in case you have a follow-up.

20 COMMISSIONER RAMSEY: Sure. Actually,
21 I'd like -- and since you addressed specific
22 proposals, I wanted to ask about one specific

1 proposal that has been mentioned but hasn't
2 received much in analysis. And I understand that
3 this might not be something that you have a
4 particular interest in. But I've been sort of
5 intrigued by the question of supermajority voting
6 rules for the Supreme Court or perhaps sort of
7 the equivalent -- not equivalent but similar
8 reform of requiring the Supreme Court to
9 determine a clear constitutional error before
10 overturning a statute. Do you think there's
11 anything to that as a way to return the Court to
12 a more modest role?

13 MR. WURMAN: I'm not sure. I don't
14 know that I have a view on it. My intuition is
15 that it's not a great idea because at the end of
16 the day, the act of having -- or having a
17 constitutional democracy means our Constitution
18 is going to balance two objectives. One is
19 democratic authority as Professor Moyn says.

20 But the other is liberty. It's this
21 idea that sometimes the people need to protect
22 themselves against democratic majorities. And so

1 the reality is -- so that's a recognition that
2 sometimes democratic majorities are going to get
3 things wrong.

4 And when they get things terribly
5 wrong as they did in, say, the Jim Crow era, I
6 don't want it to require six out of nine votes
7 for the Congress to say that those violate the
8 privileges or immunities clause of the 14th
9 Amendment. I'll take those two votes as I need.
10 And so at the end of the day, I don't see how
11 that changes the problem at all.

12 COMMISSIONER RAMSEY: Thanks for that.
13 I'd like to throw that question over to Professor
14 Dixon as well because I know that there are a few
15 courts around the world that do have
16 supermajority voting. And I'm wondering if you
17 have familiarity with those if you could comment
18 on how well that's worked and to what extent that
19 is a model that could be transferable to the
20 United States.

21 MS. DIXON: Thank you, Commissioner,
22 for the question. I mean, I think it's been

1 used, as I suggested earlier, in Poland in a very
2 anti-democratic way. But it's also had more
3 democratic origins. It's been used in Korea.

4 As Professor Moyn said, it's very hard
5 to translate some context back to the United
6 States. And I think there is a cultural norm of
7 consensus in Korea that means that it's the way
8 in which it's been implemented is not necessarily
9 directly applicable. One thing I did want to
10 note from my written submission is that I think
11 in assessing that proposal, I think you're quite
12 right to suggest that it has some functional
13 similarity with a kind of Therrien review
14 standard.

15 And obviously, Professor Wurman is
16 more originalist than he's Therrien if he's
17 against it. But I think the difficulty is that
18 it is not only just over and under inclusive, but
19 there's a functional substitute which is
20 interpretation. And if you make it extremely
21 difficult to invalidate under the Constitution,
22 the natural tendency will be for the Court to

1 rely on a kind of pre-statement rule or
2 interpretation nor as a substitute.

3 And I know in my comments in writing
4 that the Supreme Court of Japan is a notoriously
5 active statutory interpreter and yet a court that
6 has almost never invalidated the statute. And if
7 you look comparatively, I think the worry would
8 be if you introduced a supermajority voting rule
9 in constitutional decision making but not in
10 statutory decision making which is almost
11 incoherent to think about doing it in a statute
12 context, you just should expect a very high
13 substitution rate into statutory interpretation
14 of a kind that textualists certainly should be
15 worried about and that I think would not
16 necessarily be a distortion that people who are
17 textualists, originalist lawyers would be happy
18 to see the results of.

19 So I think it's an intriguing
20 possibility. I think it's one where there are
21 very little models to learn from. But I would
22 suggest that rather than Korea, Japan is the more

1 cautionary tale.

2 If I may, Commissioner, just say one
3 thing in response to Professor Wurman and his
4 comment about suspended declarations. No one is
5 suggesting and certainly I am not suggesting that
6 they are appropriate remedies in every case. I'm
7 suggesting that they should be the toolkit that
8 is on the table.

9 And when they deprived an individual
10 litigant of justice, they shouldn't be used.
11 They should be used in a way that uses a two-
12 track model. And to answer the rhetorical
13 question that Professor Wurman posed, what's the
14 difference, there's a big difference.

15 Departmentalism is in deep tension
16 with the rule of law. Suspended declarations are
17 fully consistent with judicial independence of
18 the rule of law. And that's why I think they're
19 more attractive, not that they are easy or
20 perfect or should be used in all cases. But I
21 think that the departmentalist option, while
22 historically deeply important in the United

1 States, is an unattractive one for the future,
2 particularly in light of recent events on Capitol
3 Hill.

4 CHAIR BAUER: Thank you very much,
5 Professor Ramsey. And our last questioner before
6 the lunch break is Professor Kate Andrias, the
7 Professor of Law at the University of Michigan,
8 and beginning in July, Professor of Law at
9 Columbia. Professor Andrias, you have the floor.

10 COMMISSIONER ANDRIAS: Thank you so
11 much. Thanks to all of you for a really terrific
12 and provocative testimony. I wanted to, I guess,
13 turn back to Professor Wurman.

14 And in your testimony and in your
15 answers to Commissioner Ramsey, you discuss the
16 importance of departmentalism. And in response,
17 Professor Dixon raised some significant concerns.
18 I wondered if you could first respond to her
19 concerns about the effects of departmentalism or
20 the idea that each political -- that each branch
21 is a co-equal interpreter of the Constitution
22 might have on the rule of law first. And then

1 second, could you elaborate on whether there are
2 particular reforms that would encourage a more
3 robust practice of departmentalism and whether
4 you think such reforms could be achieved by
5 statute without constitutional amendment?

6 MR. WURMAN: Thank you for the
7 question. I might have to throw it back at a
8 point to Professor Dixon because I confess I'm
9 not entirely clear on what she means by her
10 invocation of January 6th. Everything we're
11 talking about today and on this Commission is
12 about reduce the power of the Court and giving
13 more power back to Congress or the democratic
14 processes, and departmentalism would do that and
15 so would every other proposed reform that has
16 been talked about today.

17 So if January 6th somehow has to do
18 with departmentalism or the viability of
19 departmentalism, it seems to me it has to do with
20 the viability of any proposal that this
21 Commission encounters. So if the question is, is
22 rule of law ignoring judicial judgment, that is

1 not departmentalism. Departmentalism, as Lincoln
2 recognized, recognizes that judicial cases when
3 they properly have jurisdiction and judgment is
4 entered, those are final and must be respected.

5 But the law, the Missouri Compromise
6 was still on the books. And Congress can
7 continue to enforce the Missouri Compromise. The
8 President could continue to enforce the Missouri
9 Compromise. That's a law. They're following a
10 law.

11 In fact, I thought the thrust of the
12 Commission, a lot of the statements today were
13 that we should follow more congressional laws and
14 have the Supreme Court invalidate them less. So
15 if rule of law means following statutes and
16 following Court judgments, then departmentalism
17 seems 100 percent consistent to me with the rule
18 of law. In terms of whether there's anything
19 that can be done by Congress to reinvigorate
20 departmentalism, I don't think there's any
21 particular proposal that can be achieved other
22 than it should continue doing what it did as when

1 enacted the Religious Freedom Restoration Act to
2 try to reverse a decision of the Supreme Court it
3 had in 1990, Employment Division v. Smith.

4 The Supreme Court just ignored the
5 Congress' contrary judgment. I think Congress
6 should've just continued to do it and continued
7 to enforce RFRA. And at some point, the suits
8 will multiply. Judgments will be rendered.
9 Those judgments will be followed. That's all
10 consistent with the rule of law but allows
11 Congress maybe a bit more assertiveness.

12 COMMISSIONER ANDRIAS: Thank you.
13 Professional Moyn, I know that you have urged
14 both that multiple avenues should be pursued.
15 And also you have resisted stating which
16 particular reform you might be most amenable to
17 or think is most persuasive.

18 But you did in your earlier answers
19 mention that you had some concerns about
20 jurisdiction stripping or at least that it wasn't
21 your preferred reform. And I wanted to press you
22 for a bit more on your thoughts about which of

1 the -- among the suite of what you would term, I
2 think, democracy enhancing reforms or reforms
3 that shift power away from the Court, including
4 jurisdiction stripping, supermajority voting
5 requirements, legislative overrides, interpretive
6 rules of deference which we haven't really talked
7 about, or the idea of suspension of opinions.
8 Which among those do you think are most likely to
9 be -- achieve the goals that you seek and why?

10 MR. MOYN: Thanks for the question,
11 Commissioner. I'll just begin by saying that we
12 can classify the reforms in various ways. And
13 I've classified jurisdiction-stripping with the
14 others under consideration because it clearly
15 functions with the intent and effect of
16 disempowering the judiciary. That's its purpose.

17 However, as with court-packing or
18 personnel expansion, it does seem susceptible to
19 the risk, depending on how jurisdiction-stripping
20 is designed, of becoming a kind of repeated act
21 of successive majorities in Congress. Whereas
22 one of the attractive features of the other

1 mechanisms under discussion in this panel, like
2 the supermajority rule or the
3 institutionalization of a legislative override,
4 is that they seem to serve the immediate
5 interests of no party because they're not
6 substantive. They have no -- they're not about a
7 law or about a topic. They're about how the
8 Court should decide, and if the legislature
9 should have more power, in the case of
10 legislative override, relative to decisions of
11 the Court we've treated as final in our
12 tradition.

13 So I personally -- while not ruling
14 out jurisdiction-stripping, which, to respond to
15 Professor Wurman, on originalist grounds would
16 seem to have the strongest constitutional basis
17 because the exceptions clause is in the text of
18 the Constitution. I probably would demote it as
19 a matter of personal opinion relative to the
20 other disempowering options.

21 I just want to clarify. I'm not
22 refusing to take an opinion. My opinion is that

1 all of these should be tried together potentially
2 when the time is right. And so not taking
3 options off the table is much more important than
4 rapidly selecting, especially on the basis of
5 false kind of legal reasons which don't appear to
6 me to exist in what's a political matter.

7 COMMISSIONER ANDRIAS: I wonder if I
8 could just follow up on that point. I think as
9 Commissioner Grove pointed out earlier, Executive
10 Branch officials and congressional
11 representatives are sometimes guided in their
12 actions by what they think is the goal, right,
13 what they think is constitutional for that. And
14 so I wondered if you could just maybe outline
15 briefly the constitutional argument that -- for
16 why such reforms are -- can be achieve without
17 constitutional amendment.

18 MR. MOYN: So just as an abstract
19 matter, I think we need to rethink some of our
20 civics education because, of course, as students
21 long before some of us rightly or wrongly enter
22 law school are given an impression of the Court's

1 powers that doesn't check out legally if we just
2 look at the balance of opinion amongst scholars.
3 But to answer your main question, legally I think
4 jurisdiction stripping is available in the text
5 and there's no unanimous or even overwhelming
6 reason to think looking at the literature on the
7 topic that even a constitutional strip is ruled
8 out as an experiment. And even if some people
9 think it is, it's up to Congress to try it and to
10 face pushback from the judiciary or the people.

11 I think the same is true maybe with
12 less textual warrant of the other two devices.
13 Article III is abstract and broad. It's not
14 particular except with respect to very few, let's
15 say, other matters. And the decision rule with
16 respect to the constitutionality of federal laws
17 is not one of them. And so we should be
18 teaching. And I think a Commission like this is
19 in a very good position to explain that there's
20 just nothing to go on that would even
21 presumptively rule out a supermajority
22 requirement.

1 A legislative override Professor Dixon
2 suggested would be ineffective but for its
3 institutionalization via amendment. But I think
4 we should be clear that nothing in the
5 Constitution as I read it or even as it's been
6 interpreted in our tradition rules out a
7 statutory form of override. And so again, if we
8 do favor such a thing and I do as a citizen, it
9 should be communicated to our lawmakers how much
10 power they have over our judiciary which they've
11 declined to use so far.

12 COMMISSIONER ANDRIAS: Thank you. I
13 see that the time is almost out. But I would
14 like to ask Professor Sen, you offered really
15 helpful empirical data about the potential
16 benefits of term limits. I wondered if you had
17 any reflections on the other proposals that have
18 been discussed in this panel and whether or not
19 how they might affect the criteria that you are
20 applying with respect to institutional
21 legitimacy.

22 MS. SEN: Thank you for that question.

1 I actually do. I've been scribbling furiously as
2 people have been talking about supermajority
3 voting on the Court. As a political scientist,
4 that actually concerns me quite a bit, and I
5 would urge caution in that regard and I'll tell
6 you why.

7 So first of all, the Court has
8 actually seen super majorities for a long portion
9 of its history. So about 60 percent of all years
10 since 1937 have seen a Court where 75 percent of
11 seats are held by one party. So that's point
12 number one.

13 But point number two is a six to three
14 Court in terms of a partisan split -- and I'll
15 just talk frankly about partisan alignment. A
16 six to three split Court is very different in
17 terms of where that ideological medium is than a
18 five to four split. And if you're talking about
19 instituting a rule where you need a six to three
20 majority, you're looking at a lot of gridlock for
21 a portion of time where Court is split five to
22 four and then a lot of activity under a six to

1 three split Court.

2 And again, a six to three split Court
3 looks very different than a five to four split
4 Court. So you're talking about a lot of movement
5 under a Court that would be ideologically more to
6 the left but most likely much more to the right
7 than the mainstream American voter. So as a
8 political scientist, I have to say that that
9 sends up a lot of red flags for me, and I would
10 urge caution from this Commission in considering
11 something like that. And I would probably
12 recommend further study of that proposal. So
13 thank you for the opportunity to raise that.

14 COMMISSIONER ANDRIAS: Thank you.

15 CHAIR BAUER: Well, thank you very
16 much to all of the panelists and to all the
17 questioners. There's been an excellent
18 discussion. We're going to break for lunch and
19 resume at 1:30. Once again, I want to remind
20 those who are viewing that we have excellent
21 testimony to go with the testimony that you've
22 heard today, excellent testimony in writing that

1 is available on the Commission website for these
2 and the other panels we've heard. Thank you very
3 much, and we will see you at 1:30.

4 (Whereupon, the above-entitled matter
5 went off the record and resumed following a brief
6 recess.)

7 CHAIR RODRIGUEZ: I'd like to welcome
8 everybody back, all the Commissioners back from
9 our lunch break, and members of the public who
10 have decided to join us for our afternoon portion
11 of the hearings. This is our second public
12 meeting, and we are delighted to be listening to
13 a group of experts on various questions that have
14 been put before us as a Commission.

15 The third panel, which will begin now,
16 focuses on case selection, and review at the
17 Supreme Court. We've invited the witnesses for
18 this panel to address matters that include how
19 the Court exercises its power to grant
20 discretionary review, and its practices of
21 issuing emergency orders, and summary decisions
22 disposing of important questions without full

1 briefing, or argument.

2 Before we begin, I want to note that
3 one of our witnesses, Christina Swarns, the
4 director of the Innocence Project had a last
5 minute conflict, and won't be able to testify
6 this afternoon. But her written testimony
7 addressing the Court's capital docket, or death
8 penalty docket is available on the Commission
9 website for people to review. I also wanted to
10 note for the witnesses, and the panelists, that
11 there is a timer that will count down the amount
12 of time that you have to speak, five minutes for
13 the witnesses, and ten minutes for the
14 Commissioners who will ask questions.

15 If you don't see it, it is on the
16 second page of your Zoom most likely, and you can
17 drag it over from there to the first page, so you
18 can keep track of your time. And with that, I
19 would invite the witnesses on this panel to turn
20 on their cameras, and I will call first on
21 Professor Samuel Bray, Professor of Law at Notre
22 Dame Law School to address the Commission.

1 Professor Bray, you have the floor.

2 MR. BRAY: Two points about the
3 Supreme Court's case load are important to
4 establish at the beginning. The first is that
5 the Supreme Court is taking fewer cases than it
6 used to. The second is that the Court is issuing
7 more high profile orders on what is colloquially,
8 if imprecisely called, its shadow docket, the
9 orders the Court grants apart from its usual full
10 merits consideration.

11 These orders are usually just denials
12 of petitions for certiorari, but the more
13 interesting ones, and controversial ones will do
14 things like stay lower court injunctions, or
15 intervene in lower court cases. In short we see a
16 decreasing regular docket, and a rising shadow
17 docket. My aim right now is to underscore two
18 points from my written testimony. The first is
19 related to the decreasing regular docket. The
20 point is that the Commission and its report
21 should reject claims of judicial supremacy.

22 Although the decisions of the Supreme

1 Court are supreme in a particular case, for those
2 parties, for that case, or controversy, the
3 Supreme Court cannot, just by saying so, finally,
4 and forever decide a constitutional question.
5 This point about shared interpretive authority,
6 sometimes called departmentalism, associated with
7 Lincoln, as we've heard in both of the prior
8 panels of this Commission today, is connected to
9 the Court's case load.

10 When the Court was taking many more
11 cases, it was easier to see each one as a
12 decision that was first of all for the parties,
13 and then also part of a developing pattern of
14 precedent. But now, when the Court has fewer
15 cases, we expect each one to do more. We have
16 started treating Supreme Court decisions like
17 statutes, a single pronouncement that is the law.
18 This trend has been a long time in the making.

19 It was, I think unconscious, but it
20 still distorts the Supreme Court's constitutional
21 role. It turns the Court into something less
22 judicial, and more legislative. It would be good

1 for the Court to hear more cases, it would be
2 good for this Commission to emphasized the shared
3 interpretive authority of all three federal
4 branches, the states, and the American people.

5 The second point I would like to make
6 is about the Court's orders list, or shadow
7 docket. There have been plenty of criticisms of
8 the shadow docket, and I expect we're going to
9 hear more of those today. I think the best way
10 to understand this part of the Supreme Court's
11 work is an analogy to the preliminary injunction.
12 The preliminary injunction is a remedy given
13 before judgement, it is meant to hold everything
14 in place, preserving the status quo so there's no
15 irreparable injury to the parties, and so the
16 Court is still able to decide the case.

17 And that emphasis on status quo
18 preservation, and I'm using the term in a
19 different sense than Professor Vladeck in his
20 written testimony. That emphasis on status quo
21 preservation is an important theme for
22 understanding the Court's orders in cases it

1 hasn't yet granted for full merits consideration.
2 Thinking in this way about the shadow docket can
3 help us see which criticisms are weak, and which
4 are strong.

5 The criticism of the Justices for not
6 signaling their votes, and not giving opinions,
7 those criticisms are weak. The procedures for
8 orders on the shadow docket are less formal, just
9 like the procedures for a preliminary injunction.
10 There needs to be a way for the Court to move
11 quickly to preserve the status quo during
12 litigation. But that leads to the stronger
13 criticisms, precisely because the Court is moving
14 quickly, there isn't the usual deliberation of
15 the Court, and the lower courts, what
16 colloquially is called percolation.

17 And it's easy for all human beings,
18 including Justices, and even members of
19 presidential commissions, once they take a
20 position, to get locked into it, it's something
21 to be on guard against. The upshot is that some
22 of the criticisms of the Court's shadow docket

1 are sound, but the reforms that are sometimes
2 proposed are not sound. They misconceive what
3 the shadow docket is, they try to make it more
4 formal, more official, more like the merits
5 docket.

6 Instead, I think we should recognize
7 it for what it is, and as a consequence of its
8 informality, we should give the decisions on the
9 shadow docket less precedential weight. In
10 closing, I should note that I was pleasantly
11 surprised at the points of agreement between the
12 written testimony of the panelists for this
13 hearing. Just to pull out one example, I agree
14 with Ms. Swarns' suggestion, that there should be
15 an asymmetry between the Court's stay of an
16 execution, which should be easier, and the
17 Court's lifting of a stay of execution, which
18 should be harder. I look forward to your
19 questions, and to the testimony of my fellow
20 panelists.

21 CHAIR RODRIGUEZ: Thank you Professor
22 Bray. Next we will hear from Michael Dreeben, who

1 is a partner of O'Melveny & Myers, and the former
2 deputy solicitor general. Mr. Dreeben, the floor
3 is yours.

4 MR. DREEBEN: Thank you, and thank you
5 for inviting me to provide views on the Supreme
6 Court's case selection, and review. I'll offer
7 some thoughts on the certiorari process from the
8 vantage point of a practitioner, and observer of
9 the Court. From an empirical point of view, the
10 Court shapes its docket to perform four major
11 roles. To decide some of the most publicly
12 important legal issues in the society. Second,
13 to address legally important cases that have a
14 lower profile.

15 Third, to resolve lower court
16 conflicts, and fourth, occasionally to correct
17 egregious error. Since 1988, the Court has had
18 virtually plenary control over its own docket.
19 And by selecting cases for review, the Court has
20 the power to set not only its own agenda, but
21 often the agenda for national debate on high
22 profile, and socially controversial issues.

1 You've heard much insightful
2 discussion and debate this morning over the
3 Court's relationship with democracy and to
4 alternative structures for resolving
5 constitutional issues. I will take it for
6 granted that under our current structure the
7 Court will perform all of the roles I described
8 above. The question I will address is whether to
9 reform the way that it chooses its cases.

10 No institution is perfect, but the
11 Court has developed procedures that generally
12 work well in performing its task of being the one
13 Supreme Court created by Article Three. By
14 selecting cases, the Court does have the power to
15 shape the direction of the law, but that power
16 has to be lodged somewhere. And so long as the
17 Court has the Marbury v. Madison power to say
18 what the law is, there's no proposal that seems
19 better than what we have now.

20 Some critics of the Court's case
21 selection have suggested that the Court should
22 decide more cases. They also question its

1 unchecked discretion to decide which cases to
2 hear. Some remedies for those perceived problems
3 include providing statutory clarity of certiorari
4 standards, reinstating mandatory jurisdiction,
5 creating a certiorari division of court of
6 appeals judges to select the cases for the Court,
7 and requiring Justices to disclose their votes on
8 certiorari petitions, and on favor to those
9 approaches.

10 First, Supreme Court rule ten
11 generally describes the criteria for certiorari.
12 While those standards are general, focusing on
13 conflicts in authority in important issues of
14 federal law primarily, it's doubtful that more
15 specific criteria could be written into a statute
16 that could be readily applied, or easily
17 enforced. Second, the creation of a special
18 certiorari jurisdiction to select the Court's
19 docket would likely fall prey to the same
20 concerns about agenda setting sometimes lodged
21 against the Supreme Court, and its membership
22 could become an object of partisan jockeying akin

1 to the confirmation process.

2 Furthermore, separating case selection
3 from actual decision would likely hinder rather
4 than improve development of the law. How
5 broadly, or narrowly to decide a case, whether to
6 move slowly, or in big steps are closely tied to
7 case selection. The Court knows that it has to
8 decide an issue when it grants review, and that
9 is a useful discipline before taking up an issue.
10 Finally, with respect to transparency about
11 certiorari votes, there is a public interest in
12 knowing how a Justice exercised a governmental
13 power, but a bare vote does not shed much light
14 unless explained.

15 That is a practical impossibility,
16 given the thousands of petitions turned away each
17 year. The Justices can indicate their votes, and
18 write statements concurring it, or dissenting
19 from the denial of certiorari, and often do that.
20 Those opportunities let some light into the black
21 box, and sufficiently justify the maintaining of
22 the Court's practice of not disclosing certiorari

1 votes routinely.

2 I'd like to conclude with a brief
3 response to some of the comments this morning on
4 the tension between the Supreme Court's power of
5 final decision on constitutional questions in
6 democracy. Many of the critiques focused on the
7 Court's thwarting of democratically determined
8 decisions. But the discussion paid less
9 attention to the Carolene Products footnote four
10 rule of the Court, to conduct more search, and
11 judicial inquiry in cases raising a risk of quote
12 prejudice against discreet, and insular
13 minorities.

14 That quote tends to seriously curtail
15 the operation of those political processes that
16 would ordinarily protect them. In the past, the
17 Court has protected on popular individual rights
18 when legislative majorities did not. Professor
19 Wurman this morning touched on this, as did
20 Professor Feldman. The question I would ask is
21 where do we think protection for those citizens,
22 and individuals will come from, if not from an

1 independent Supreme Court? I welcome the
2 Commission's questions.

3 CHAIR RODRIGUEZ: Thank you Mr.
4 Dreeben. We will now hear from Steven Vladeck,
5 who is Charles Alan Wright Chair in Federal
6 Courts at the University of Texas Law School.
7 Professor Vladeck, the floor is yours.

8 MR. VLADECK: Thank you Commissioner
9 Rodriguez. As you know, my written testimony is
10 focused on what Commissioner Baude dubbed the
11 shadow docket. Although that's just one part of
12 the Court's case selection, I don't think it's
13 controversial to suggest that it has become an
14 increasingly significant piece in recent years,
15 both on its own, and relative to the merits
16 docket, which as Professor Bray noted, has shrunk
17 to the lowest number of argued cases per term
18 since the Civil War.

19 In my opening remarks, I'd like to
20 briefly amplify four points echoing Professor
21 Bowie's powerful reminder this morning, that it's
22 especially important for those of us who teach

1 about, and in my case, practice before the Court,
2 to not be shy about criticizing it. First,
3 although my written testimony includes lots of
4 data, it's the qualitative shift in the shadow
5 docket that I find most interesting, and
6 revealing.

7 As recently as ten years ago, most of
8 the emergency relief that the Court issued
9 consisted of stays of execution, or stays of
10 appellate mandates pending appeal. Whatever
11 their merits, these were case specific rulings
12 that seldom had broader impact. In recent years,
13 in contrast, we've seen a dramatic uptick in
14 stays of district court injunctions, where the
15 Court is allowing nationwide federal policies
16 back into effect. Especially this term, we've
17 also seen far more emergency injunctions pending
18 appeal, where the Court is acting to directly
19 restrain state officials after multiple lower
20 courts refuse to do so.

21 Thus, not only has the total number of
22 orders changing the status quo, at least as I

1 define it, increased dramatically in recent
2 years, but within that increase has been a
3 significant, sustained, systematic shift from
4 case specific summary orders to massive policy
5 shifting rulings. Thus, those who try to suggest
6 that this uptick is merely a matter of degree are
7 not accurately describing the phenomenon.

8 Second, and relatedly, whatever the
9 merits of objections to nationwide injunctions in
10 the abstract, there's simply a bogeyman here.
11 These quantitative, and qualitative shifts in the
12 shadow docket both predated, and have postdated
13 the uptick in nationwide injunctions during the
14 Trump administration. But even looking only at
15 emergency applications from DOJ during the Trump
16 years, nationwide injunctions still account for
17 less than half of that self-selecting total.

18 Third, with all respect to my good
19 friend Professor Bray, attempting to analogize
20 the Supreme Court's recent shadow docket rulings
21 to preliminary injunctions from district courts
22 drives home much of what is wrong with what the

1 Court has been doing. After all, this seems that
2 it's both normatively, and legally appropriate
3 for the Supreme Court to act like a trial court.
4 But as the Justices are quick to stress in any
5 other context, their primary function, in their
6 words, is as an appellate tribunal.

7 They don't find facts, they don't hold
8 hearings, and at least with respect to emergency
9 injunctions, they're purportedly limited by
10 statutes to granting relief pending appeal only
11 when the rights at issue are independently clear.
12 That's not the role of a trial court. It also
13 overlooks the rather significant difference in
14 precedential effect of these interim rulings, as
15 the five-four majority itself drove home in the
16 Tandon ruling late on Friday night in April.

17 A preliminary injunction issued by a
18 district court has literally zero precedential
19 value, so we're understandably not as worried
20 about the system effects if district courts
21 balance the equities incorrectly. But the
22 Justices themselves are insistent that many of

1 these recent Supreme Court emergency rulings,
2 including unsigned orders, have precedential
3 effect. That's problematic enough in the
4 abstract, but it also further undermines the
5 notion that they are, or ought to be, acting like
6 a court of first impression.

7 And it neglects the reality in
8 practice, which is that unlike preliminary
9 injunctions in district courts, the Supreme
10 Court's emergency rulings have increasingly been
11 the last word on an array of state and federal
12 policies. Some of that is because the clock runs
13 out on the policy before the merits come back to
14 the Court, as happened with the border wall, MPP,
15 the Medicaid work requirements, and others. Some
16 of it's because emergency relief prompts the
17 relevant officials to change the challenged
18 policy. Perhaps even in the New York case, the
19 emergency relief was against a policy that was no
20 longer even in effect.

21 Either way, the Court is increasingly
22 changing the law on the ground under the guise of

1 temporary litigation protecting exigency in a way
2 that's having permanent effects far beyond those
3 specific disputes.

4 Fourth, and finally, it should hardly
5 be surprising that those who like the results in
6 these cases have every reason to downplay the
7 procedural and substantive shortcuts that the
8 Justices are taking to reach them.

9 But as Justice Sotomayor suggested in
10 her dissent from a stay in the Cook County
11 public-charge case last year, procedural
12 regularity is exactly what insulates the Court
13 from charges that it's playing favorites.
14 Whether with particular litigants, specific legal
15 theories, or both. And procedural regularity is
16 exactly what the Court has sacrificed in far too
17 many of these shadow docket rulings over the past
18 few years, not because lower courts have forced
19 its hand, but because the current Court is far
20 more willing to depart from regular order, at
21 least in this context, than any of its
22 predecessors.

1 In contrast, the high profile merits
2 rulings, or the broader debates about which we
3 heard so much this morning, these procedural, and
4 substantive shifts may not be front page news,
5 but that's all the more reason why it's critical
6 that they meaningfully feature in any detailed
7 conversation about Court reform, and it's why I'm
8 grateful to the Commission for the chance to
9 testify today. I look forward to the questions.

10 CHAIR RODRIGUEZ: Thank you Professor
11 Vladeck. At this time I'll invite the
12 Commissioners, who are to ask questions, to
13 please turn on their cameras, and we'll proceed
14 to that part of the panel. So, we will hear
15 first from Commissioner Sherrilynn Ifill, who is
16 the president and director-counsel of the NAACP
17 Legal Defense and Education Fund. Commissioner
18 Ifill, please proceed. You're muted Commissioner
19 Ifill.

20 COMMISSIONER IFILL: Naturally, thank
21 you so much. And thank you to all of the
22 witnesses, thank you for your written testimony.

1 I want to begin with Professor Vladeck, and I
2 think I want to ask you first to put a fine point
3 on the issue that you raised about nationwide
4 injunctions. So, there are some who've suggested
5 that the rise in the volume, and significance of
6 the shadow docket is because of nationwide
7 injunctions.

8 You've already said that is not true,
9 others have said it is because of the rise of
10 cases that press to the Court as a result of the
11 exigencies of COVID, and some have said the 2020
12 election also pushed cases onto the shadow
13 docket. I want to make sure that you have an
14 opportunity to respond to all three of those
15 suggestions as the rationale for the uptick in
16 the shadow docket.

17 MR. VLADECK: Sure, thank you
18 Commissioner Ifill, I appreciate the question.
19 The short version is that yes, if you focus on
20 the categories of federal government applications
21 challenging nationwide injunctions, COVID related
22 religious liberty disputes, COVID related, or

1 other election disputes, numerically that's a
2 large chunk, those three categories together, of
3 the numerical rise in shadow docket reliance over
4 the last couple of years. It's still not all of
5 it.

6 I mean, and I think a really good
7 example of that is the public charge rule, where
8 shortly after the Court issued a stay of a lower
9 court ruling that had imposed a nationwide
10 injunction against the public charge rule, the
11 Court came back and issued another stay of an
12 Illinois specific injunction against the public
13 charge rule, even though the briefing on the
14 second case, the Cook County case, had been
15 entirely about why this wasn't the same thing as
16 the nationwide injunction. There, in a nutshell,
17 is one case that perfectly captures how
18 nationwide injunctions are not what's driving
19 this trend.

20 And Commissioner Ifill, I would just
21 say, this is why I think the right thing to do is
22 not to get sort of distracted by the numbers, but

1 to look at the qualitative shifts in what the
2 Supreme Court is doing. Whatever the provocation
3 is, I think the point where I really have never
4 heard an adequate response from those who have
5 been very quick to push back against my
6 criticisms, is to push back against the claim
7 that the Court has weakened the balancing of the
8 equities in stay applications, to push back on
9 the notion that the Court is violating its own
10 interpretation of the Albritz Act (phonetic).

11 When, as in the Tandon case, it issues
12 an injunction for rights that were not
13 indisputably clear. And so I guess Commissioner
14 Ifill, the sort of short wind up to my long
15 answer to your question is that I still think
16 numerically there's an uptick, even if we pushed
17 those specific categories aside. But that the
18 undeniable piece here is the qualitative uptick,
19 where the Court is doing things in these cases
20 that it had never done before. And that it is
21 likely to continue as you're going forward, and
22 the shifts in doctrine, those to me, cannot be

1 justified by the underlying factual predicates.

2 COMMISSIONER IFILL: Thank you. I
3 want to zero in on one part of your testimony.
4 You lay out what you describe as problems with
5 the shadow docket, and there are maybe seven, or
6 eight of them. But one of them, I think is very
7 important, and you've already alluded to it. You
8 say that the Court is increasingly using the
9 shadow docket to prematurely, and unnecessarily
10 resolve constitutional questions without full
11 briefing on the merits, without full lower court
12 review, and without oral argument.

13 And some would say if the Court is
14 issuing emergency orders, why does it matter in
15 your view that the kind of full treatment
16 afforded merit decisions are not afforded to
17 decisions on the shadow docket? In other words,
18 I'm asking the question whether the lack of
19 briefing, oral argument, lower court review is an
20 independent concern, or is it a concern only in
21 tandem with the other phenomenon that you
22 identify, that the Court in your view, appears in

1 some instances to be treating, or expecting lower
2 courts to glean some precedential smoke signals
3 from prior unsigned orders issued without
4 opinions, or without a majority rationale.

5 Are those two independent concerns, or
6 are they a concern that goes together?

7 MR. VLADECK: So, I think the short
8 answer is both, that I think I would have those
9 concerns even if they were fully independent of
10 each other. But I think they're only exacerbated
11 by the extent to which they might be reinforcing
12 each other. So, if I can just take an
13 illustration, let's take the Tandon case again.
14 This is the five four decision from early April
15 where the majority wrote a cryptic four page
16 opinion that adopted what some have called the
17 most favored nation theory, the free exercise
18 clause of the First Amendment.

19 To me, Commissioner Ifill, that's a
20 perfect example of how the short circuited
21 process gets in the way. There was not extensive
22 briefing in the Tandon application about

1 Employment Division versus Smith. There was not
2 extensive briefing about the sort of merits, and
3 demerits of the most favored nation theory.
4 There was, I believe one amicus brief filed by
5 the Becket Fund, filed in such a manner, that I
6 think it was pretty clear they had notice from
7 the applicants that the application was coming.

8 And so here was a very significant
9 constitutional interpretation that the Court
10 reached without hearing from plenty of parties
11 that I think had a clear stake in the outcome.
12 The federal government was not represented before
13 the Court in the Tandon case. Meanwhile, less
14 than three months later, the Court issues the
15 merits decision in the Philadelphia Catholic
16 Services Case. Where one of the questions
17 presented had been should we overrule Smith? In
18 that case there had been extensive merits
19 briefing, there had been a ton of amicus
20 briefing, there had been participation by the
21 federal government, and the majority did not go
22 nearly as far in my view, as the majority in

1 Tandon had gone.

2 I can't prove Commissioner Ifill, that
3 there's cause, and effect here, but I do think it
4 is revealing that the Court, in a case where it
5 had similar questions presented, but plenary
6 review, full briefing, and arguments reached what
7 I would think of as a more compromised, moderate
8 result, rightly, or wrongly, than the far more
9 aggressive, far less developed four page analysis
10 we received in the Tandon case.

11 COMMISSIONER IFILL: You say in your
12 written testimony, I think perhaps one of the
13 most provocative observations is that you believe
14 that a majority of the Justices are now of the
15 view that the merits are the predominant
16 consideration in considering emergency
17 applications. And I've read through your
18 recommendations, I'm not sure I found any reforms
19 that respond to that. So, I wondered if you'd
20 say a little bit more about the basis for that
21 view, and what you think, if that is true, can,
22 or should be done, if anything.

1 MR. VLADECK: Yeah, so I hope you'll
2 forgive me for delving into the doctrinal reach
3 for a moment. I think the way to sort of see the
4 phenomenon, is especially in cases where it was
5 the federal government seeking emergency relief
6 from the Justices. And as I note in my written
7 statement, there's a line of in chambers opinion,
8 including a very important one by Chief Justice
9 Roberts in Maryland versus King, where at least a
10 majority of the current Justices, or I think,
11 we're pretty sure it's a majority of the current
12 Justices, had adopted the view that when looking
13 at the traditional four factors for a state
14 pending appeal, when the government, federal, or
15 state is the party seeking a stay, seeking
16 emergency relief, we assume it's been irreparably
17 harmed.

18 We assume the equities tilt in favor
19 of the government because it's prevented from
20 enforcing its policy. And Commissioner Ifill, as
21 I explain in my testimony, I think that's
22 incorrect, that it's based on a warped

1 understanding of something called the presumption
2 of constitutionality, but the effect of that is
3 to have the dominant consideration among the four
4 factors the Court is supposed to weigh be the
5 likelihood of success on the merits.

6 That what was just one part of the
7 analysis becomes the dominant part of the
8 analysis. And with regard to reforms, I mean I
9 think I don't go all the way there. One of the
10 reforms I suggest in my written testimony is that
11 Congress consider simply codifying the
12 traditional four factor standard for emergency
13 stays pending appeal. That it codify the
14 traditional standard for emergency injunctions
15 pending appeal.

16 I think that might not of itself force
17 the Court to do anything differently, since they
18 are clearly interpreting it a particular way, but
19 just reiterating where I believe this, Congress
20 is right to say that emergency right depends not
21 just on the merits, but on a balancing of the
22 equities that looks not just of the harms of the

1 government, but the harm to, in some cases
2 Commissioner Ifill, the millions of people who
3 are potentially harmed by allowing a policy to go
4 back into effect pending appeal.

5 A policy that might never, ever be
6 adjudicated all the way to a final judgment. I
7 think that's something Congress has the
8 constitutional power to do as part of its power
9 to regulate the Supreme Court's appellate
10 jurisdiction, and I think it would be a salutary
11 development from my perspective.

12 COMMISSIONER IFILL: I have a question
13 for Professor Bray, but I think I'm going to
14 stick with you Professor Vladeck for one more
15 second, just for a final question about the
16 volume. The suggestion of your testimony is that
17 the shadow docket perhaps is beginning to crowd
18 out the merits docket. There doesn't seem to be
19 a way we can exactly discern that, but would you
20 say more about that? This refers back to your
21 opening comment about the few cases that the
22 Court is taking, I think 56 this term, maybe

1 second lowest since the Civil War, and the rise
2 of the shadow docket, and your concern that
3 perhaps the shadow docket is eating up the time,
4 and attention of the Court.

5 MR. VLADECK: Yeah, I mean I'm
6 certainly mindful of implying that correlation
7 creates causation, and as you say, we can't prove
8 it. I do think it is more than a coincidence,
9 that as the Court is hearing more of these
10 applications, Commissioner Ifill, as the Court is
11 dividing more often, as we're seeing more
12 published opinions respecting these emergency
13 orders, it just so happens at the same time the
14 merits docket is down to its lowest level since
15 the Civil War.

16 I don't think that it's one to one,
17 Commissioner Ifill, but it's impossible to
18 imagine that it has no relation whatsoever.
19 Indeed, the Solicitor General's Office
20 restructured its staff so that there would be an
21 additional, I believe deputy level lawyer in the
22 office to handle emergency application. That is

1 as much a reflection of what's going on behind
2 the scenes of the Court as anything I could
3 suggest.

4 COMMISSIONER IFILL: Thank you
5 Professor Vladeck.

6 MR. VLADECK: Thank you.

7 CHAIR RODRIGUEZ: Thank you
8 Commissioner Ifill, we'll next hear from
9 Commissioner Will Baude, who is a professor of
10 law at the University of Chicago Law School. Mr.
11 Baude, you have the floor.

12 COMMISSIONER BAUDE: Thank you very
13 much. And I think I may start with picking up
14 with Professor Bray. So, I think I've found very
15 helpful the back and forth between your
16 testimony, and Professor Vladeck's testimony in
17 writing, and now here as well. So, I'd like to
18 start by asking you whether you share, and if you
19 don't share, why, some of the criticisms that
20 Professor Vladeck has just made orally, in
21 particular the claims that the shadow docket
22 problems are not related to nationwide

1 injunctions, and that the Court is not doing
2 enough to balance the equities, that it's lost
3 track of balancing equities. Do you share those,
4 what do you think?

5 MR. BRAY: So, let me start with the
6 second of those, on whether the Court is doing
7 enough to balance the equities. I agree with
8 Professor Vladeck on that. I don't think the
9 shift to see irreparable injury basically
10 whenever there's a government applicant for
11 emergency relief as a good move at all. And one
12 of the bad effects of it, is exactly what
13 Professor Vladeck identified, which is that you
14 tend to, most of the test just flows out, and
15 then it's likelihood of the merits, which I think
16 is a pernicious development.

17 Because it exacerbates the kind of
18 lock in on whatever decision you're going to make
19 at the preliminary stage, if you're thinking it's
20 all about the merits, then it's really hard to
21 give yourself the mental space to back out when
22 you go to the next decision, because you've

1 already decided the merits, because that was what
2 it was all about. So, I agree with that
3 criticism.

4 I will say the shadow docket entry
5 from last night is an example, I think, of a
6 salutary shift on that by at least one Justice,
7 so Justice Kavanaugh --

8 COMMISSIONER BAUDE: Can you remind us
9 what that is?

10 MR. BRAY: Okay. So, this is about
11 the moratorium on evictions, and there was a
12 district court judge in Florida that imposed, in
13 a sense, a nationwide remedy, but stayed it, and
14 the question was whether the Supreme Court was
15 going to lift the stay, and the Court decided
16 five four not to. And Justice Kavanaugh's
17 concurrence, one paragraph basically said I agree
18 with the applicants on the merits, but balancing
19 the equities, I don't think we're going to get an
20 orderly transition here if we just start
21 evictions in two days.

22 So, I think that was a good shift in

1 the direction that Professor Vladeck has
2 identified, I wish there was more of that. I
3 also don't think codifying the test is going to
4 have any effect on that, because it's the same
5 test the Court is already using. But we agree on
6 the substantive point I think. On the question
7 whether national injunctions is driving it, I
8 sort of agree, and I sort of don't agree.

9 So, if the point is yes, they're part
10 of it, but they're not all of it, then I think
11 that position is exactly right. If the point is
12 if we're counting numbers, it's a small part, but
13 if we're counting number of times the Trump SG's
14 Office asked for emergency relief, then it's a
15 high percentage of those. I mean, I think on the
16 quantitative stuff we just completely agree.

17 I don't know that quantitative versus
18 qualitative is exactly the right way to think
19 about what's going on. I think it's more what
20 are the factual scenarios that are the triggering
21 actions, and then how do we evaluate the actions.
22 But I also think the rise in the shadow docket

1 is, the best estimates of it are qualitative,
2 it's like big, high profile stuff is happening
3 now, not there are more orders on the orders
4 list.

5 So, I think we wind up agreeing on
6 both of those, though I probably think the
7 national injunction is a little bit more of a bad
8 development than Professor Vladeck does, but I
9 think on those two points there's a lot of common
10 ground.

11 COMMISSIONER BAUDE: So, on the lock
12 in problem, which you both identified I think,
13 and the Court sort of issuing these opinions that
14 the shadow docket stays that sort of resolve
15 things at the merit stage, is it possible, what
16 do you think about the possibility that part of
17 the problem here actually is transparency? So,
18 many people, and I'll say myself, in prior
19 writing before joining the Commission, called
20 upon the Court to engage in sort of more opinion
21 writing, more vote disclosure, more transparency
22 in the shadow docket, and it seems like some of

1 that has happened.

2 But is it possible that is part of
3 what produces the lock in? Would it actually be,
4 at this point better, to go back to the system of
5 just unsigned orders with no opinion saying stay
6 granted, or stay denied so that there'd be less
7 lock in? What do you think?

8 MR. BRAY: I'm not sure if that's a
9 better system, but I do think all else being
10 equal, more transparency does increase lock in.
11 So, this is why I don't think saying we need vote
12 disclosures, partly for Mr. Dreeben's very good
13 points about disclosing a vote doesn't tell you
14 why. So, I think that's right. But I also think
15 it does increase the lock in problem. Because
16 you start to get identified with your decision.

17 So, for example I think the same thing
18 would happen on denial of petitions for writ of
19 certiorari, if they always had to identify who
20 voted, then it would start to have more of a
21 sticking effect, and that would be bad.

22 COMMISSIONER BAUDE: All right, so

1 then it does seem like something that divides you
2 and Professor Vladeck, who I'm going to turn to
3 in a second, is this question about sort of
4 changing the status quo. And as I'm reading it,
5 and again, tell me if you think this is right, or
6 wrong, part of the question is what to see as the
7 status quo. So, when the executive branch
8 announces a dramatic new program, and then a
9 district court announces a dramatic new
10 nationwide injunction, is the Court staying the
11 status quo by letting the executive branch do
12 something dramatic, or is the Court changing the
13 status quo by letting the district court put
14 things back the way they were before the
15 executive action? How should we think about that
16 in your view?

17 MR. BRAY: So, I think there might
18 just be a terminological disagreement here, but
19 it might be more. So, we both do use status quo
20 a lot, but we're using it for two different
21 things. Like I'm using it in the preliminary
22 injunction sense for the last peaceable moment,

1 like what was it predisruption? And with that
2 framing, the disruption is coming from the lower
3 courts usually. Particularly in the national
4 injunction case.

5 Sometimes the injunction is from
6 executive actions, so this is like some of the
7 New York COVID cases. So, I'm thinking of it
8 that way. Professor Vladeck is using status quo
9 for the status quo as the case arrives at the
10 Court, in which case the district court's action
11 is the status quo, or the court of appeals. So,
12 I can understand the way he's using it, and I
13 expect he can understand the way I'm using it.

14 But even the way I'm using it, there
15 are big normative questions about how do you
16 identify that status quo. I'm saying I
17 understand how the Court's coming at it in most
18 of the cases, though I disagree with some of the
19 death penalty decisions, so that's a kind of
20 intra conceptual issue that's different from the
21 choice of the two concepts.

22 COMMISSIONER BAUDE: All right, and so

1 why is it the last peaceable moment, as you put
2 it, that's the right way to look at it?

3 MR. BRAY: I mean this is the way
4 preliminary injunctions work, if you're trying to
5 just hold things in place, then you try to go
6 back to that point, and so I think part of the
7 normative decision making here, like in the COVID
8 cases, the Court is thinking of the fact that you
9 get to exercise your religion is the status quo,
10 that's the default, and then things come in, and
11 change that. But like I say, that is a normative
12 judgment, and people can disagree.

13 COMMISSIONER BAUDE: All right, and
14 Professor Vladeck, I take it you do disagree, and
15 could you tell us why?

16 MR. VLADECK: So, I disagree, I think
17 much more importantly on substance than on
18 nomenclature, and let me just briefly explain.
19 So, I think there is an enormous difference
20 between a lawsuit challenging a statute that's
21 been on the books for 45 years. And a lawsuit on
22 a brand new executive branch interpretation of

1 said statute that's one day old, and that has no
2 basis in the statutory attacks. I think we would
3 accord the presumption of constitutionality to
4 one of those, and not the other.

5 So, the notion that those two things
6 come to a Court with equal presumptions is
7 something I would vehemently chafe against, and
8 resist. I also want to say I am not, I don't
9 think status quo altering rulings, whatever the
10 status quo is, are per se bad. I think the point
11 is that there ought to be special justifications
12 for them, and part of why I really resist
13 Professor Bray's analogy to preliminary
14 injunctions is that the Supreme Court has such a
15 different role.

16 That the point of the Supreme Court at
17 the outset of litigation is not to be making this
18 broad assessment of what's going on, it's rather
19 to be sort of deciding whether the district court
20 stayed in its place. That's why the question in
21 a stay, and the question in an injunction is not
22 was the district court right? The question is

1 something much, much higher, it's a higher bar.

2 And so in that respect, Commissioner
3 Baude, I think to me the key is that the Justices
4 need special justifications for upsetting the
5 litigation status quo, regardless of what else
6 might have been true coming into the litigation.
7 And that's, I think perhaps where there's the
8 most daylight between Professor Bray, and myself.

9 COMMISSIONER BAUDE: And just to
10 crystallize that last point in our minds, I guess
11 what do you think are the most important sort of
12 authorities, or practices of the Court to
13 preserve? That is imagining a world where the
14 Supreme Court is controlled by Justices who we
15 think are good and virtuous and share our views,
16 and the lower courts are not, and so the Court is
17 going to need some authority. What's the
18 authority you'd urge to make sure it's preserved?

19 MR. VLADECK: This is, I think, a
20 problem of my critics often caricaturing my
21 position. I have no problem with the existence
22 of a shadow docket. I think the Court must have

1 the power to issue stays pending appeal, and it
2 must have the power to issue emergency
3 injunctions in an appeal, and I would frankly
4 preserve both of those. I just think there are
5 reasons why the standards for both of those forms
6 of emergency relief, and others are very high.

7 And significant evidence to believe
8 that at least a majority of the Court in recent
9 years have departed from those standards. So,
10 it's more about restoring what I see as the
11 traditional, and correct standards for such
12 relief, than it is about scrapping them all
13 together from my perspective.

14 COMMISSIONER BAUDE: Thank you.

15 CHAIR RODRIGUEZ: Perfectly timed,
16 thank you Commissioner Baude. We'll now here
17 from Commissioner Huang, who is the Michael I.
18 Sovern Professor of Law at Columbia Law School.
19 Professor Huang, you have the floor.

20 COMMISSIONER HUANG: Thank you
21 Commissioner Rodriguez, thanks to all of our
22 panelists, it's wonderful to have your insights.

1 Mr. Dreeben, if I may turn to you, and to focus
2 on your written testimony, first let me say that
3 we all appreciate that you've argued more than
4 100 cases before the US Supreme Court. You spent
5 30 years in the Solicitor General's Office, so if
6 anybody knows how this all works, you do. So,
7 thank you for bringing your perspective, and
8 experience to us.

9 As you noted, your testimony focuses
10 on the certiorari process, or cert process, which
11 is how the Court chooses the 50, 60, maybe 70
12 cases it hears each year out of thousands of
13 petitions. In particular, you seem to draw our
14 attention to blind spots in this selection
15 process. As you put it, quote, there are sort of
16 below the radar issues worthy of review, unquote.
17 So, I'd like to ask you to elaborate on two of
18 the possible solutions mentioned in your
19 testimony, because these seem broadly useful for
20 informing the Court about what the important
21 legal issues are.

22 Your point is that the important legal

1 issues that need to be addressed aren't always
2 found in the cases where that radar is located,
3 which is as we call it, splits. So, the first
4 solution mentioned in your testimony I'm hoping
5 you can elaborate on is about calling for the
6 views of the US Solicitor General more often, the
7 CVSG, using it more often. The second, if we
8 have time, is for the Court to allow
9 certification of legal issues from the circuit
10 courts, which is authorized of course, but the
11 Court's basically shut it down on its own device.

12 So, why don't we start with the CVSG,
13 and maybe a useful place to start, and then work
14 towards sort of broadening the solution idea is
15 to ask you are there areas of law where calling
16 for the views of the solicitor general just
17 wouldn't be that useful, it would be just strange
18 for the Court to CVSG on a particular kind of
19 issue. That is to say are there areas of law
20 that would be kind of left out of this solution
21 supposing the Court took it up? A related
22 question would be well then how do we broaden

1 this?

2 Is there a way to broaden the Court's
3 seeking of input to other parties bringing in
4 commentary from other parties that would be
5 affected, other people in the public, other
6 courts who might be affected by a particular
7 decision on a legal question. The standard
8 answer would be amici, but in your testimony you
9 expressed doubts. You say that quote, a raft of
10 amicus briefs from the usual suspects is not
11 necessarily helpful for the Court, unquote. So,
12 how would you design it? How would you design a
13 broader system? Is there a way to model the CVSG
14 process, or at least how would you design a
15 compliment to that, that brings in views beyond
16 the government?

17 MR. DREEBEN: Thank you very much for
18 that question, Commissioner. There's a lot in
19 there. Let me start off with just an
20 institutional observation that may frame some of
21 the issues that you raised. The first is that
22 one of the real challenges for the Court is

1 getting access to information about the world.
2 It's limited to the record, and to the briefs,
3 the Justices of course can do their own research,
4 they can consult Google, they bring to bear their
5 own knowledge, but because of the nature of the
6 judicial function, they're a little trapped
7 inside the marble palace, and access to
8 information is one of the hardest things for them
9 to get.

10 Then correspondingly, the executive
11 branch is an institution of government, a coequal
12 branch of government who represent the same
13 underlying interest, even though the separation
14 of powers gives us different interests in doing
15 it, gives the United States government a
16 different interest in doing it. So, it's a place
17 where the Court can turn to get information about
18 the world where there's a presumption I think
19 that's well founded, that the government will
20 tell it straight, that it has access to sources
21 of information that the Court does not, that it
22 does some screening on reliability, and that it

1 has a well-deserved reputation for candor.

2 And I can say from my time in the SG's
3 Office, we regarded the CVSGs a little bit
4 differently from the party representation,
5 because the Court had invited us to be an amicus,
6 it's an invitation that you cannot refuse, and we
7 viewed ourselves as advocates for the executive
8 branch of course, but at the same time realizing
9 we were more in a role of providing information
10 for the Court that would be useful for its
11 processes.

12 So, I think that the CVSG process is
13 a good place for the Court to turn for
14 independent information. It typically does issue
15 CVSGs in areas where there's federal
16 responsibility, an agency that has responsibility
17 for administering a federal statute, and there
18 may be even legal reasons for that such as
19 Chevron deference, or other forms of deference.

20 We got a few CVSGs that were totally
21 out of the blue, and had to do with areas of law
22 that we did not administer, and we had to reach

1 out, and educate ourselves about them, and in
2 those, we almost functioned as kind of the 35th
3 law clerk. But I think we still have some value
4 add for the Court, and I wouldn't say that
5 there's really any area of the law that the Court
6 should presumptively put off limits. Although
7 typically it does it when it can't figure it out
8 on its own, and it thinks that there's a federal
9 interest that it has not heard.

10 Now, the certification process from
11 the courts of appeals is fallen into disuse, I
12 think simply because the Court likes the power to
13 shape its own docket. It rewrites questions
14 frequently, the more experienced petitioners do a
15 better job of framing questions than the courts
16 of appeals, and I think that there's also a sense
17 of that's your job, decide the case, we'll see
18 how you do with it, that gives us valuable
19 information, and when you're done, then we'll
20 decide whether to review it.

21 So, although it could be a valuable
22 source of information about what's bothering the

1 lower courts that the parties, or even the
2 government may not reveal, it's not one that the
3 Court has encouraged use of, and I suspect that
4 most court of appeals judges would prefer to keep
5 their own decisional power, and not just buck
6 things up to the Court. Then finally the
7 question of should the Court invite other amici
8 to weigh in, I think that's a little bit of a
9 mixed bag.

10 I mean the government is part of the
11 United States government. Inviting in other
12 amici as institutional stand ins for interests
13 that the Court may want to hear from, or get more
14 information about is a little more fraught, and
15 it's a little bit like picking your favorite
16 child, and I think it could lead to some of the
17 same kinds of resentments, and concerns about
18 lack of impartiality that would flow from
19 choosing one organization over another.

20 So, although in theory, it might be a
21 good idea, I think the Court more relies on
22 uninvited amicus briefs to provide that

1 information, and the Court's probably pretty good
2 at taking it with a grain of salt, and not giving
3 undue weight to players that it knows have
4 particular vantage points.

5 COMMISSIONER HUANG: So, if I might
6 follow up on each of the possible solution
7 directions, on the question of amici, and
8 bringing in further input, would there be other
9 ways of designing that? I mean, look, if the
10 Court CVSG's, that buys everybody a bunch of
11 time, could that time be filled up with some kind
12 of public comment, or drawing in something where
13 it's not just only members of the Supreme Court
14 Bar can file these amicus briefs, and it's not
15 only on the petitioner's side, that you'll see
16 the amicus briefs, which are in all of these
17 built in structural issues, along with those that
18 you've mentioned.

19 Is there a way to broaden the input?
20 Along those lines, is there something to be
21 learned from those categories of appeals courts
22 where they're specialized, and they're the only

1 ones, and they're still split if that's ever
2 possible roughly speaking, for example federal
3 circuit on patent cases. Other examples of sort
4 of how to get information to the Court about
5 importance of cases that we might learn from
6 that. On certification, I'll just get that
7 question out, so that you can take the rest of
8 the time to answer.

9 On certification, you have this
10 wonderful example in your testimony about a
11 combination strategy where the second circuit
12 tried to certify a question, they wrote it up,
13 and then the Court asked the SG's Office if they
14 want to file petition instead. So, having the
15 sort of combo of a certified question from a
16 circuit court plus a petition from one of the
17 actual parties, is that something that can be
18 scaled up, let's say?

19 Is that something that can become
20 systematic? Is that a strategy that courts
21 should use going forward? It almost sounds like
22 it's kind of inviting cert before judgment in

1 your own case, where then it turns out that the
2 petitioner has an amicus, who happens to be the
3 court of appeals. I mean, that could be very
4 persuasive, so I'm curious, aside from just
5 increasing the use of certification, whether that
6 combination strategy that you highlight might be
7 something to be used.

8 MR. BRAY: Just first, to address the
9 question of amici, and whether there's other ways
10 to broaden it, the Court functions a little bit
11 as a balance of a self-starting institution, and
12 one that's party driven, and it likes to say that
13 it's party driven, and there's the principle of
14 party presentation, but if you look at its
15 behavior, it can be viewed as having, putting its
16 own shoulder into the wheel, and turning it the
17 direction that it wants to, particularly by
18 rewriting questions presented.

19 So, I think that it would probably be
20 uncomfortable with the idea that it can, or
21 should reach out to generate information that
22 people have not chosen to bring to it. And the

1 amicus practice is very active, it has the down
2 sides that I mentioned of lack of objectivity,
3 but it's not supposed to be objective. It's
4 supposed to have a point of view, and to present
5 it, and to back it up. And those advocates who
6 have a reputation for credibility, I think have
7 more credence at the Court, they build it up over
8 time, and it's something that everybody who wants
9 to have an influence should try to do.

10 As far as the certification question,
11 very briefly, I wouldn't be averse to seeing the
12 court of appeals communicate with the Supreme
13 Court that way, but they have other ways to
14 communicate as well, so called dissentals from
15 the denial of rehearing en banc. Or dissents
16 that say I'm not going to vote for rehearing en
17 banc, because this is an issue that only the
18 Court can resolve. And I think the Court reads,
19 and respects the work product of its lower court
20 colleagues, and it probably gets a fair amount of
21 informal information at judicial conferences.

22 I know from the example that you

1 pointed out, of the post-Blakely era, where the
2 federal sentencing guidelines were in chaos,
3 federal judges were calling me up, they were
4 calling their colleagues on the Supreme Court up,
5 they were pretty much shouting from the rooftops,
6 there's chaos out here, you need to fix it. So,
7 the certification was only the most visible part
8 of a kind of judicial cry for help.

9 COMMISSIONER HUANG: Thank you.

10 CHAIR RODRIGUEZ: We'll now turn to
11 Commissioner Andrew Crespo, who is professor of
12 law at Harvard Law School. Commissioner Crespo,
13 it is now your time.

14 COMMISSIONER CRESPO: Thank you so
15 much. Professor Bray, I'd like to focus on an
16 issue you highlighted in your oral testimony, and
17 written testimony, cases on the so called shadow
18 docket involving the death penalty. As you know,
19 but as some people viewing our proceedings may
20 not, when a person sentenced to death is
21 scheduled for execution, a number of legal issues
22 typically need to be resolved in short order,

1 including many that couldn't be resolved earlier,
2 such as questions about the person's competency
3 to be executed, or the legality of the proposed
4 method of execution.

5 When these cases come to the supreme
6 Court, the decision it has to make turns on what
7 happened in the lower courts. If those courts
8 have not halted the execution, the Court has to
9 decide whether it should, and if they have, it
10 has to decide whether to effectively overrule
11 them, and let the execution go forward. Often by
12 the time the case gets to the Supreme Court, the
13 scheduled execution may be only hours away,
14 leaving the Court substantially less time to
15 review the matter than the trial and appellate
16 courts below.

17 You've argued today Professor Bray,
18 that the Court's approach to execution should be
19 asymmetrical, the Justices you say should be
20 quote much more willing to issue orders that
21 delay an execution than orders that accelerate an
22 execution. And as you noted, you're in agreement

1 here with death penalty expert Christina Swarns,
2 who provided written testimony to the Commission,
3 and who is herself endorsing a proposal put
4 forward by another death penalty expert, Mr. Amir
5 Ali, Deputy Director of the MacArthur Justice
6 Center, when he proposed this reform in testimony
7 to Congress earlier this year.

8 As you know Professor Bray, the
9 Supreme Court generally does take an asymmetrical
10 approach to capital cases on its shadow docket,
11 but it's the opposite of the approach that you,
12 Ms. Swarns, and Mr. Ali suggest. It tends to
13 restart executions paused by the lower courts
14 more often than it grants stays to pause
15 executions. When this happens, the execution
16 goes forward, with sometimes multiple judges, and
17 even multiple Justices having concluded that
18 there's a substantial likelihood the execution
19 will violate the legal rights of the person being
20 put to death.

21 And against that backdrop, I think
22 what would be most helpful for the Commission is

1 if you could invite thoughts you may have on how
2 to operationalize your proposed intervention.
3 What could, or in your view should be changed
4 about either the Court's internal norms, and
5 practices, its formal standards of review, its
6 rules regarding the number of votes required to
7 take action, or perhaps even its jurisdiction to
8 bring about the about face essentially in its
9 current practice that you're urging?

10 MR. BRAY: So, your characterization
11 of my position Commissioner Crespo, is exactly
12 correct. In terms of how to operationalize it, I
13 don't think this is something where there's a
14 kind of specific rule from the outside that is
15 going to achieve the needed change, although Ms.
16 Swarns' testimony did have some good things to
17 consider. But I think that the main thing that
18 needs to happen is a conceptual shift to
19 emphasize irreparability, and the status quo.

20 And in particular within that, I think
21 it's important to recover the emphasis on the
22 ability to decide the case, because the execution

1 moots the ability to decide the case in the way
2 the non-execution does not. So, since part of
3 what's supposed to happen, if you adopt a kind of
4 preliminary injunction framing here, part of
5 what's supposed to happen, is the Court is
6 supposed to preserve its ability to decide the
7 constitutional question, and that's important.

8 I also think, just in a personal
9 sense, the asymmetry arises out of just the
10 profound difference in an erroneous execution,
11 and an erroneous non-execution. I think that's
12 very important, and if I can pick up on a thread
13 from Professor Vladeck about thinking about each
14 injury to a state, and its inability to enforce
15 its law as a kind of irreparable injury, even if
16 there is some kind of irreparability, I think a
17 form of irreparable injury is the canonical
18 phrase from the Court, even if it is, it's a much
19 lesser form.

20 And so once we just think about how
21 weighty the irreparable injury is to the prisoner
22 who might be executed, then I think it fully

1 justifies the differential treatment. So, I'm
2 suggesting a conceptual emphasis on
3 irreparability, on preserving the status quo, and
4 on preserving the Court's ability to decide the
5 case is the way to go. And if I could add one
6 more point, I think this is an example of how the
7 preliminary injunction analogy I am urging
8 doesn't have an ideological, or partisan spin to
9 it.

10 It will result in different answers in
11 different areas of law, and some of those will
12 seem progressive, and some of those will seem
13 conservative, and within for example the national
14 injunction, it will depend on who the President
15 is. So, I think it's an example of how it's a
16 neutral principle that can be applied across,
17 although normative judgments are still required.

18 COMMISSIONER CRESPO: Thank you
19 Professor Bray. Professor Vladeck, I have a
20 question for you in a similar vein. I think that
21 Professor Bray's response helps us crystallize
22 what he contends the right substantive answer

1 ought to be, and as I hear him, the intervention
2 is insisting, or urging the Court to embrace the
3 position he's put forward. I'd appreciate your
4 helping us think through, Professor Vladeck, both
5 the constitutionality, and the advisability of
6 congressional action to force a change along the
7 lines that Professor Bray, and Ms. Swarns, and
8 Mr. Ali have proposed.

9 Focusing you on three potential
10 interventions in particular, though if you have
11 others to add, I'd welcome them. The first is a
12 statutorily mandated asymmetric standard of
13 review. I know you talked about statutorily
14 mandated standards of review in your written
15 remarks, but the focus here is specifically on an
16 asymmetric one along the lines that Professor
17 Bray has put forward. The second is super
18 majority, or perhaps even unanimous voting
19 requirements that are again, asymmetrical. That
20 is to say vacating a lower court's stay requiring
21 a larger number of votes than five.

22 And finally a statute that would, in

1 a targeted way, bar the Court from considering
2 applications to vacate lower court stays.
3 Essentially a micro version of jurisdiction
4 stripping. Could I ask you to just speak through
5 both, again, constitutionality, and advisability
6 of these potential ways of implementing Professor
7 Bray's proposal?

8 MR. VLADECK: Sure, so let me sort of
9 go quickly. I think the first one would be
10 clearly constitutional, that Congress's power to
11 provide standards of review is not limited to
12 symmetrical standards of review, and indeed there
13 are contexts where Congress has created
14 presumptions, and burden shifting standards in
15 statutes, and so I don't think that if Miller v.
16 French and INKEN (phonetic) are good law, that
17 Congress couldn't go one step further, and say in
18 order to obtain a particular kind of relief, the
19 moving party must be held to this particular
20 standard.

21 So, the first one, Commissioner
22 Crespo, strikes me as low hanging fruit. The

1 second one, I am sort of two minds about the
2 constitutionality of the super majority voting
3 rule, but I also think it won't matter, because I
4 think in practice, any super majority voting rule
5 foisted upon the Court will just be mooted by the
6 Justices agreeing to publicly reflect a super
7 majority, even if the vote behind the scenes was
8 not a super majority. And so I think the second
9 one, I think it can be argued both ways on the
10 constitutionality, I don't think it would be
11 effective.

12 Third, on jurisdiction stripping, I
13 mean in a world in which the limits on Congress's
14 power over the Supreme Court's appellate
15 jurisdiction are informed only by the exceptions
16 clause, and the due process clause, which I think
17 are the two dominant theories, it's hard to see a
18 statute that precludes the Supreme Court from
19 disrupting an interim lower court decision, where
20 it's not actually preventing the Court from
21 redoing the case eventually, would run afoul of
22 the exceptions clause as its been interpreted

1 down the years.

2 And at least for the moment, states as
3 litigants don't tend to have the same kind of due
4 process rights that individual litigants do. So,
5 I think the third one would be constitutional,
6 again, I'm not sure it would be sort of
7 normatively ideal. I would encourage,
8 Commissioner Crespo if I may, since you invited
9 additional ideas, I would encourage the
10 Commission to think about it in the other
11 direction, which is actually opening the Supreme
12 Court's doors to death row inmates.

13 Taking pressure off the shadow docket
14 by creating a statutory right to a direct appeal
15 with mandatory Supreme Court appellate
16 jurisdiction once an execution date is set. And
17 by preventing, by bar, and by statute a state
18 from executing the judgment, from literally
19 executing the prisoner until that statutory
20 appeal has been completed, and gone final. In
21 that context I think you would be taking pressure
22 off of the shadow docket, you would be responding

1 to criticisms, that especially the conservative
2 Justices have been making about lawyers trying to
3 sort of game 11th hour emergency litigation in
4 this context, and you'd be providing death row
5 inmates with a less fraught direct shot to raise
6 method of execution challenges, spiritual advisor
7 claims, and so on.

8 I think that would be less an attack
9 on the Court, than it would be a way of reducing
10 what I think of as the hydraulic pressure that
11 the Court's docket, and that the Court's
12 doctrinal rules have created in capital cases.

13 COMMISSIONER CRESPO: Thank you
14 Professor Vladeck. Mr. Dreeben, if May, just
15 continuing this theme with one more question, ask
16 you about an issue that Ms. Swarns raises in her
17 written testimony that intersects with the
18 Court's certiorari docket. Ms. Swarns urges
19 lowering the number of votes required to halt an
20 execution, this is the opposite of the situation
21 I was just discussing with Professor's Vladeck,
22 and Bray.

1 She urges that in part to avoid what
2 she calls quote, the intolerable situation in
3 which a death sentenced person might be executed
4 after four Justices have granted certiorari, but
5 before the Court can hear the merits of the case.
6 Ms. Swarns observes that this situation has
7 arisen in the past, and she more broadly makes
8 the point that whenever Justices, even if not a
9 majority of the Court, think that they need more
10 time to responsibly address a pending
11 application, that they ought to have that time.
12 And I'm just curious Mr. Dreeben, drawing on your
13 experience overseeing criminal litigation for the
14 Department of Justice, what thoughts you might
15 share on this proposal to lower the number of
16 votes required to halt an execution.

17 MR. DREEBEN: Thank you, Commissioner
18 Crespo. My first reaction would be that it's
19 really for the Court to determine how many votes
20 it takes to do something, and I would worry a
21 little bit about the constitutionality, as well
22 as the threat to historic judicial independence

1 for Congress to start dictating the number of
2 votes. For the Court's internal processes, I
3 think a much better approach would be that if
4 four Justices to hear a case, that there either
5 be a courtesy fifth, or just a policy that four
6 in that instance trumps five, and the Court hear
7 the case on the merits.

8 I think that that would be more
9 consistent with the traditional rule of four, and
10 the underlying purposes that it serves. So,
11 lowering the number of votes seems to me less
12 important than simply saying that if four votes
13 have determined that there is a substantial issue
14 here, the Court afford the opportunity to
15 litigate it, and how to bring about that change
16 is difficult to determine unless the Court
17 decides that it was the wiser practice in the
18 first instance.

19 COMMISSIONER CRESPO: Many thanks. I
20 have another question for you, and one for
21 Professor Vladeck also, but I'm realizing I don't
22 know, Commissioner Rodriguez, are we restarting

1 at the top, or?

2 CHAIR RODRIGUEZ: Why don't you, since
3 you're in a line of questioning, why don't you
4 ask your two questions, and we have half an hour,
5 so we'll restart at the top after you ask those
6 questions.

7 COMMISSIONER CRESPO: Excellent. Mr.
8 Dreeben, the next question I have is also for
9 you, and it's shifting gears a bit actually,
10 taking you both beyond the scope of your written
11 testimony, and a bit beyond the scope of this
12 panel. But having you here, I can't resist
13 asking you about some of your impressions about
14 the state of the criminal defense bar at the
15 Supreme Court. As you know, multiple Justices
16 have expressed concern that indigent criminal
17 defendants are, to quote Justice Kagan, arguing
18 with one hand tied behind their backs, end quote,
19 when appearing before the Court.

20 The basic claim that she, and some of
21 her colleagues have advanced, is that lawyers
22 representing indigent criminal defendants are

1 consistently outmatched by seasoned, and
2 sophisticated repeat players arguing on behalf of
3 State Solicitor's General Offices, and most of
4 all, the Office of the US Solicitor General. As
5 Commissioner Huang observed, no one has argued
6 more criminal cases on behalf of that latter
7 office than you, giving you, I think a truly
8 unique perspective on the Court's criminal
9 defense bar.

10 I would just welcome your thoughts on
11 the critique that Justice Kagan, and others have
12 raised, and if you have any insights on
13 corrective steps that might be taken, if you
14 think there are any that would be worthwhile.

15 MR. DREEBEN: So, thank you for the
16 question Commissioner Crespo. I think that the
17 state of the criminal defense bar in the Supreme
18 Court is pretty different now than it was five,
19 or ten years ago. And there are a few
20 developments that have contributed to that. One
21 is the rise of Supreme Court clinics in a variety
22 of law schools that offer free, excellent, and

1 very dedicated services to litigants who want to
2 work with them.

3 And they take on a lot of criminal
4 cases for free, and do an amazing job with them,
5 and develop a degree of sophistication that makes
6 them tantamount to institutional litigators with
7 the experience that you get that way. Second,
8 development has been a rise of Supreme Court
9 practices in private firms that are very actively
10 engaged in soliciting criminal defense attorneys
11 to represent them in the Supreme Court, and they
12 too bring a fairly great degree of experience,
13 many of them are alums of the SG's Office, and
14 they too have improved the quality of
15 representation.

16 The third component of that
17 improvement in criminal representation has been
18 Supreme Court moot court clinics at Georgetown,
19 and at other places that offer coaching, and
20 counseling through the process. And on the
21 defender side itself, the development of
22 sophistication in groups like the NACDL, and the

1 federal public defenders that reach out and
2 provide a service to, at least on the federal
3 side, lawyers in public defenders offices who
4 don't have any experience, and could gain from
5 it.

6 I think that there is a structural
7 problem with trying to compare the SG's Office,
8 or the state solicitor's general to the defense
9 bar. The defense bar is inherently
10 decentralized, and they have primary loyalty to
11 their own client's interests, and are not in a
12 position to function as institutional litigators
13 the way the Solicitor General's Office does. At
14 times the SG's Office will confess error, or it
15 will trim its sails on a position in order to
16 achieve a different institutional goal.

17 I think I'd be pretty upset if I were
18 a criminal defendant, and my lawyer adopted the
19 same view because it's going to benefit other
20 people rather than me. So, at least on the sort
21 of positional front, I think it's hard to change
22 it. On the pure quality front, in addition to

1 the three things that I've mentioned, proposals
2 have been floated to increase funding to national
3 federal defender organizations to provide
4 training, and support to lawyers who may be first
5 timers. Everybody is a first timer once, and it
6 does not mean that you do a bad job.

7 I lost cases to a lot of people that
8 were arguing their first case. So, you'd have to
9 consult the Justices to see if that impression is
10 still as strong as it was five, or ten years ago,
11 but from my perspective, there's been a notable
12 trend of improvement.

13 COMMISSIONER CRESPO: One brief follow
14 up question Mr. Dreeben, on the positional point
15 you raised, some have proposed, and in fact
16 introduced legislation in Congress to create
17 something along the lines of an office of the
18 defender general, that would have that sort of
19 institutional role, and it could argue alongside
20 the defendant's counsel. Others have proposed
21 sort of a standing amicus committee to serve a
22 similar role. Would you favor those, given the

1 positional imbalance you were just describing?

2 MR. DREEBEN: I would not favor either
3 of those approaches. I think that having an
4 institutional defender general stand up as an
5 amicus ostensibly for the defendant, or maybe
6 just a neither, nor representation is a little
7 bit at odds with the goal of the defendant, and
8 his counsel in trying to achieve a favorable
9 result. I just don't see the institutional norms
10 as favoring kind of a standing amicus that
11 represent defense interest at large, as opposed
12 to letting the adversary system do its work.

13 And the amicus briefs are filed
14 regularly by organizations that have
15 institutional interests. I've done a little of
16 that myself since I've been in private practice,
17 and can see how that opportunity shapes what you
18 say to the Court differently, than if you're just
19 representing the party. I'm not sure that
20 there's a benefit to trying to institutionalize
21 that process at this point.

22 COMMISSIONER CRESPO: Thank you.

1 MR. DREEBEN: I did have one other
2 comment in response to the mandatory jurisdiction
3 proposal that Professor Vladeck put out, and I
4 know I only have 30 seconds on it, so I won't
5 take up a lot of time. But definitely cases tend
6 to be extraordinarily factually intensive, and
7 involve a large number of issues, much larger
8 than the typical case a Court hears, and I would
9 worry about a proposal for mandatory jurisdiction
10 for two reasons. One is not sure that the Court
11 would do a better job than three conscientious
12 judges of the courts of appeals rolling up their
13 sleeves, and devoting a lot of time to it.

14 And it would change the function of
15 the Supreme Court, because a lot of those cases
16 are purely error correction, and require a lot of
17 work. And the second collateral consequence
18 would be the effect on the Supreme Court's
19 docket, and what I think would diminish its
20 ability to carry out what we view as its prime
21 directive. So, in theory it sounds like it
22 affords a lot of dignity to the death penalty

1 process, and will improve its regularity, and
2 fairness. In practice, I'm not sure that it
3 would achieve either of those, and I think it
4 would have costs for the Supreme Court's other
5 functions. Thank you for allowing me to share
6 that.

7 COMMISSIONER CRESPO: Thank you.
8 Chairwoman Rodriguez, I can hold my last question
9 for Professor Vladeck, if there's time at the end
10 I'll ask it, if not, I'll find some other way.

11 CHAIR RODRIGUEZ: Great, so we will
12 start back at the top with Commissioner Ifill, if
13 you have questions. We have 20 minutes left, so
14 you can try to distribute those minutes amongst
15 the four of you.

16 COMMISSIONER IFILL: Great, I'll be
17 brief. Professor Bray, in your written testimony
18 you concede that the shadow docket decisions have
19 unclear precedential effect, and thus offer
20 limited guidance to the lower courts, and you say
21 that's a good thing. But I haven't heard you
22 have the opportunity, or take the opportunity to

1 respond to Professor Vladeck's observation that
2 the Court itself seems to expect lower courts to
3 see some precedential signs, or smoke signals in
4 some of its shadow docket orders.

5 And that at least in one instance that
6 Professor Vladeck refers to in his testimony, the
7 Casa de Maryland case, the fourth circuit seemed
8 to be trying to discern some reading the tea
9 leaves from the emergency orders that the Court
10 issued involving the public charge rule that was
11 before the fourth circuit. I'd love for you to
12 have the opportunity to respond to that point, if
13 in fact you believe these orders shouldn't have
14 precedential value, and don't have precedential
15 value, and don't provide clear direction, how do
16 you respond to Professor Vladeck's observation
17 about how the Court has been using it, and how
18 lower courts might be seeing these orders?

19 MR. BRAY: So, I think the factual
20 premise that the effect of them is uncertain is
21 correct. And I don't come at this thinking about
22 precedential effect as the binary on off. Like

1 they are the law, or they don't have any
2 precedential effect. Which, to be fair
3 Commissioner Ifill, you didn't suggest that
4 strong binary, but if one did think about it that
5 way, then it would force an all, or nothing
6 decision, and I think they're operating in a more
7 liminal space, where they're having some, where
8 they're showing some movement on the Court, but
9 they are not themselves a final resolution of the
10 question.

11 And I think we can see that by
12 comparing Tandon, and Fulton. So, Fulton does
13 not have, in the opinion of the Court, any
14 citations to Tandon. So, in Fulton, the Court is
15 not saying Tandon rewrote the First Amendment,
16 isn't that great? And now we're going to cite
17 it. Now, I don't know what the mechanics of that
18 were for the Justices. I have noticed when
19 searching for Tandon in Fulton, that there are no
20 cites until you get to Justice Gorsuch's
21 concurrence, and then the first cite is Tandon
22 ante, which suggests there was a citation

1 somewhere that came out, and I don't know what
2 happened there.

3 But I do think putting it all
4 together, what we're seeing is that Tandon, and
5 the decisions before it tell us something, but
6 they don't settle the questions, and I think we
7 should tamp down the precedential effect rather
8 than tamp it up, ramp it up to avoid the lock in.

9 COMMISSIONER IFILL: Can I just ask
10 you to follow up on the conversation earlier
11 about death penalty, and symmetry, to respond to
12 the question that I think was asked earlier of
13 Mr. Dreeben about lowering the number of Justices
14 needed to, so that we have some symmetry with the
15 cert number. Mr. Dreeben was skeptical about
16 whether that would actually produce a change, but
17 if we did lower the number of votes needed to
18 grant stay of execution, it would be in symmetry
19 with the cert number. I wonder if that's one of
20 the reforms that you would support, and agree
21 with Christina Swarns.

22 MR. BRAY: I do think the practice of

1 a courtesy fifth is a good one, and I think in a
2 first best world, that's something the Justices
3 would do themselves. So, but I do think that
4 would be a good development.

5 COMMISSIONER IFILL: Professor
6 Vladeck, let me turn to one of your suggestions
7 for reform in which you suggested the Court
8 itself could do more around transparency by
9 revealing the identity of the Justices, and their
10 votes, and also by ensuring that there are
11 written rationale in the shadow docket cases.
12 And I wonder if this is not intention with one of
13 the problems that you associate with the rise of
14 the shadow docket, which is the increasing
15 divisiveness of the shadow docket.

16 And you haven't really had an
17 opportunity to speak about the divisiveness of
18 the shadow docket opinions, but wouldn't more
19 information, more opinions, more identity of the
20 votes actually increase that problem that you've
21 identified, that I take it you believe undercuts,
22 and in some ways harms the public perception of

1 the Court, or the public perception of the
2 legitimacy of the Court.

3 MR. VLADECK: It's a fair question
4 Commissioner Ifill, it hasn't happened on the
5 merits docket, right? And so I think the data
6 that we have is the merits docket, where every
7 term, especially this term commentators are agog
8 at the extent to which some decisions produce
9 unusual bedfellows, and some decisions produce
10 Justices you wouldn't have expected, and some
11 decisions produce unanimity you wouldn't have
12 expected.

13 I guess I think there is value in
14 requiring the Justices to both endorse a
15 rationale, and to identify the fact that they are
16 endorsing a rationale. That is lost when all
17 they have to do is just vote behind the scenes in
18 a manner that may never be reflected publicly.
19 Maybe there's a cost too, but I actually think
20 that cost is dramatically outweighed by how much
21 pressure it puts on the Justice to agree with not
22 just the bottom line, but with the reasoning when

1 there's actually reasoning.

2 And I think that's reflected, if we
3 just look at October term 2019, which at least
4 until tomorrow, is the last complete data set we
5 have. There were 12 five to four decisions on
6 the merits docket in October 2020. In '19, I
7 think only seven or eight of them broke down
8 along what we might think of as the traditional
9 ideological lines. There were 11 public five
10 four decisions on the shadow docket that broke
11 right down, all 11 of them with the Chief
12 Justice, with the other conservatives in nine,
13 and with the progressives in two.

14 And so, I guess, Commissioner Ifill,
15 the data that we have to this point suggests that
16 more rationales, and more analysis is actually
17 not likely to lead to increasing divisiveness.

18 COMMISSIONER IFILL: Are you seeing
19 any indications that there is a trend towards
20 doing that more, increasingly in the shadow
21 docket? That is more decisions, more
22 identification, are you seeing anything, just

1 maybe in the last three, or four years that the
2 Court is trying to reveal more to provide
3 direction?

4 MR. VLADECK: I'm sorry, I didn't mean
5 to interrupt. Only in the sense that a little is
6 more than nothing, right? So just this term
7 there have been two published per curiam opinions
8 of the Court respecting shadow docket orders.
9 Which is two more than there were the term
10 before, the term before, the term before, right?
11 And so I think there is value to me in the
12 published per curiams in Roman Catholic Diocese,
13 and Tandon. But they're the exceptions to me,
14 Commissioner Ifill, that prove the rule.

15 And if may just really briefly on
16 Tandon, I worry that Professor Bray has perhaps
17 misinterpreted my critique of Tandon precedential
18 effects. The concern I have is not Tandon's
19 precedential effect, the concern I have is that
20 part of the four page per curiam majority opinion
21 in Tandon specifically, and directly chastises
22 the Ninth Circuit for not giving precedential

1 effect to four prior unsigned orders that the
2 Court had issued in California COVID cases.

3 So, Commissioner Ifill, I think these
4 dovetail in the sense that yes, I think at the
5 very least, the more the Court writes, the better
6 off we are, because the Court itself is signaling
7 to lower courts that the unsigned orders have
8 precedential effect. And so, at the very least
9 tell us why, and tell us what about them is
10 precedential, and tell us what exactly the rules
11 are going forward. That's where I think even if
12 the results are all the same, we'd still be
13 better off.

14 COMMISSIONER IFILL: Thank you.

15 CHAIR RODRIGUEZ: Commissioner Baude,
16 would you like to ask any more questions of the
17 witnesses?

18 COMMISSIONER BAUDE: Yeah, just three
19 quick topics I think. So one, picking up on
20 something that Professor Vladeck commented on,
21 and I'm very curious about his expertise.
22 Professor Vladeck, why do you think it is that

1 there are more, so called unusual lineups, in the
2 merits cases than the shadow docket cases?

3 MR. VLADECK: That's a great question.
4 I think a very, very short answer is because I
5 think the Court's merits docket tends to include
6 a higher percentage of cases Commissioner Baude,
7 that don't divide the Justices along traditional
8 ideological lines. And so for example, statutory
9 interpretation in questions that don't turn on
10 your particular methodological commitments, or
11 things of that ilk. And so I think it's
12 inevitable on the merits docket that there will
13 be cases that divide the Justices in ways that we
14 might not have thought of as predictable, even if
15 they were predictable to us, not sort of visually
16 identifiable with a particular partisan balance.

17 I think on the shadow docket we've
18 seen a real uptick in applications that have much
19 stronger ideological, and in some cases partisan
20 valences. And that on topics, Commissioner
21 Baude, that divide the Justices along those axes
22 more aggressively. So, I think it's both the

1 added diversity of the merits docket, and just
2 the sort of more general increasing utilization
3 of the shadow docket by particular groups, and
4 particular litigants raising particular types of
5 complaints.

6 COMMISSIONER BAUDE: Okay, thank you.
7 And the second is sort of on the death penalty
8 cases. If, for whatever reason, the direct
9 appeal in all the death penalty cases is not the
10 solution, do you think that there's anything that
11 could be usefully done to better handle the
12 Court's concerns about timing? As you know, in a
13 bunch of these cases the Justices expressed the
14 concern that they're getting these applications
15 to stay an execution, or illicit that sort of too
16 late. And I'm not sure what not too late would
17 be, but is there some reform, some rule, some
18 statute that could handle the timing issue?

19 MR. VLADECK: So, I would commend to
20 the Commission a book by Carol Steiker and Jordan
21 Steiker, titled "Courting Death," which looks at
22 how it's actually the Supreme Court's own

1 doctrines that have pushed all this litigation
2 back up against execution dates. And so,
3 Commissioner Baude, one possibility is that the
4 Court itself revisit some of the doctrines. I do
5 think that Mr. Dreeben slightly misunderstood,
6 perhaps because I was not artful, what I think
7 the solution is, which I think is in between how
8 he framed it, and your question Commissioner
9 Baude.

10 I would have Congress consider direct
11 appeals not of the entire case, but rather once
12 the execution date is set, direct appeals of
13 claims specifically challenging the execution.
14 Because that is where we see so much of the 11th
15 hour litigation, especially these cases, method
16 of execution challenges, and, or spiritual
17 advisor challenges. And Congress could, I think,
18 even delineate which kinds of claims are
19 cognizable in that context.

20 But short of that, Commissioner Baude,
21 I think any reform would have to come from the
22 Court. Where I think that Justices who are often

1 ripe to complain about what they perceive as
2 strategic lawyering by defense lawyers, bear some
3 of the responsibility for adopting, and embracing
4 doctrinal rules that may have been impossible to
5 bring on those claims earlier.

6 COMMISSIONER BAUDE: Thank you. And
7 Mr. Dreeben, do you have any reflections on, I
8 guess that sort of modified version of the
9 proposal? I guess a direct appeal of method of
10 execution claims, like the ones Professor Vladeck
11 mentioned?

12 MR. DREEBEN: Other than the benefits
13 of potentially eliminating the middle man and
14 giving the Court a little bit more time to review
15 it, I don't see the benefit to it at all. I think
16 that the Court functions best when it's really
17 dealing with very focused issues and gets the
18 benefit of an appellate process that examines a
19 trial record and applies standards of review and
20 serves up an opinion that allows the Court to
21 intervene on a more focused question.

22 So, cert before judgement, direct

1 appeals, they all have the feature of skipping
2 the court of appeals process, which I think
3 ultimately benefits the way that Supreme Court is
4 able to decide it. I don't think the benefits of
5 direct review outweigh that.

6 COMMISSIONER BAUDE: And sorry I keep
7 moving the goal posts, but then maybe imagining
8 something more like a mandatory post court of
9 appeals, the court of appeals decides it, and
10 rather than having the Supreme Court decide
11 whether to hear the claim or not, just saying all
12 of these cases will go on cert to the Supreme
13 Court, or whatever we call it.

14 MR. DREEBEN: Go on cert, or have
15 basically an appeal, and then the Court has to
16 hear it on the merits regardless?

17 COMMISSIONER BAUDE: Yes, go on the
18 merits from the court of appeals to the Supreme
19 Court, and the Supreme Court will spend more time
20 on all these method of execution cases.

21 MR. DREEBEN: I think the problem may
22 be more with either the doctrine that the Court

1 has created, and the degree to which it's in
2 flux, and the lower courts are applying it in a
3 different way than the Supreme Court thinks that
4 it should be applied, than it is a procedural
5 question of we just want the Court to do this. I
6 haven't studied it, but I would suggest that
7 maybe the Court look at how the California
8 Supreme Court has responded to the influx of
9 capital cases, because it has to hear them now.

10 I realize your proposal, Commissioner
11 Baude, has modified it and made it a little bit
12 more limited than I think it started out. It's
13 kind of shrinking as we discuss it, but I do
14 think that there's a real question of whether the
15 Supreme Court is the right body to be taking kind
16 of first cuts, or mandatory cuts, at every issue
17 in these very fact-bound cases.

18 COMMISSIONER BAUDE: Thank you. And
19 this is sort of the last theme I'm very curious
20 about your view, is you mentioned early on the
21 Court does take some cases for, I guess what we
22 call error correction, that don't fit the sort of

1 other rules of certiorari. As a descriptive
2 matter, do you think there's any pattern, or
3 principle, or rhyme, or reason to when the Court
4 gives us an error correction, and as a normative
5 matter, do you think there should be?

6 MR. DREEBEN: I think as a normative
7 matter, it should do it in a way that's even
8 handed. I think as a descriptive matter, if you
9 study the sort of patterns of past cases, they
10 leaned in the direction on two areas of kind of
11 governments, and law enforcement, and that was
12 habeas, and enforcing the AEDPA standards, which
13 are very deferential to state habeas and
14 qualified immunity.

15 My sense is that a majority of the
16 Court that was taking those cases felt like the
17 lower courts were just not in sync with what the
18 Supreme Court wanted to do, and it was trying to
19 send a message, that pattern was kind of
20 unmistakable. It's interesting that it's not
21 entirely reversed, but there's a little bit of
22 counter action going on now with two very recent

1 prominent cases, and one on Monday's order list
2 for the Court vacated a judgement in favor of
3 government officials, and against a prisoner who
4 claimed an excessive force claim that resulted in
5 his death, kind of a George Floyd-esque scenario
6 in some ways.

7 And Justice Alito dissented from the
8 Court's disposition, and he said, look, I don't
9 think we're above occasionally taking a fact-
10 bound case and digging in, rolling up our
11 sleeves, doing the hard work. And it's
12 illustrative to how you do these things, but I
13 don't think that we should do it by a drive by
14 summary reversal, where we don't actually do the
15 hard work, and we accuse the court of appeals of
16 having made a mistake. So, I think in general
17 there's a little bit of disagreement on the Court
18 of when to use it.

19 Justice Sotomayor has dissented
20 repeatedly from decisions that she thought were
21 egregious and should be corrected. And probably
22 the Court is internally thinking about how to

1 balance it out so that it preserves its
2 institutional capital legitimacy and sends the
3 kinds of messages that it wants to send.

4 COMMISSIONER BAUDE: Thank you very
5 much.

6 CHAIR RODRIGUEZ: Commissioner Huang,
7 do you have any final questions to pose?

8 COMMISSIONER HUANG: Yes, Mr. Dreeben,
9 if you wouldn't mind indulging more lightning
10 round, this won't be like Justice Kagan's
11 lightning round, sorry to disappoint, but I'll
12 try to serve up a couple of questions, and I know
13 Commissioner Crespo has one more question to ask
14 as well, so let's try to do this quickly if you
15 don't mind.

16 On the categories of cases that you
17 described the Court taking, or maybe it's wishful
18 thinking that they would take in some of those
19 categories, what do you think the role is of the
20 elite Supreme Court bar? Professor Richard
21 Lazarus among others has done work showing that
22 there was a very big disparity in success rates,

1 and getting cert grants. Does that effect a
2 particular category, or another better, or worse?
3 And actually that's the end of the lightning
4 round, so that we can save time for Commissioner
5 Crespo.

6 MR. DREEBEN: I don't think that it
7 affects any category particularly, just people
8 who practice in front of the Supreme Court seek
9 to achieve a little bit of a mind meld, and an
10 understanding of how to reach the Court.
11 Generally it's by applying the standards that the
12 Court is going to apply itself, and they're
13 simply better at it just for the same reason that
14 brain surgeons who do 100 brain operations a year
15 are going to be better than somebody who is
16 walking up, and doing their first.

17 CHAIR RODRIGUEZ: Commissioner Crespo,
18 do you want to get in a last question?

19 COMMISSIONER CRESPO: Sure, and thank
20 you to Commissioner Huang for guarding that last
21 minute 20. For Mr. Vladeck, this is really just
22 a point of clarification question. Among the

1 proposals you listed, one was returning to a
2 world where circuit justices dominate and where
3 single Justices are doing most of the work on the
4 shadow docket. And I suspect it's just lack of
5 either knowledge or imagination on my part, but I
6 was trying to understand how that would address
7 some of the core concerns you're getting at. So,
8 could you just spin out a few more sentences on
9 why a single Justice world is better?

10 MR. VLADECK: Sure, and I think,
11 Commissioner Crespo, as you know, there was a
12 period of time, especially through the 1950s
13 until the early 1980s where that was the norm for
14 shadow docket cases. Where a circuit justice
15 would act alone and would receive the papers by
16 themselves, oftentimes would hear oral arguments
17 in chambers, which hasn't happened since 1980,
18 and would issue an opinion, many of which we
19 still cite today for establishing some of the
20 rules we've been talking about for the last hour
21 and a half, respecting that decision.

22 The great virtues of that is it was a

1 more flexible process, where you only needed one
2 Justice to accommodate whose schedule you had to
3 accommodate. The opinion was useful to the
4 parties, but not precedential on behalf of the
5 Court, which meant that the full Court was not
6 bound by what an individual justice did. The
7 parties had an opportunity to be heard, much in
8 the same way as they would in a plenary review
9 context, at least an amount that was possible
10 under the circumstances.

11 And if it ever needed to come to pass,
12 the full Court could have necessarily come back
13 and overruled the individual circuit justice.
14 The key that -- folks sort of hear that and it
15 causes not something where you see these days,
16 they assume it's not realistic because applicants
17 will just go to either Justice Sotomayor, or
18 Justice Thomas, but the reality is that at least
19 from the 1950s until the 1980s, the Justices with
20 maybe one exception, were incredibly responsible
21 about acting not necessarily as they would have
22 if it were up to them, but as they thought the

1 entire Court would.

2 So, I think there's a lot to commend
3 what used to be the norm in this context, which
4 is having these emergency applications handled by
5 the Justice specifically assigned by statute to
6 handle the emergency applications for the
7 relevant Court case.

8 CHAIR RODRIGUEZ: Well, thank you so
9 much to all of the witnesses for an incredibly
10 full and rich panel. I know that the
11 Commissioners appreciate all of your insights.
12 We will now break until 3:20 when we will resume
13 with Panel 4 and a new set of witnesses.

14 Thanks again, everybody.

15 (Whereupon, the above-entitled matter
16 went off the record and resumed following a brief
17 recess.)

18 CHAIR BAUER: Welcome back to the
19 balance to the last panel of our public hearing.
20 Thank you to the previous panelists, and we
21 welcome the next panel.

22 The next panel is concerned with

1 issues in equity and transparency in the
2 operations of the Supreme Court. It will touch
3 on issues of equity and transparency, such as
4 recusal practices and balances in representation,
5 participation of amici, questions of the adoption
6 of the code of judicial conduct, and similar
7 issues. But, yet again, the panelists are free
8 to speak any of the issues that are before the
9 Commission within its charge.

10 And so, with that, what I would like
11 to do is proceed. Again, the format is going to
12 be the same. We will have opening statements of
13 three to five minutes from each witness, followed
14 by questions from Commissioners, each of whom
15 will be given ten minutes to ask their questions.

16 So, with that, I would like to ask all
17 of the witnesses to please turn their cameras on.

18 So, we will begin. Our first witness
19 will be Deepak Gupta. He's the founder of the
20 law firm of Gupta Wessler and a lecturer at
21 Harvard Law School. Mr. Gupta, the floor is
22 yours.

1 MR. GUPTA: Thank you, Mr. Co-Chair.
2 And may it please the Commission.

3 As an advocate who often goes to bat
4 for consumers, workers, and civil rights
5 plaintiffs before the Supreme Court, I'm really
6 glad that the Commission is devoting some
7 attention today to issues of access to justice
8 and transparency.

9 You've heard today from some of our
10 most distinguished scholars on topics like the
11 legitimacy of judicial review in a democracy. I
12 won't speak to any of that. People like me who
13 practice before the Court are probably the last
14 people in the world that you should ask for
15 advice on such topics. Our job is to work within
16 the system, so we're necessarily compromised.

17 But what I can offer is my perspective
18 on some problems that, while complex, have, in my
19 view, some commonsense solutions that are far
20 less elusive and on which I'm hopeful we can
21 achieve some measure of consensus.

22 My thesis today is simple. The Court

1 and its ecosystem is too insular, too opaque, and
2 too skewed in favor of large corporate interests.
3 There are some ways that we can make it less so,
4 and doing so would be good for the Court's
5 legitimacy in the eyes of the public, and for the
6 Court's ability to deliver on the promise
7 engraved above its entrance: equal justice under
8 law.

9 The first problem is one of diversity.
10 Not since the early 19th century has practice
11 before the Court been so dominated by such a
12 small group of elite repeat-player lawyers who
13 are overwhelming White and male. This group is
14 totally unrepresentative of America and even less
15 of the legal profession at-large.

16 And in the rare instance when the
17 Justices have complete control over who will
18 argue, when they appoint counsel, they tend to
19 choose from an unrepresentative group with whom
20 they have personal relationships, they're own
21 former law clerks.

22 While counsel are only appointed once

1 or twice a term, these appointments offer a
2 window into the Court's insularity. Of the
3 roughly 70 advocates appointed by the Court since
4 1926, a mere eight have been women.

5 When I was invited by the Court to
6 argue in 2019, I was the first Asian American and
7 only the fourth person of color appointed in the
8 Court's history. The Court should continue to
9 expand and diversify the pool beyond former
10 Supreme Court law clerks. And in my view, it
11 should use an outside advisory panel to suggest
12 candidates.

13 The Court should seek similar
14 diversity in hiring law clerks and it should
15 publish its statistics on law clerk diversity.
16 Institutions and firms that hire attorneys who
17 appear before the Court should do the same.

18 The second problem, related problem,
19 I want to address is one of imbalance. The elite
20 Supreme Court bar overwhelming consists of
21 lawyers associated with large corporate law
22 firms. And that corporate dominance ends up

1 shaping the contours of American law. Only the
2 wealthiest clients can afford these lawyers, and
3 conflicts prevent these lawyers from representing
4 plaintiffs. For example, consumers who sue a
5 bank or workers who sue an employer for wage
6 violations.

7 This is of particular concern at the
8 cert stage when repeat players who know the ropes
9 enjoy a distinct advantage. There are thousands
10 of petitioners filed each year, but when the
11 Court decides which ones to grant, we end up
12 seeing the same names, again and again.

13 Redressing this imbalance isn't easy,
14 but we can start by encouraging the development
15 of a specialized plaintiffs and public interest
16 appellate bar, including by increasing funding
17 for appellate practices and organizations like
18 legal aid and public defender officers.

19 The third and final problem I want to
20 address is that aspects of the Supreme Court's
21 work unnecessarily lack transparency. You just
22 heard about this on the last panel, but I think

1 it's important to consider in this context, too,
2 because complexity and secrecy work to the
3 advantage of the more powerful, who can hire
4 experts who know the unwritten rules.

5 My written testimony describes
6 solutions to increase accessibility to, and
7 transparency of, the Court's decision-making,
8 especially in the cert process and the so-called
9 shadow docket.

10 Last October, I argued a case that was
11 broadcast live on C-SPAN. Among the first live
12 broadcasts in the Court's 230-year history. Our
13 experience with those arguments in the pandemic
14 has shown us that the sky won't fall if the Court
15 broadcasts its proceedings live. Just as the
16 supreme courts of the United Kingdom and Canada
17 do, and as state supreme courts have done for
18 years.

19 If the Court is going to make
20 momentous constitutional decisions that affect
21 the daily lives of Americans without their votes,
22 the least it can do it allow us a glimpse into

1 the process. The court itself can and should
2 consider its own reforms to aid transparency.
3 These proposals don't require any acts of
4 Congress.

5 I'll admit that I am skeptical of what
6 can really emerge from this Commission process,
7 but I do hope we can all agree that the Supreme
8 Court and its ecosystem is in need of
9 diversification, balance, and transparency. And
10 I urge the Commission to highlight these concerns
11 in its final report. Thank you.

12 CHAIR BAUER: Thank you very much, Mr.
13 Gupta. Our next witness is Ms. Amy Howe, and she
14 is the cofounder of SCOTUSblog, for which she
15 continues to report. She is speaking here on her
16 own behalf; however, her views are informed by
17 conversations with other members of the press
18 that follow the Supreme Court. And so, with that
19 introduction, let me turn this over to you, Ms.
20 Howe.

21 MS. HOWE: Thank you, Commissioner
22 Bauer. Good afternoon. Thank you again for

1 inviting me to testify about an issue that's
2 always important to me, but especially at the end
3 of June, in a term in which we have not seen the
4 Justices take the bench because of the pandemic.

5 You have my written testimony, so I'm
6 not going to repeat it verbatim here. Instead, I
7 want to focus on a few brief and key points. The
8 first is a very basic one that goes to why
9 transparency is important.

10 In his book, "Making Democracy Work,"
11 Justice Stephen Breyer wrote that the Court can't
12 take for granted that the public will accept its
13 decisions as legitimate. The Supreme Court
14 itself, he said, must help to maintain the
15 public's trust in the Court. An important part
16 of securing and maintaining that trust, I
17 believe, is for the public to be able to see and
18 understand what's happening at the Court.

19 As I describe in my written testimony,
20 the Supreme Court has taken a variety of steps to
21 make its actions more transparent to the public.
22 But I think it's important to note that perhaps

1 the biggest step towards greatest transparency
2 that the Court has taken in recent years, making
3 live audio of oral arguments available in real-
4 time, came about just last year as a response to
5 the pandemic. With the courtroom closed to the
6 public for the foreseeable future, the Justices
7 needed to hold our oral argument remotely, and
8 they couldn't hold the oral arguments without
9 providing some form of public access.

10 The question of whether the Justices
11 will continue to provide live audio of oral
12 arguments, and add live audio of opinion
13 announcements when they return to the courtroom,
14 is, in my view, the most pressing transparency
15 issue facing the Court right now. It's, to me,
16 unfathomable that we could go back to a world in
17 which we have to wait until the end of the week
18 to hear the audio of oral arguments.

19 But live video of oral arguments and
20 opinion announcements would be even better than
21 live audio. I've always been a proponent of
22 cameras in the courtroom, but I became an even

1 more fervent one after SCOTUSblog courtroom
2 access project in 2019 and 2020, when we tracked
3 efforts by members of the public to obtain one of
4 the 50 seats set aside for the public at oral
5 argument.

6 I talked with people who spent the
7 night outside on the sidewalk in February or flew
8 in from Puerto Rico because they wanted to try to
9 see the Supreme Court in action on an issue that
10 was deeply personal to them. And if we've
11 learned one thing from the Court's use of live
12 audio for a full term, plus the May argument
13 session in 2020, it's that none of the parade of
14 horrors that are often cited as arguments
15 against cameras in the courtroom, but which apply
16 fully to live audio, as well, came to pass. As
17 Mr. Gupta just said, the sky did not fall.

18 Although my remarks here and in my
19 written testimony are sometimes critical of the
20 Court, they stem in no small part from my
21 experience as a reporter covering the Court.
22 When the Supreme Court is in session, I get to

1 attend the overwhelming majority of the oral
2 arguments and sit in very good seats. I see
3 Justices who come to the bench well-prepared and
4 excellent lawyers from all over the country. I
5 just think that everyone else should have the
6 opportunity to see them, too. I look forward to
7 answering your questions.

8 CHAIR BAUER: Thank you very much, Ms.
9 Howe. Our next witness is Professor Allison
10 Larsen. She's professor of law and director of
11 the Institute of Bill of Rights at the William &
12 Mary Law School. Professor Larsen, you have the
13 floor.

14 MS. ORR LARSEN: Thank you so much.
15 Thanks for inviting me to testify today. I'm
16 honored to be here.

17 I think the aspect of my work that's
18 most relevant to this Commission is my research
19 on Supreme Court amicus briefs. And just for the
20 record, we can say amicus or amicus or amicus,
21 just like Justice Breyer says it; it's all the
22 same to me.

1 Amicus briefs have been through a
2 tremendous growth spurt over the past 30 years.
3 And it's growth on a number of different levels.
4 So, the number of briefs filed have increased
5 dramatically, the range of entities filing them
6 has increased, and the rate at which the Justices
7 cite them in their opinions has increased as
8 well.

9 For virtually every case now the
10 Justices are awash in a sea of amicus briefs. To
11 put things in perspective for you historically,
12 amici average about one brief per case in the
13 1950s and five briefs per case in the 1990s. In
14 2015, in the Obergefell case, that number was
15 147. For sake of comparison, Brown v. Board was
16 six.

17 Why does any of that matter and merit
18 your attention? It matters, I think, because the
19 kind of amicus briefs that the Justices rely on
20 the most are briefs that provide facts,
21 generalized facts about the way the world works,
22 which are called legislative facts. And many

1 people applaud them for this, for the briefs
2 providing the sort of specialized knowledge, and
3 I can see why. The decisions affect many people,
4 and so, many people should be allowed to weigh
5 in.

6 The trouble, however, is that these
7 amicus facts come in at the 11th hour and they're
8 submitted by motivated actors who are barely
9 subjected to adversarial testing at all. So, the
10 factual sources are chosen by somebody with a dog
11 in the fight. They're not chosen because they're
12 the industry standard, most peer reviewed, most
13 accurate state of our knowledge today.

14 And with the vast amount of
15 information available online now, it's not very
16 hard to assemble evidence, whether of strong or
17 dubious reliability, that will support a
18 preexisting point of view.

19 The secret is out that the Justices
20 like these briefs, the briefs that supplement
21 their factual knowledge. And so many amicus just
22 stretch in order to make these factual claims,

1 even if it's beyond their institutional capacity
2 to do so.

3 As part of my research, I did a deep
4 dive into some of the amicus briefs that the
5 Justices use to support their arguments, and I
6 found examples where the reliability is pretty
7 shaky. Sometimes the study was funded by the
8 amicus itself, sometimes the numbers cited
9 weren't publicly available. And often they cite
10 a minority view in the field without recognizing
11 that there are countervailing authorities, too.

12 This is going to get worse before it
13 gets better, because facts are not just easier to
14 access in the digital age, they're also easy to
15 legitimize. Factual claims that may have once
16 been deemed outrageous assertions from fringe
17 players, are now easily distributed in a way that
18 makes them seem mainstream.

19 I just want to be clear here that I'm
20 not arguing for the abolition of amicus briefs,
21 nor do I think it's realistic to ask the Justices
22 to shut their eyes to anything outside the

1 record. I also don't think this is a partisan
2 issue. Justices appointed by Presidents of both
3 parties use amicus briefs freely.

4 Instead, I think the problem is that
5 the Supreme Court's hunger for factual
6 information has outgrown what the amicus process
7 can reliably provide. So, we're driving an old
8 tool through a new data-rich terrain. And the
9 rules governing amicus briefs have just not
10 caught up.

11 The good news, though, is I think
12 there are concrete reforms within your reach that
13 might really ameliorate the problem. And the key
14 to making this all work is transparency. So, as
15 I describe in my written testimony, I think the
16 amicus process can be improved with some stronger
17 disclosure rules. And I'm happy to talk about
18 the details of that in the Q&A.

19 But leaving things the way they are,
20 I think, would be a mistake. Over the past 30
21 years the world has undergone a revolutionary
22 change in how information is transmitted and

1 received. To ignore this change, and leave the
2 Justices in a factual free-for-all, risks
3 exasperating confirmation bias and tainting
4 Supreme Court decisions with unreliable evidence.
5 Thank you.

6 CHAIR BAUER: Thank you very much,
7 Professor Larsen. Our next witness is Professor
8 Judith Resnik. She is the Arthur Liman Professor
9 of Law at Yale Law School. Professor Resnik, you
10 have the floor.

11 MS. RESNIK: Thank you. I'm glad to
12 have spent the day with you and to be talking
13 with you now.

14 I fit well in terms of following
15 because change is the leitmotif. There was a
16 risk at the beginning of these sessions that the
17 idea was that there's a problem that we are
18 facing, oh my goodness, could nine change, as if
19 hundreds of changes have not taken place
20 throughout the federal system, at the Supreme
21 Court as well as at the lower courts.

22 In the submitted testimony I provided

1 photographs and charts and the like to try to
2 capture a few. Here, I just want to sketch that
3 when the 20th century began there were fewer than
4 120 judges around the entire United States,
5 included the Justices. And by the century's end
6 there were more; by now, there are more than 870
7 of those judges. On top of which, at the
8 beginning of the century, there were fewer than
9 about 30,000 cases in the beginning of the 20th
10 century. And we look at a docket of 300,000 and
11 more cases every year.

12 And with the addition of these new
13 judges did not come tremors about legitimacy,
14 efficacy, judicial impartiality, but rather a
15 salute, picking up on earlier themes, of the
16 possibility of diversifying and expanding the
17 judicial capacity of the United States.

18 Why did these changes get pushed?
19 Because Congress has endowed so many of us with
20 rights that didn't exist at the beginning of the
21 20th century.

22 So, the filings are up, there are new

1 tiers of judges, magistrate and bankruptcy
2 judges. And term-limited federal judges exist
3 throughout our system.

4 To summarize the first point, given
5 the redesign across the spectrum, it's odd to
6 think that the Supreme Court doesn't need some
7 redesign. And of course, in fact, as you just
8 heard, it has redesigned a good deal itself, or
9 been presented with new materials.

10 So the second point is changes of the
11 Court. Unlike a hundred years ago, the Court has
12 carte-blanced over its docket, basically, as its
13 mandatory docket has shrunk and its discretionary
14 docket has grown. And its caseload has shrunk,
15 despite the growing caseload around the country.

16 And more than that, and maybe not so
17 much in focus, the federal appellate courts issue
18 about 50,000 cases a year. Of that 50,000, 80
19 percent are marked not for publication, not
20 precedential; i.e., not important.

21 Yet the Court takes, every year, about
22 14 percent of its cert grants come from those not

1 important cases. So there's a genuine
2 disjuncture in the conversation between the
3 courts of appeals and the U.S. Supreme Court.

4 And in terms of the cases that are
5 picked, we know that the Justices and the judges
6 alone don't agree on what's important. Yet the
7 Court has changed a lot, which is the second
8 point.

9 And a third point is that the Chief
10 Justice's powers have grown stunningly over the
11 course of the last century with the creation of
12 something called the Judicial Conference of the
13 United States picking committees, picking people
14 to sit on courts, dozens and hundreds of statutes
15 that authorize particular roles for the chief.

16 And, moreover, the Supreme Court's
17 rulemaking, about which we've just heard some,
18 does not actually conform to the rulemaking
19 processes of the rest of the federal system,
20 where it's notice and comment and transparency as
21 well.

22 To focus on what can be changed, a lot

1 can be changed. Some of it volitionally by the
2 Court and some of it through statutes given
3 congressional authority under Article III of the
4 Constitution, and a fixed set of statutes that's
5 already done.

6 The proposals that you see are many.
7 The chief justiceship could rotate, as it does in
8 many state courts, and as the lower federal
9 courts' chief judges rotate. The Chief Justice
10 and the Court could voluntarily adopt a better
11 rulemaking system for itself. There could be
12 both more Justices sitting on panels. You heard
13 something of the examples from before. And you
14 don't have to cross the oceans, any ocean, or
15 borders in order to take examples from state and
16 federal systems of panels sitting rotation and
17 the like. You can be tenured to the federal
18 system but not necessarily to a particular bench.
19 And of course the cert process, many people have
20 suggested changes in this.

21 The key fact is that democracy doesn't
22 tell us how to select judges. You can't inherit

1 it, you can't exclude, but it doesn't tell you
2 how. But it does tell you that a few people
3 holding power for so long is a genuine problem.
4 And the key point is that the Court's power has
5 expanded radically. And it is time for the Court
6 and the Congress and the population, working
7 together, to insist on forms of change. Thank
8 you.

9 CHAIR BAUER: Thank you very much,
10 Professor Resnik. Our next witness is Professor
11 Russell Wheeler. He's president of the
12 Governance Institute and a visiting fellow in the
13 Brookings Institution's governance studies
14 program. Professor Wheeler, you have the floor.

15 It could be the mute function.
16 Professor Wheeler, can you hear us?

17 (Audio interference.)

18 CHAIR BAUER: Your audio --

19 (Audio interference.)

20 CHAIR BAUER: Yeah, your audio is mal
21 functioning at the moment.

22 Now you're muted. It may make sense

1 --

2 (Audio interference.)

3 CHAIR BAUER: Professor, you're not --
4 I think it might make sense for you to disconnect
5 and dial back in, because at the moment the
6 connection is very poor. So we'll just take 30
7 seconds here and see if Professor Wheeler can
8 dial back in successful and restore the audio.

9 (Pause.)

10 MR. WHEELER: Is that better?

11 CHAIR BAUER: Yes. Much better,
12 Professor Wheeler. Thank you. We can hear you
13 very clearly now.

14 MR. WHEELER: You may not be happy
15 about that, but, anyhow, I'll proceed.

16 CHAIR BAUER: Please. Please do.

17 MR. WHEELER: I appreciate the chance
18 to talk about the two topics you asked me to
19 discuss. A code of conduct for the Supreme Court
20 and the Supreme Court recusal practices.

21 These are both areas in which there is
22 a lot of misleading information, by the way. As

1 to a code of conduct, there is of course a code
2 of conduct for the federal judiciary which by its
3 terms does not apply to the Supreme Court.

4 There is also -- and I should say that
5 code, because most people don't understand this,
6 this code is purely aspirational. The Judicial
7 Conference of the United States has no statutory
8 authority to require compliance with that code.

9 There is also a mechanism, separate
10 from the code, to receive complaints of
11 misconduct by federal judges, administered
12 pursuant to the 1980 Judicial Conduct Act.

13 Now, as to a code of conduct for the
14 Justices, some argue that the Justices have
15 plenty of sources of advice as to when they face
16 an ethical problem. The code itself, advisory
17 opinions, colleagues, and others.

18 And there is no need, the Chief
19 Justice has said, for one more, the Court to have
20 its own code. Others respond, of course, that
21 there is some symbolic value in the Court putting
22 in black and white its conception of its ethical

1 obligations and its commitment to abide by them.

2 I think the touchier question is
3 whether or not there is any mechanism to receive
4 complaints of misconduct and impose sanction for
5 misconduct as there is for judges of a lower
6 court. I think most people agree, if that were
7 to be, if the Congress were to put that into
8 effect, it would almost surely have to involve
9 lower court judges, pardon the expression,
10 perhaps selected by the Judicial Conference, to
11 receive complaints of misconduct by the Justices
12 and determine whether action was appropriate.

13 The Justices, to the degree they've
14 spoken on it, are uniformly opposed to that
15 concept on the view that lower court judges
16 shouldn't be evaluating the complaints of
17 misconduct by Supreme Court Justices. And they
18 give a variety of reasons for that, which I've
19 tried to sketch out in my paper.

20 A response might be that already under
21 the Judicial Conduct Act the lower court judges,
22 district judges, review the conduct of circuit

1 judges, so it wouldn't be such a leap to have
2 circuit and district judges evaluate complaints
3 about the conduct of Supreme Court Justices. And
4 as many others have said, if you look to the
5 states, that's basically the way all the state
6 systems operate, and they seem to be operating
7 fairly well. So that's one aspect of the
8 problem.

9 As to recusals, again, there are pros
10 and cons. Currently, federal judges, under the
11 disqualification statute, decide for themselves
12 whether to grant a disqualification motion filed
13 pursuant to statute, obviously decide on their
14 own whether to recuse sua sponte.

15 And I think the Supreme Court is
16 generally of the view they want to maintain that
17 practice of deciding for themselves, unlike in
18 some other courts, in some state systems, for
19 example, in which disqualification motions are
20 referred to another judge for decision.

21 Of course, at the Supreme Court, the
22 Justices referring such a motion to another body

1 might violate the so-called "one supreme court"
2 mandate of the constitution, because the
3 disqualification or recusal decision is a
4 judicial decision, not an administrative
5 decision. The response to that, of course, is
6 that people simply shouldn't be judges of their
7 own case. So, that's what happens when a judge
8 decides a disqualification motion or decides all
9 by him or herself to recuse in a case because
10 there may be a conflict.

11 And they point out that this argument
12 of one supreme court really hasn't been fleshed
13 out very much. And ever since Chief Justice
14 Hughes announced it in the 1930s in opposing the
15 court-packing plan, it's been thrown around, but
16 perhaps not very much analyzed.

17 The other aspect of recusals, of
18 course, is whether or not the judge who recuses,
19 who denies a disqualification motion, should have
20 to explain why. The arguments for that are
21 fairly obvious. On the one hand it just promotes
22 transparency; and on the other, as well, it

1 encourages judges to think through their reason
2 for denying a motion. What may seem obvious may
3 not been seen obvious and they have to explain
4 it.

5 On the other hand, judges and Justices
6 point to recusal matters and disqualification
7 matters which turn on delicate personal matters,
8 family matters, they say they shouldn't have to
9 put those matters on the record. It might
10 discourage them from recusing if they had to do
11 so. And there are arguments, which I highlighted
12 in my paper, but I'll stop now and, of course, be
13 happy to try to answer any questions you may
14 have.

15 CHAIR BAUER: Thank you very much,
16 Professor Wheeler. We'll now turn to the
17 Commissioners who will be asking questions. I'll
18 ask them to please come into the conversation at
19 this point.

20 The first of our questioners is
21 Professor Margaret Lemos, who is the Professor G.
22 Seaks Professor of Law at Duke University School

1 of Law. So, Professor Lemos, please proceed.

2 COMMISSIONER LEMOS: Thank you,
3 Commissioner Bauer. And I'd like to thanks as
4 well to all of the witnesses from this Panel for
5 your really thoughtful and informative testimony.

6 Mr. Gupta, I'd like to start with you,
7 if I might, and ask you to say a little bit more
8 about the concerns you've raised about the fact
9 that a relatively small group of elite lawyers
10 seems to play an outside role in the cases the
11 Court hears.

12 And so I'm curious in particular about
13 what effect you think that might have on the
14 Court and its decision making. Whether at the
15 cert stage, when the Justices are deciding which
16 cases to take, or later on, on the merits.

17 And among other things, I'm curious
18 whether you think the problem at the cert stage,
19 if there is one, is a problem with false
20 positives in the sense that the Justices are
21 being persuaded by the advocate or perhaps by
22 their clerks, to take cases that are not in fact

1 worthy of their limited attention, or whether
2 it's more of a problem of false negatives in the
3 sense that the Justices are missing out on cases
4 that they really ought to be deciding?

5 MR. GUPTA: Thank you, Professor
6 Lemos, that's an excellent question. I think
7 it's a combination of both.

8 So, it's very difficult to measure
9 this sort of stuff empirically and to make causal
10 claims, but I think some of the best research
11 that's been done is by Professor Richard Lazarus
12 in Harvard in two articles.

13 One, which is provocatively called
14 Docket-Capture at the High Court. And by analogy
15 to sort of agency capture where you have powerful
16 interests that are well represented and that the
17 agency is hearing from those folks more than
18 others who may represent the public interest.

19 And one example that I think I've
20 always found pretty compelling that Professor
21 Lazarus gives is the example of a series of cases
22 filed by a really well respected Supreme Court

1 practitioner, Carter Phillips, who happened to
2 represent a couple of railroads.

3 And he filed petitioners over and over
4 again about an obscure statute called the FELA,
5 the Federal Employers Liability Act. And
6 persuaded the Court to take these cases on pretty
7 minor questions of tort liability that the Court
8 probably otherwise would not have had on its
9 radar, would not have been interested in.

10 And I think that's just a small window
11 into the ability of expert advocates who are
12 repeat players to send the signals that the Court
13 is looking for and to really shape the docket.
14 And so, the fact that a single advocate
15 representing a single client can get, can shape
16 the Court's agenda and get an issue onto the
17 Court's docket is pretty remarkable. I think the
18 public would be surprised by that.

19 But to go to the second part of your
20 question, I also think that there are, there are
21 cases that are just not making it to the Court
22 that otherwise would be filed. And so, there are

1 whole categories of litigants that do not have an
2 expert bar, that knows the, what I like to think
3 of as the dark arts of the cert process.

4 This is the phase where I think, more
5 so than the merits phase, where the particular
6 kind of lawyering that Supreme Court advocates
7 know how to do makes a difference because the
8 Court is not interested as much in who's right or
9 who's wrong, which is what lawyers are used to
10 briefing, they're interested in things like, is
11 this a good vehicle, are there true splits.

12 And the Court necessarily relies on
13 repeat player advocates because the Justices just
14 don't have enough time to process all of those
15 petitions. And so, it's a combination of
16 expertise, credibility, familiarity.

17 And if that know-how and familiarly is
18 not evenly distributed, it does have a, I think,
19 a measurable effect on the Court's docket. Even
20 if it's hard for me to reduce that to any kind of
21 mathematical or empirical proof.

22 COMMISSIONER LEMOS: Thank you, Mr.

1 Gupta. Professor Resnik, I'd like to ask you a
2 question about cert as well. Picking up on some
3 things that were explored in the panel we just
4 heard before this.

5 You have expressed concerns about the
6 Court's unfettered discretion to select which
7 cases adheres. And you mentioned a proposal that
8 we heard about on the last panel of giving
9 federal appellate judges, and maybe state judges
10 as well, or some subset of them, a hand in
11 selecting cases for the Supreme Court's review.

12 Can you say a little bit more about
13 what you see is the problem, or problems, with
14 the Court's current processes for cert and why
15 you think it would be an improvement to give
16 other judges a voice in that process?

17 MS. RESNIK: Yes, I would be, you
18 heard that the cert pool may be skewed, as Mr.
19 Gupta said, by who can, who's a repeat player
20 versus a one-shot lawyer in that process or no
21 lawyers.

22 We should recognize that in about a

1 quarter of the filings of the state, at the trial
2 level and half on appeal, there are no lawyers
3 whatsoever. So when we try to talk about the
4 resources and the problems of skewing the docket
5 because these are unrepresented cases, then 80
6 percent of those cases that are in the courts of
7 appeals end up with the courts of appeals saying,
8 and these aren't important, and then the Supreme
9 Court takes them.

10 So I think that it's really important
11 to see that the Court is currently sitting on a
12 dysfunctional system and its dysfunction echoes
13 through the docket of the Supreme Court. And the
14 idea that it's developed its process of picking
15 cert and therefore it is the process that it is,
16 it would rattle our cages to change, is a problem
17 rather than saying, what are the ways to fix it.

18 And you have a kind of smorgasbord of
19 options in terms of how to fix it. And one that
20 was proposed by a bunch of law professors more
21 than a decade ago, Paul Carrington and Roger
22 Cramton get pride of place in moving it forward,

1 is to say, why don't we have some judges who are
2 sitting on the courts of appeals rotate through
3 the system to give a better insight on it.

4 And it looks like it could be an
5 importantly two-way street, because the Supreme
6 Court could say, wait a second, we think that's
7 important. Telling the courts of appeals, you
8 may be ducking issues we think are important.

9 It's also the case that it diffuses
10 the centrality of power of nine people, which has
11 gotten so distorted over the century.

12 And so there are different ways to do
13 it. Including, I believe, that the Court could
14 invite more information from the courts of
15 appeals.

16 We heard about the amicus practice --
17 I'm sorry, I'm geographic so I'm pointing to
18 where you are on my screen -- and we could think
19 of ways in which the Court could, first of all,
20 own that it's sitting on a problem, use its role
21 model leadership and work with Congress. Chief
22 Judge Katzmann who recently died kept calling for

1 the, work with Congress courts to develop a whole
2 set of better practices, of which cert is one.

3 COMMISSIONER LEMOS: Thank you. Mr.
4 Gupta, let me come back to you with another cert
5 question while we're on this topic.

6 You've argued for disclosure of the
7 Justices' votes on cert, largely for reasons of
8 transparency. I'd like to invite you to just say
9 more about that and why that information would be
10 helpful to the public or to the legal system.

11 And I'd also be curious to hear your
12 views on one proposal that's sometimes made to
13 disclose which cases make it onto the so called
14 discuss list. The sort of short list of cases
15 that the Justices actually talk about with each
16 other.

17 As you know, one objection to
18 disclosing the votes on cert is that it might be
19 somewhat misleading because there is this large
20 number of cases that the Justices probably don't
21 give their full attention to. And so, I'd be
22 grateful to hear your views on the discuss list as

1 well as the votes on cert.

2 MR. GUPTA: Sure. So I want to be
3 clear that I'm not advocating for any
4 legislation, I'm advocating that the Court may
5 wish to consider these transparency reforms,
6 indeed that it should, it would be a good idea.

7 And I'm favor of both proposals. And
8 I think they're complementary. Because actually
9 for the reason you have suggested in the
10 question.

11 If the Court discloses both the votes
12 and the list of cases that are discussed, then
13 there is less likely to be an inappropriate or
14 mistaken inference that the Court gave a whole
15 lot of thought to a case and denied it.

16 Of course, a denial of cert is not
17 supposed to be read as any judgement on the
18 merits. That would be true regardless of whether
19 the cases are disclosed or not.

20 I think we know from experience, from
21 the lower courts, there are many kinds of
22 discretionary review decisions where those votes

1 are disclosed. And I don't think that has harmed
2 the deliberation in those courts or public
3 perceptions of the legitimacy of those courts, so
4 it's hard for me to see how that would occur
5 here.

6 I do think this is a court in a
7 democracy and transparency is generally a good
8 thing. We know what the votes on cert were in
9 times past because we know that from the
10 disclosure of the Justices' papers.

11 And I don't think that that reflects
12 badly on the Court as an institution. And it's
13 hard for me to see why that would be any
14 different if the Court were to decide to do that
15 today.

16 COMMISSIONER LEMOS: Thank you.
17 Professor Larsen, let me see if I can sneak in
18 one question for you before my time runs out.

19 We've been talking a bit about
20 imbalances and representation by the actual
21 attorneys for the parties. I'm curious whether
22 in your work on amici, whether you have come

1 across any evidence that certain interests are
2 better represented by amici than others?

3 Or to put that differently, whether
4 there are certain interests that are typically
5 not well represented by amici?

6 MS. ORR LARSEN: Well, I think the
7 answer is yes, but there is an important
8 distinction between the merit side and the cert
9 side.

10 So, on the merit side, I've written
11 about this before. Since the docket is shrinking
12 and lots of people want Supreme Court work, it's
13 not hard to find a Supreme Court specialist to
14 take your case for free once you have a cert
15 grant.

16 And so, there are some issues where
17 the bar is often, is too often conflicted out.
18 Consumer protection which I heard is one of them.

19 But on the merits, you often see very
20 qualified specialized lawyers on both sides of
21 the beat.

22 On the cert side I think there is an

1 imbalance. And I think there is a problem. And
2 it's the one we've been talking about before.

3 And it has to do with amicus briefs
4 because there's a thud factor when the law clerk
5 gets a cert petition with a big stack of amicus
6 briefs and that plays a, it plays an important
7 part mentally in sort of the calculus of whether
8 it's a grant or not.

9 And those briefs are filed by people
10 who can afford them because they are, they're
11 still a shot in the dark. They don't have a cert
12 grant yet.

13 So I do think there is a really
14 important distinction between the merit stage and
15 the cert stage. And the imbalance, I see it, is
16 on the cert stage, not on the merit stage.

17 COMMISSIONER LEMOS: Thanks.

18 CHAIR BAUER: Thank you very much,
19 Professor Lemos. The next questioner is
20 Professor Olatunde Johnson at Columbia Law
21 School. The Jerome B. Sherman Professor of Law
22 on the faculty there. So, Professor Johnson.

1 COMMISSIONER JOHNSON: Thank you,
2 Commissioner Bauer. And thank you to this whole
3 panel for your perspectives and your insights.

4 I wanted to start with Mr. Gupta.
5 It's actually a follow-up of the previous line of
6 questioning around cert.

7 And one of the things you say in your
8 written testimony is that the certiorari process
9 is opaque, right. And so part of that might be
10 dealing with those kind of after the fact, back-
11 end reforms, of the kind that you were just
12 talking about, disclosing the votes, disclosing
13 the prominent discuss list.

14 I wondered if you thought there should
15 be some changes to the announced standards for
16 granting certiorari or more clarification?

17 So, as you know, Supreme Court rules
18 talk about a circuit conflict and important
19 questions. The Supreme Court can also, in
20 theory, grant cert for correcting an error.
21 Maybe that's done less on the certiorari docket.

22 Are there ways or are there

1 suggestions that you have about how those
2 standards could be less opaque from your
3 practitioner perspective?

4 MR. GUPTA: You know, I think
5 ultimately the standards are what are written
6 down on paper, but because this is such a
7 discretionary decision, so much more content to
8 what the Court is doing is going to be beyond
9 written standards.

10 So I do, I'm in favor of transparency.
11 I think the Court should, and does from time to
12 time, tell us why it's taking a case or why it's
13 not taking a case.

14 Usually that comes either in the text
15 of the merits opinion that explains, sometimes
16 briefly, why a case was taken. And then also, we
17 get a lot of information from the single Justice
18 or multiple Justice dissents that are written
19 when the Court denies cert.

20 But the problem is that it's folks
21 like me and my counterparts and the corporate
22 Supreme Court bar, who read all of those opinions

1 and understand how to interpret those signals.
2 And then of course it's the law clerks. The
3 people who are responsible for overseeing the
4 process, who know the most about it.

5 Those law clerks, when they leave the
6 Court, are very likely to take a \$350,000 bonus
7 on top of their base salary and go to a number of
8 firms that have practices before the Court. Now
9 I'm not saying that the law clerks are disclosing
10 to people confidences from within the Court, but
11 they understand the process very well, and that
12 expertise is unequally distributed.

13 So I'm skeptical that writing down
14 standards is going to fix the imbalance. I think
15 it has to come in having more balance in Supreme
16 Court expertise across different categories.

17 COMMISSIONER JOHNSON: Okay, thank you
18 for that. I'm going to, I want to ask some
19 questions of Ms. Howe. Thank you for your
20 testimony about transparency from the perspective
21 of the press.

22 One of the things that you say, in

1 your written testimony, but also as you're
2 speaking here, is on the importance of video or
3 televised coverage, and you talk about your own
4 experience going in and having that kind of live
5 watching of the oral argument. And also about
6 the success of audio and the lack of parade of
7 horribles.

8 So, that raises, for me, a series of
9 questions I just want to ask too. I mean, one
10 is, since there has been resistance to televised
11 arguments, and I want to get to some of the
12 specific concerns, what do you think is really
13 gained from video?

14 Because, I mean, you were there live,
15 right, and that's a whole experience, but what do
16 you think is the added advantage of video over,
17 let's say audio?

18 MS. HOWE: Sure. And I think it's a
19 great question. Thank you for the question.

20 I think that there are nuances to the
21 Justices' body language, in particular, that you
22 simply can't capture on the audio. And I know

1 that people who argued at the Court over the last
2 term or so, and I see Mr. Gupta nodding his head
3 said that, certainly it was better than no
4 argument at all but that it wasn't the same as
5 arguing in person and being able to look at the
6 Justices and see their responses to the answers
7 to your questions.

8 It's a very difficult thing to sort of
9 put your finger on.

10 COMMISSIONER JOHNSON: Yes.

11 MS. HOWE: But there are just
12 intangibles and contexts to seeing the arguments
13 and seeing the Justices' responses that you can't
14 get from live audio.

15 COMMISSIONER JOHNSON: Okay. And
16 we're talking, I mean, certainly from the
17 perspective of the person who is arguing, it's
18 really hard when you see on Zoom, lack of social
19 queues, even in that, on audio is even more.

20 I guess I was interested in, from the
21 public's perspective. But let me merge that with
22 another question which is, because I think it

1 relates, is that we've often heard that that's
2 almost what the Court is trying to avoid, right,
3 is the idea that oral argument will have outsized
4 importance if you have video, because people will
5 be looking at their facial expressions.

6 And then they've also, in addition to
7 the concerns that you articulated for us before,
8 have expressed concerns about privacy, people
9 recognizing their faces, publicly and also more
10 generally about litigants' privacy. That they
11 then sort of sign up to the celebrates in this
12 instance.

13 I mean, how do you assess those as
14 someone who is a really close observer of the
15 Court?

16 MS. HOWE: Okay, so let me unpack that
17 question, so to speak. I mean, I think first of,
18 like in addition to sort of the nuances, I want
19 to go back to a point that I made, both in my
20 written testimony and in my testimony here, there
21 are 50 seats reserved for the members of the
22 public in the courtroom. And people wait in line

1 sometimes for days to get a seat in the courtroom
2 for the oral argument and the challenge to
3 California's Proposition 8.

4 The first person in line waited in
5 line for 114 hours. And someone paid him several
6 thousand dollars to do that.

7 The first nine out of ten people in
8 line for the Obama care argument were paid line-
9 standers. People say, they're open to the
10 public, but in a certain sense, for some of the
11 high profile cases, they're not really open to
12 the public.

13 For issues like these that effect how
14 people live their everyday lives, people want to
15 see these arguments. And video, for many people,
16 is really the only way to do that.

17 In terms of the Justices' privacy, I
18 think they are members of the highest court in
19 the land. I'm not sure that that is necessarily
20 something that should factor into their
21 consideration of whether or not people should see
22 these arguments.

1 And then in terms of the litigants, I
2 don't think that the litigants themselves, first
3 of all, would necessarily be shown. They're
4 seated in the gallery. Many of the television
5 oral arguments in the Ninth Circuit, you see the
6 judges and you see the lawyers who are arguing,
7 they don't show the gallery at all.

8 And I would add that often after the
9 oral arguments in big cases, many of the
10 litigants come down the front steps of the
11 courthouse, of the Supreme Court of the United
12 States, and talk to the press out front. You
13 know, many people are not actually looking for
14 privacy in these cases.

15 COMMISSIONER JOHNSON: Yes, thank you.
16 That's helpful. I actually, I want to ask
17 another question of you, and if we have time at
18 the end I can ask some questions of others.

19 I want to give you some space just to
20 talk about some of the other transparency related
21 issues that you would identify as top of the list
22 that came up in your written testimony. For

1 example, financial disclosure.

2 What are the ways in which the current
3 system is inadequate, and then also, the lack of
4 reporting on public appearances, speeches and
5 things like that?

6 MS. HOWE: Sure. Both of these go to
7 Justices' recusal practices from a slightly
8 different angle than some of the other ways that
9 have been touched upon.

10 And I think that most of the logistics
11 and the ability to know, in many ways, why the
12 Justices are recusing themselves, one way is sort
13 of useful to think about it is a continuum. You
14 know, maybe the Justices aren't going to explain
15 why they're recusing themselves, but if they're
16 not going to do that, we need to give members of
17 the public adequate information for us to, for
18 the members of the press at least, to try and
19 figure out why they're recusing themselves.

20 And so, for the financial disclosures
21 there is sort of two issues. Is first, sort of
22 just the logistics.

1 As I indicated in my written
2 testimony, if you want to get a copy of the
3 Justices' financial disclosures you have to
4 submit a request to the administrative offices of
5 the U.S. Courts and then they send the
6 disclosures on a thumb drive.

7 In 2021 you would think we could at
8 least put them online. And then the issue of
9 having them in real-time, rather than as a
10 historical snapshot of the previous year.

11 And then, similarly, the Justices'
12 speaking engagements so that we can know what
13 they're saying and who they're talking to in
14 real-time, rather than finding out about it after
15 the fact.

16 COMMISSIONER JOHNSON: Okay, thank
17 you. So I'm not going to --

18 MS. HOWE: I'm sorry, I got a little
19 energetic about this.

20 (Laughter.)

21 COMMISSIONER JOHNSON: Energy is good.
22 So I am not going to take up any more time

1 because I'm out of time.

2 CHAIR BAUER: Thank you, Ms. Johnson.

3 COMMISSIONER JOHNSON: Thank you very
4 much.

5 CHAIR BAUER: Our next questioner is
6 Professor Walter Dellinger. He's a Douglas B.
7 Maggs Emeritus Professor of Law at Duke
8 University Law School and a partner at the law
9 firm of O'Melveny & Myer. Professor Dellinger,
10 the floor is yours.

11 COMMISSIONER DELLINGER: Thank you.
12 Professor Larsen, your work as (audio
13 interference) in the legal world is --

14 CHAIR BAUER: We might be having some
15 difficulty --

16 (Simultaneously speaking.)

17 CHAIR BAUER: We might be having some
18 difficulty, Professor Dellinger, hearing you.
19 Can you possibly raise the volume?

20 COMMISSIONER DELLINGER: Let's see,
21 can you hear me Professor Larsen?

22 MS. ORR LARSEN: I can hear you but

1 you're slightly, I should say the thud factor was
2 your phrase and I should have given you credit.

3 (Laughter.)

4 COMMISSIONER DELLINGER: Am I clear
5 now?

6 MS. ORR LARSEN: Let's see --

7 COMMISSIONER DELLINGER: Ms. Larsen?

8 MS. ORR LARSEN: I think I can hear
9 you. That was a little better.

10 CHAIR BAUER: Your fuzzy. You just
11 may want to raise a your voice a little bit
12 because it's a little muffled, sir.

13 COMMISSIONER DELLINGER: Okay. And we
14 may want to repeat the question.

15 But this (audio interference) thing,
16 amicus group that you were thought to have a
17 scholarship. I'm wondering, why you think that
18 is happening, and to respond to no particular
19 reason just that, unlike (audio interference) the
20 Court can be (audio interference) time when the
21 courts are ultimately using the case as a jumping
22 off point, are there other factors?

1 MS. ORR LARSEN: Are there other
2 factors besides -- I'm so sorry, Walt, the last
3 bit I lost. Are there other factors besides
4 what?

5 COMMISSIONER DELLINGER: Besides the
6 fact the Court is offering reasonable cases not
7 to side on particular issues, but to proclaim on
8 a larger --

9 MS. ORR LARSEN: Oh. Like what are
10 these using these factual things for? Is that
11 what you mean?

12 COMMISSIONER DELLINGER: What is the
13 reason for the growth of amicus briefs?

14 MS. ORR LARSEN: Oh. Oh, I see. I
15 think there is several reasons. I think part of
16 it is exactly what you're saying, that the type
17 of answers they're providing, the cases they're
18 taking are more law declaration and not case
19 specific. I think that's part of it.

20 I also think technology is part of it.
21 I think how easy it is to access information and
22 assemble a brief now, it's much easier to do in

1 2021 than it was even in 1981. So I think that's
2 part of it.

3 I also think, I think the docket
4 shrinking is part of it. So as they take fewer
5 cases and you have specialists that want the
6 work, amicus is a way to do it. To file a brief
7 like that.

8 So I think there are several factors
9 working into the growth of it. But it's like an
10 800 percent increase. And it's tremendous
11 growth. It's hard to just say increase and have
12 that word mean enough in describing the change
13 over the past 30 years.

14 COMMISSIONER DELLINGER: (Audio
15 interference) amicus briefs are for judges,
16 Justices, to get their information from all the
17 legal bloggers who are (audio interference) for
18 the law clerks?

19 MS. ORR LARSEN: Yes. So I have
20 written about this too, this virtual briefing.
21 That happens outside of all the briefing, include
22 amicus briefs.

1 CHAIR BAUER: Ms. Larsen, could I ask
2 you to just repeat the questions you heard so
3 that --

4 MS. ORR LARSEN: Yes. Sure.

5 CHAIR BAUER: -- everybody can be
6 clear on what --

7 MS. ORR LARSEN: And I hope I heard it
8 right. I could be doing one of those things
9 where you answer a question you want to answer
10 but actually --

11 (Laughter.)

12 MS. ORR LARSEN: I think, Walter asked
13 about, is there a real difference between the
14 amicus brief and the virtual briefing that
15 happens online, on blogs and Twitter and things
16 like that.

17 And I think both of them are worrisome
18 for different reasons. So I worried a little bit
19 about the online blogging and briefing the Court
20 through Twitter. I worry about with a coauthor
21 because I'm old fashioned in value of that
22 adversarial system.

1 I think there is something to be
2 gained when you read two briefs from two sides,
3 from two different people and you poke holes in
4 each one.

5 And in an era where we're sort of in
6 our own little echo chambers anyway and we're
7 reading news that's served to us because it makes
8 us feel good and we're reading people that agree
9 with us already, I think briefing the Court
10 online, completely outside of the traditional
11 adversarial system, risks that, like exasperating
12 confirmation bias. It risks that the Justices
13 will just look to the same voices instead of
14 forcing themselves to listen to challenging
15 voices.

16 And that's why I think I favor amicus
17 briefs, even with their flaws, over a free for
18 all virtual briefing world.

19 COMMISSIONER DELLINGER: Amy Howe.
20 Amy, in the debate over whether to allow real-
21 time audio, the justice system consider the fact
22 that the announcement of attendance, and even the

1 arguments, are market sensitive information and
2 that to allow the select few to gain access to
3 the Supreme Court and can leave during the
4 announcement (audio interference) and can leave
5 during oral argument, that is market sensitive
6 information which also is made available
7 simultaneously to the public at large. Is there
8 any concern about that?

9 MS. HOWE: That's a great question.
10 And I'll repeat the question. The question is
11 whether or not there is any concern about the
12 idea that the announcement of opinions, and in
13 oral arguments, contain market sensitive
14 information. And you can walk out if you're in
15 the courtroom, you hear something being, an
16 opinion being announced, you can walk out with
17 that information.

18 I don't know. You are probably better
19 sourced inside the Court than I am, but I do
20 think that some of that has probably has been, I
21 think that that almost certainly was a problem as
22 recently as, I'm going to say ten years ago, when

1 there was a gap between when opinions were
2 released in the supreme, this is sort of really,
3 sort of down in the weeds, but when opinions were
4 released in the courtroom and on the first floor
5 of the Court in the Court's public information
6 office or the order was released with the Court
7 on the first floor of the Court, and when they
8 were published online.

9 And now that is, there essentially is
10 no gap. So that I don't think that, I think it
11 would be very difficult to act on that
12 information in the market. But I do think that
13 it was once, there was once the potential for a
14 big problem with that.

15 COMMISSIONER DELLINGER: And could be
16 still with oral arguments.

17 MS. HOWE: And still could be at oral
18 arguments. Which could be eliminated as a
19 problem.

20 COMMISSIONER DELLINGER: I'll ask one
21 last question because I have to shout. And it's
22 for Professor Resnik.

1 In the (audio interference) factor 14
2 percent of places the Justices think are
3 important enough to hear, they were scheduled or
4 labeled not for publication. Which means they
5 can't be cited by individuals.

6 How does that square with the notion
7 that why the cases are being decided alone, if
8 you can't cite what the Court did? Given an
9 opportunity like yours, how can we have a system
10 where the (audio interference) cases decided
11 alone?

12 MS. RESNIK: Again, I will repeat the
13 question. Is about this I think, certiorari
14 being granted in a significant percent, a seventh
15 or so of the Court's docket, in cases that the
16 appellant courts noted as, not for publication.

17 There was a brouhaha engaging with the
18 First Amendment when the Court's used to say, not
19 for citation, and people backed away from that to
20 say, you can cite it for what it's worth but
21 we're telling you it's worthless as of precedent.

22 And my beacon in this is, Richard

1 Arnold's, who was a judge, formally chief judge
2 of the Eight Circuit, wrote an opinion that said,
3 that Constitution Article 3 says there is
4 something called the judicial power. And
5 appellant judges don't have the power to say, you
6 win this time, but I don't remember mean it. I
7 haven't reasoned and deliberated it enough it
8 know that this is a principle decision.

9 Also, in the expertise of this room
10 and far beyond it, we know that with the non-
11 publication can come bargaining at the appellant
12 court. I'll sign on if you don't publish it. Or
13 hopefully we won't publish it so we won't get the
14 Supreme's attention, when in fact they still look
15 at it and now we'll go to the thud factors and
16 the Court sure processes as well.

17 So we're looking at a really
18 problematic, worrisome decision making process
19 that has exacerbated over the years because when
20 it was first promoted in the '60s, and it was 40
21 percent and now it's more than 80 percent of the
22 cases. And these are only, frankly, 50,000

1 cases, which in a world of our size isn't that
2 many cases with our wonderfully resourced and
3 need for more resources on the courts of appeals.

4 And if judges say we don't do this
5 because we don't have time, of course the answer,
6 as Judge Arnold said was, then we need more
7 judges. We need to deal with the cases.

8 I just think we should see, the good
9 news of the 20th century. Because a lot of
10 people thought the federal courts could help
11 them.

12 And what we see in the dysfunction in
13 the 21st is the federal courts haven't stepped up
14 through Congress and the Court to staff and
15 marshal the resources that are needed. And this
16 is one measure of the dysfunctional system.

17 CHAIR BAUER: Thank you very much,
18 Professor Dellinger. Our next questioner is
19 Professor David Levi. He is the Levi Family
20 Professor of Law and Judicial Studies and the
21 director of Bolch Judicial Institute at Duke
22 University Law School. Professor Levi, the floor

1 is yours.

2 COMMISSIONER LEVI: Thank you very
3 much. I'm acutely aware that I think I'm the
4 last questioner on a very long and very
5 interesting day, and I thank the panelists.

6 The day wouldn't be complete without
7 a deeper dive into rules of recusal and the codes
8 of conduct, which is something of a specialty
9 topic, but we're very lucky to have Russell
10 Wheeler with us here today, who has been an expert
11 on these, these matters.

12 Mr. Wheeler, might I start with
13 recusal? And we all know that the consequences
14 of recusal at the Supreme Court are quite
15 different than for the lower courts where another
16 judge will simply come in and handle the matter.
17 We don't have another Justice to come in and sit
18 on the Supreme Court. So there is quite a bit of
19 interest in this, and it's understandable because
20 of these consequences.

21 Are there constitutional limits on
22 Congress's ability to prescribe rules for the

1 Court on recusal, whether these are procedural or
2 substantive rules?

3 MR. WHEELER: Well, I'm probably the
4 best one to ask that question, but we do have the
5 judicial disqualification statute. You know,
6 450, 455 in Title 28, which does tell all
7 Justices and judges when they're supposed to
8 recuse, when it's waivable and when they have to
9 recuse. And financial situations it's pretty
10 strict.

11 The Chief Justice said in his 2011
12 year-end report that no one has ever tested
13 whether or not Congress can actually impose those
14 restrictions on the Supreme Court, on the theory
15 that the Constitution creates the Supreme Court
16 and Congress creates the lower courts. So it's
17 never really been tested.

18 On the other hand, judges have been
19 complying with it all along. They file their
20 financial disclosure reports, that's not recusal
21 I realize, but it's the same sort of thing.
22 Congress has said, you file financial disclosure

1 reports with the judicial congress, and they've
2 been doing it.

3 So I don't know how it would be tested
4 necessarily. Well, I can see how it would be
5 tested, but it hasn't been tested yet.

6 But I think since the Congress
7 obviously, and no one doubts that they can limit
8 the term of the Court, they can define its
9 officers, they can say when it's supposed to
10 convene a number of Justices.

11 It's pretty hard for me to think that
12 they can't say on the same token that these are
13 disclosure rules that you have to follow. After
14 all, you're governing a judicial process not an
15 administrative process.

16 COMMISSIONER LEVI: So, when a Justice
17 recuses, they can file a statement of reasons if
18 they wish to --

19 MR. WHEELER: Right.

20 COMMISSIONER LEVI: -- but they rarely
21 do. I've seen that, at least Justice Kennedy and
22 maybe some of the other Justices agree with this,

1 that when they recuse for personal reasons, they
2 ought not to file a statement because it would
3 feel as if they are lobbying or in some way
4 contaminating the other Justices. And I wonder
5 if you have any views on that?

6 MR. WHEELER: Well, no. I mean, that
7 seems to me that's the perspective of the Justice
8 that I really wouldn't have a view on.

9 This is one area, this whole area,
10 putting aside the Supreme Court, this is a whole
11 area in which the states have spent an awful a
12 lot of time dealing with these matters of recusal
13 and disqualification. Part of the reason for
14 that is that court state judges get campaign
15 contributions so there are more disqualification
16 motions.

17 But generally speaking, the states
18 have been able to fashion a variety of rules
19 governing referring disqualification motions to
20 other judges and requiring judges to state, give
21 some reason about why they're honoring or denying
22 the motion to disqualifying why they're recusing

1 themselves.

2 I think you and I talked earlier, that
3 perhaps could even be, there's some statement of
4 why it's being done so that somebody has
5 confidence that they actually thought it through.
6 That it's not one of those the judges talk about
7 opinions that won't write, well, maybe this is
8 disqualification denial that doesn't look so good
9 once you try to put it on paper.

10 COMMISSIONER LEVI: And at least
11 perhaps the Justices would consider identifying
12 whether it's a financial conflict or it's a prior
13 service conflict they served on the panel,
14 perhaps that had some connection to the case at
15 hand. Or that it's another reason. It's a
16 personal reason. Something of that sort.

17 MR. WHEELER: Yes. It comes down
18 just, so transparency reason. The notion that
19 when the Justices assume this office, people get
20 to know a little more about them than they would
21 otherwise, and you want to be sure that the
22 public's business is being done on an upright

1 manner. I mean, we doubt pretty much that it is
2 most of the time, but there are advantages to
3 having it on the record.

4 COMMISSIONER LEVI: You know, you
5 mentioned the state systems, so in Texas I
6 gather, on the Texas Supreme Court the recusal
7 decision is made initially by an individual
8 Justice. And if they grant the motion than
9 that's it. But if they deny it, it's referred to
10 the entire court. Do I have that right?

11 MR. WHEELER: Yes. Texas ruled
12 appellant procedure, Rule 16.3. I encountered it
13 when I was doing some work on the states.

14 It's noteworthy, Texas does that. If
15 you get a disqualification motion, the Justice
16 either grants it, steps off the case or refers it
17 to the rest of the Court to decide without the
18 participation of the subject judge.

19 The thing is, not many other supreme
20 courts have come up with much. And that may
21 speak to the difficulty of formulating rules for
22 courts of a last resort as opposed to

1 intermediate courts, because there you always
2 have a situation. It's easier to replace,
3 replace the judge for example.

4 COMMISSIONER LEVI: Let's talk a bit
5 about the code of conduct. As you say, it has
6 confused many people, including judges.

7 The word code suggests that it's law
8 and that it's enforceable, but actually, the code
9 of conduct, these are very broad principles of
10 aspirational conduct. And they're stated in a
11 very general sort of fashion that judges should
12 resolve cases expeditiously and that they should
13 be attuned to the appearance of justice, that
14 sort of thing.

15 MR. WHEELER: Right.

16 COMMISSIONER LEVI: So, even for a
17 lower court judge, these rules aren't directly
18 enforceable as, let's say, a criminal statute
19 could be.

20 MR. WHEELER: Right.

21 COMMISSIONER LEVI: We have a code of
22 conduct committee that's a part of the judicial

1 conference structure. And according to the Chief
2 Justice's 2011 letter, the Justices avail
3 themselves already of code of conduct committee.
4 If they have a question they may ask that
5 committee.

6 And since it is aspirational already,
7 I'm wondering whether it makes a difference if
8 the Court were to formally adopt the code of
9 conduct, they occasionally have issued a
10 resolution in which the Court will adopt some
11 ethical standard, they've done this in the past,
12 not often, but they could formally adopt the
13 conduct of conduct.

14 MR. WHEELER: Right.

15 COMMISSIONER LEVI: Would that just be
16 symbolic or do you think that would actually have
17 some impact on --

18 MR. WHEELER: I think it would have
19 the same impact that the code of conduct has now.
20 It's a statement that these are the rules that
21 we, these are the guidelines that we expect
22 judges to observe. They're very general

1 guidelines.

2 We setup an advisory committee that
3 judges can, from which judges can seek advice on
4 whether a particular action does or not comply
5 with the code. Which judges do, I think.

6 Probably because they want to do the
7 right thing, and partly because they don't want
8 their name in the newspaper. I think it would
9 have the same effect on the Supreme Court.

10 I mean, I think it's, I don't know why
11 the Court hasn't done it already. And Justice
12 Kagan did say in 2019, in the appropriations
13 hearing, which seem to be the form of all these
14 things discussed, that the Chief Justice in 2019
15 was considering a code. The court hasn't had any
16 appropriations hearings since 2019 so we haven't
17 learned much more about that. But it's
18 obviously, I think even perhaps under
19 consideration.

20 It may be the Court doesn't want to
21 adopt the code for the reasons I mentioned.
22 Simply because it doesn't want to appear to have

1 been pressured into doing so.

2 I think the much tougher question is
3 the question of enforcement, not of the code, the
4 judicial conduct statute is not setup to police
5 the code but it has its own standard. And that
6 gets much more dicer, I think.

7 I indicated in my paper, I think it's
8 not quite as obvious that it can't be done, but
9 it's obviously, this is an area in which, as Ryan
10 Nebart (phonetic) said, approximate solutions to
11 insoluble problems. And guess what we're looking
12 for in this area.

13 COMMISSIONER LEVI: So, let's just
14 talk about that for a second. When you're a
15 lower court federal judge you're subject to a
16 complaint procedure.

17 And they're often are, they are many
18 complaints that can be filed and they go to the
19 chief judge of the circuit and then there is a
20 process for moving on from there. There can be
21 sanctions. And there are many complaints. Most
22 of them are dismissed and found to be without

1 merit.

2 You say in your written testimony that
3 you'd be concerned that the Supreme Court would
4 be kind of a lightning rod for these kinds of
5 complaints and that they would be weaponized.
6 Can you explain what your concern is?

7 MR. WHEELER: Well, one just very
8 briefly, you're right. Great, it's not in
9 addition to the majority the great majority, the
10 great number of complaints that are filed are, by
11 any standard, non-meritorious. There are a few
12 needles in the haystack.

13 Every once in a while members of
14 Congress, for example, file a complaint against a
15 judge. It was Congressman Sensenbrenner's
16 complaint filed because he thought, he filed a
17 judicial misconduct complaint in the Seventh
18 Circuit, and we don't have to go into reasons
19 why, which was dismissed, and he got very mad
20 about it and told the judicial conference he
21 thought he was getting the shaft.

22 And so Chief Justice Rehnquist

1 appointed the Breyer committee. So that led to
2 something, some consequence.

3 I just think if there were a complaint
4 procedure, a lot of legislatures, for example,
5 would say, I can file an impeachment resolution
6 against Justice A or Justice B, but nothing is
7 going to happen.

8 If I file a complaint procedure we'll
9 get a little bit of publicity. Under the statute
10 they'll probably have to release, subjected to
11 some limited inquiry. It will get some more
12 press attention than it would otherwise.

13 That would induce, I think, members of
14 Congress to do it. And I think it would be all
15 sorts of interests groups because of the higher
16 visibility of the Supreme Court. It just ups the
17 stakes.

18 Then I think you would have, you have
19 a small bureaucracy process in these complaints.
20 Most of them would be non-meritorious as well,
21 but it would just give a lot more visibility to
22 the process.

1 And that's a downside of it. Whether
2 it's a fatal downside I think is a different
3 question.

4 COMMISSIONER LEVI: Thank you very
5 much. Back to you, Professor Bauer.

6 CHAIR BAUER: Thank you very much,
7 Professor Wheeler. Before we conclude, Professor
8 Johnson, did you have a question that, I see a
9 hand up. Or is that just a technical glitch?

10 COMMISSIONER JOHNSON: My hand doesn't
11 need to be up. Is it?

12 CHAIR BAUER: I saw it briefly, but
13 that's no problem at all. Then we'll conclude.

14 (Laughter.)

15 COMMISSIONER DELLINGER: Chairman
16 Bauer, I just want to apologize, I've identified
17 the problem with my computer and it will not
18 happen in the subsequent hearings. I apologize.

19 CHAIR BAUER: We ultimately made out
20 the questions, which were excellent questions,
21 and elicited very good answers from the
22 panelists, so thank you very much.

1 That concludes the panel discussions
2 for today. And thanks very much on behalf of the
3 Commission to all of the witnesses for their
4 testimony and there written statements. And we
5 also want to thank members of the public who have
6 submitted comments.

7 Please keep in mind, again, that the
8 testimony, as well as the public comments, are
9 posted to the Commission website.

10 Our next public meeting is scheduled
11 for Tuesday, July 20th beginning at 8:30 a.m.
12 Over the course of that day we're going to hear
13 from six other panels.

14 And those panels, and the order in
15 which we will hear them, one will be devoted to
16 perspectives from practitioners and views on the
17 confirmation process. Then two panels that are
18 going to present perspectives on the fundamental
19 question of court reform, a panel on term limits
20 and turnover on the Supreme Court, a panel on the
21 composition of the Supreme Court, and then some
22 closing reflections in the last panel on the

1 Supreme Court and constitutional governance.

2 We will have three more public
3 meetings thereafter at which the Commission will
4 deliberate on the issues it is taking up for
5 analyses in the report to be submitted to the
6 President. Those meetings have been tentatively
7 scheduled as Friday, October 1, Friday, October
8 15 and Wednesday, November 10th.

9 And once again, I want to remind you
10 that further information on these meetings, the
11 witnesses who will be appearing on July 20th, the
12 draft materials that the Commission will take up
13 for deliberation, all of these will be posted
14 regularly as they become available on the
15 Commission's website.

16 I want to also note in closing here,
17 the Commission will continue to accept public
18 comment until November 15th. However, comment is
19 most useful to the Commission if it is submitted
20 prior to our deliberative meetings scheduled for
21 October and November.

22 So if at all possible, we'd very much

1 like to see the comments before then. However,
2 we will accept them through November 15th.

3 Many thanks again. And on behalf of
4 the Commission, we hope you will all join us
5 again on July 20th. Thank you very much.

6 (Whereupon, the above-entitled matter
7 went off the record.)

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C E R T I F I C A T E

MATTER: Presidential Commission on the
Supreme Court of the United States
2nd Public Meeting

DATE: 06-30-21

I hereby certify that the attached transcription of
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