PRESIDENTIAL COMMISSION ON
THE SUPREME COURT OF THE UNITED STATES

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2ND PUBLIC MEETING

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WEDNESDAY
JUNE 30, 2021

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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.)

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

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

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

ensure the committee operates in compliance with FACA.

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

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

Michelle Adams.

(No response.)

MS. FOWLER: Cate Andreas.

COMMISSIONER ANDREAS: Here.

MS. FOWLER: Jack Balkin.

COMMISSIONER BALKIN: Here.

MS. FOWLER: Bob Bauer.

CHAIR BAUER: Here.

MS. FOWLER: Will Baude.

COMMISSIONER BAUDE: Here.

MS. FOWLER: Elise Boddie.

COMMISSIONER BODDIE: Here.

MS. FOWLER: Guy Uriel Charles.

COMMISSIONER CHARLES: Here.

MS. FOWLER: Andrew Crespo.

COMMISSIONER CRESPO: Here.

MS. FOWLER: Walter Dellinger.

COMMISSIONER DELLINGER: I'm here.

MS. FOWLER: Justin Driver.

COMMISSIONER DRIVER: Here.

MS. FOWLER: Dick Fallon.

COMMISSIONER FALLON: Here

MS. FOWLER: Thank you. Caroline Fredrickson.

COMMISSIONER FREDRICKSON: Here.

MS. FOWLER: Heather Gerkin.

COMMISSIONER GERKIN: Here.

MS. FOWLER: Nancy Gertner.

COMMISSIONER GERTNER: Here.

MS. FOWLER: Jack Goldsmith.

COMMISSIONER GOLDSMITH: Here.

MS. FOWLER: Tom Griffith.

COMMISSIONER GRIFFITH: Here.

MS. FOWLER: Terrilee Grove.

COMMISSIONER GROVE: Here.

MS. FOWLER: Burt Huang.

COMMISSIONER HUANG: Here.

MS. FOWLER: Sherilynn Ifill.

COMMISSIONER IFILL: Here.

MS. FOWLER: Alatee Johnson.

COMMISSIONER JOHNSON: Here.

MS. FOWLER: Michael Kang.

COMMISSIONER KANG: Here.

MS. FOWLER: Alison LaCroix.

COMMISSIONER LACROIX: Here.

MS. FOWLER: Maggie Lemos.

COMMISSIONER LEMOS: Here.

MS. FOWLER: David Levy.

COMMISSIONER LEVY: Here.

MS. FOWLER: Trevor Morrison.

COMMISSIONER MORRISON: Here.

MS. FOWLER: Caleb Nelson. Caleb will

be joining us later today.

Rick Pildes.

COMMISSIONER PILDES: Here.

MS. FOWLER: Michael Ramsey.

COMMISSIONER RAMSEY: Here.

MS. FOWLER: Cristina Rodriguez.

CHAIR RODRIGUEZ: Here.

MS. FOWLER: Kermit Roosevelt.

COMMISSIONER ROOSEVELT: Here.

MS. FOWLER: Bertrall Ross.

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

David Strauss.

COMMISSIONER STRAUSS: Here.

MS. FOWLER: Larry Tribe.

COMMISSIONER TRIBE: Here.

MS. FOWLER: Michael Waldman.

COMMISSIONER WALDMAN: Here.

MS. FOWLER: Adam White.

COMMISSIONER WHITE: Here.

MS. FOWLER: Keith Whittington.

COMMISSIONER WHITTINGTON: Here.

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

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

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

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

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

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

On April 9, 2021, President Biden

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

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

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

today's debates.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Professor Bowie, the floor is yours.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Professor Feldman, the floor is yours.

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

I want to begin by noting that the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHAIR RODRIGUEZ: Thank you very much,

Professor Feldman.

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

Professor Kalman, you have the floor.

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

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

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

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

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

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

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

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

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

Into March, the original bill looked

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

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

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

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

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

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

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

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

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

CHAIR RODRIGUEZ: Thank you, Professor Kalman.

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

Professor McConnell, please proceed.

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

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

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

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

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

Now, there are many proposals before

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

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

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

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

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

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

I personally don't much care whether

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

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

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

No State Supreme Court, no drafters of

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

CHAIR RODRIGUEZ: Thank you, Professor McConnell.

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

Professor Scheppele, the floor is yours.

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

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

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

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

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

system.

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

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

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

get the problems that we have.

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

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

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

override mechanism.

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

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

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

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

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

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

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

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

CHAIR RODRIGUEZ: Thank you so much, Professor Scheppele.

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

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

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

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

Commissioner Tribe, please proceed.

COMMISSIONER TRIBE: Thank you, Professor Rodriguez.

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

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

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

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

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

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

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

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

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

And, you know, to me the way that each

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

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

COMMISSIONER TRIBE: Thank you, Professor Feldman.

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

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

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

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

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

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

COMMISSIONER TRIBE: Thank you, Professor Bowie.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COMMISSIONER TRIBE: Thank you, Professor Bowie.

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

CHAIR RODRIGUEZ: Thank you, Commissioner Tribe.

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

Professor LaCroix, please proceed.

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

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

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

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

countermajoritarian institution?

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

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

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

MS. KALMAN: Yes.

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

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

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

Based on these factors you argue the

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

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

COMMISSIONER LACROIX: So would you

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

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

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

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

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

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

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

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

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

MS. KALMAN: Yes.

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

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

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

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

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

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

overwhelming set of views of the great majority of Americans.

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

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

COMMISSIONER LACROIX: Thank you very

much, Professors Kalman and Feldman.

CHAIR RODRIGUEZ: Thank you, Commissioner LaCroix.

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

Commissioner Griffith, the floor is yours.

COMMISSIONER GRIFFITH: Thank you very much, Commissioner Rodriguez.

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

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

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

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

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

That violated a certain norm of

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Like, for example, the Philadelphia

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

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

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

much.

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

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

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

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

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

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

abolition of judicial independence.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

threaten its legitimacy.

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

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

threatened now?

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

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

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

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

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

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

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

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

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

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

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

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

COMMISSIONER MORRISON: Thank you.

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

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

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

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

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

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

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

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

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

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

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

And so one thing it does, the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And so that is what leads to the

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

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

So the decision ultimately will rest

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

COMMISSIONER BODDIE: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

So I want to focus my suggestions on

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

They eliminate the incentive to

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Simultaneous speaking.)

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

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

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

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

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

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

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

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

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

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

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

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

said orally today.

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

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

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

MR. MOYN: It is, Commissioner.

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

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

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

(Simultaneous speaking.)

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

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

If it were statute by statute, we'd be

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

political institution in one or another sense.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

any one vacancy.

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

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

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

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

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

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

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

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

That's the current status of where we are today. And this goes back to something that Professor Moyn kind of echoed which is that reform will be filtered through partisan concerns. And so initial Court expansion would likewise be filtered through those concerns. And I would anticipate that the political -- excuse me -- the public response would change in terms of support or opposition depending on essentially the political actors who control the White House and the Senate.

COMMISSIONER GROVE: So I want to turn to Professor Dixon. You actually point to a different audience for Supreme Court reform and that is the international audience. And one of the things that I found most provocative in your written testimony and also your oral statements, you note that if there is Supreme Court reform here, that could potentially be used by authoritarians maybe incorrectly but still used by authoritarians in other countries.

And you say that President Roosevelt's

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COMMISSIONER GROVE: Thank you.

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

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

and it shows.

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

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

escalates the current partisan polarization around appointments.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. DIXON: Well, thank you again for

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

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

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

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

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

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

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

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

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

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

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

I just want to mention that in

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

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

MR. MOYN: Right.

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

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

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

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

Constitution.

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

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

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

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

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

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

COMMISSIONER GERTNER: Professor Moyn,

do you have a position on this?

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

(Simultaneous speaking.)

COMMISSIONER GERTNER: Although -- yeah, okay.

CHAIR BAUER: I'm sorry.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

cautionary tale.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. SEN: Thank you for that question.

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

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

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

three split Court.

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

COMMISSIONER ANDRIAS: Thank you.

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

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

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

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

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

briefing, or argument.

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

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

Professor Bray, you have the floor.

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

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

Although the decisions of the Supreme

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

to the confirmation process.

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

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

votes routinely.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

justified by the underlying factual predicates.

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

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

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

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

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

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

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

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

Tandon had gone.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COMMISSIONER IFILL: Thank you Professor Vladeck.

MR. VLADECK: Thank you.

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

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

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

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

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

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

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

COMMISSIONER BAUDE: Can you remind us what that is?

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

So, I think that was a good shift in

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

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

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

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

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

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

that has happened.

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

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

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

COMMISSIONER BAUDE: All right, so

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

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

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

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

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

COMMISSIONER BAUDE: All right, and so

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

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

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

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

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

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

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

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

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

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

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

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

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

COMMISSIONER BAUDE: Thank you.

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

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

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

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

Your point is that the important legal

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

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

this?

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

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

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

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

has a well-deserved reputation for candor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I know from the example that you

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

COMMISSIONER HUANG: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And finally a statute that would, in

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

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

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

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

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

down the years.

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

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

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

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

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

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

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

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

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

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

at the top, or?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

positional imbalance you were just describing?

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

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

COMMISSIONER CRESPO: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. BRAY: I do think the practice of

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

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

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

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

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

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

there's actually reasoning.

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

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

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

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

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

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

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

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

COMMISSIONER IFILL: Thank you.

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

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

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

MR. VLADECK: That's a great question. I think a very, very short answer is because I think the Court's merits docket tends to include a higher percentage of cases Commissioner Baude, that don't divide the Justices along traditional ideological lines. And so for example, statutory interpretation in questions that don't turn on your particular methodological commitments, or things of that ilk. And so I think it's inevitable on the merits docket that there will be cases that divide the Justices in ways that we might not have thought of as predictable, even if they were predictable to us, not sort of visually identifiable with a particular partisan balance.

I think on the shadow docket we've seen a real uptick in applications that have much stronger ideological, and in some cases partisan valences. And that on topics, Commissioner Baude, that divide the Justices along those axes more aggressively. So, I think it's both the

added diversity of the merits docket, and just the sort of more general increasing utilization of the shadow docket by particular groups, and particular litigants raising particular types of complaints.

COMMISSIONER BAUDE: Okay, thank you. And the second is sort of on the death penalty cases. If, for whatever reason, the direct appeal in all the death penalty cases is not the solution, do you think that there's anything that could be usefully done to better handle the Court's concerns about timing? As you know, in a bunch of these cases the Justices expressed the concern that they're getting these applications to stay an execution, or illicit that sort of too late. And I'm not sure what not too late would be, but is there some reform, some rule, some statute that could handle the timing issue?

MR. VLADECK: So, I would commend to the Commission a book by Carol Steiker and Jordan Steiker, titled "Courting Death," which looks at how it's actually the Supreme Court's own

doctrines that have pushed all this litigation back up against execution dates. And so, Commissioner Baude, one possibility is that the Court itself revisit some of the doctrines. I do think that Mr. Dreeben slightly misunderstood, perhaps because I was not artful, what I think the solution is, which I think is in between how he framed it, and your question Commissioner Baude.

I would have Congress consider direct appeals not of the entire case, but rather once the execution date is set, direct appeals of claims specifically challenging the execution. Because that is where we see so much of the 11th hour litigation, especially these cases, method of execution challenges, and, or spiritual advisor challenges. And Congress could, I think, even delineate which kinds of claims are cognizable in that context.

But short of that, Commissioner Baude, I think any reform would have to come from the Court. Where I think that Justices who are often

ripe to complain about what they perceive as strategic lawyering by defense lawyers, bear some of the responsibility for adopting, and embracing doctrinal rules that may have been impossible to bring on those claims earlier.

COMMISSIONER BAUDE: Thank you. And Mr. Dreeben, do you have any reflections on, I guess that sort of modified version of the proposal? I guess a direct appeal of method of execution claims, like the ones Professor Vladeck mentioned?

MR. DREEBEN: Other than the benefits of potentially eliminating the middle man and giving the Court a little bit more time to review it, I don't see the benefit to it at all. I think that the Court functions best when it's really dealing with very focused issues and gets the benefit of an appellate process that examines a trial record and applies standards of review and serves up an opinion that allows the Court to intervene on a more focused question.

So, cert before judgement, direct

appeals, they all have the feature of skipping the court of appeals process, which I think ultimately benefits the way that Supreme Court is able to decide it. I don't think the benefits of direct review outweigh that.

COMMISSIONER BAUDE: And sorry I keep moving the goal posts, but then maybe imagining something more like a mandatory post court of appeals, the court of appeals decides it, and rather than having the Supreme Court decide whether to hear the claim or not, just saying all of these cases will go on cert to the Supreme Court, or whatever we call it.

MR. DREEBEN: Go on cert, or have basically an appeal, and then the Court has to hear it on the merits regardless?

COMMISSIONER BAUDE: Yes, go on the merits from the court of appeals to the Supreme Court, and the Supreme Court will spend more time on all these method of execution cases.

MR. DREEBEN: I think the problem may be more with either the doctrine that the Court

has created, and the degree to which it's in flux, and the lower courts are applying it in a different way than the Supreme Court thinks that it should be applied, than it is a procedural question of we just want the Court to do this. I haven't studied it, but I would suggest that maybe the Court look at how the California Supreme Court has responded to the influx of capital cases, because it has to hear them now.

I realize your proposal, Commissioner Baude, has modified it and made it a little bit more limited than I think it started out. It's kind of shrinking as we discuss it, but I do think that there's a real question of whether the Supreme Court is the right body to be taking kind of first cuts, or mandatory cuts, at every issue in these very fact-bound cases.

COMMISSIONER BAUDE: Thank you. And this is sort of the last theme I'm very curious about your view, is you mentioned early on the Court does take some cases for, I guess what we call error correction, that don't fit the sort of

other rules of certiorari. As a descriptive matter, do you think there's any pattern, or principle, or rhyme, or reason to when the Court gives us an error correction, and as a normative matter, do you think there should be?

MR. DREEBEN: I think as a normative matter, it should do it in a way that's even handed. I think as a descriptive matter, if you study the sort of patterns of past cases, they leaned in the direction on two areas of kind of governments, and law enforcement, and that was habeas, and enforcing the AEDPA standards, which are very deferential to state habeas and qualified immunity.

My sense is that a majority of the Court that was taking those cases felt like the lower courts were just not in sync with what the Supreme Court wanted to do, and it was trying to send a message, that pattern was kind of unmistakable. It's interesting that it's not entirely reversed, but there's a little bit of counter action going on now with two very recent

prominent cases, and one on Monday's order list for the Court vacated a judgement in favor of government officials, and against a prisoner who claimed an excessive force claim that resulted in his death, kind of a George Floyd-esque scenario in some ways.

And Justice Alito dissented from the Court's disposition, and he said, look, I don't think we're above occasionally taking a fact-bound case and digging in, rolling up our sleeves, doing the hard work. And it's illustrative to how you do these things, but I don't think that we should do it by a drive by summary reversal, where we don't actually do the hard work, and we accuse the court of appeals of having made a mistake. So, I think in general there's a little bit of disagreement on the Court of when to use it.

Justice Sotomayor has dissented repeatedly from decisions that she thought were egregious and should be corrected. And probably the Court is internally thinking about how to

balance it out so that it preserves its institutional capital legitimacy and sends the kinds of messages that it wants to send.

COMMISSIONER BAUDE: Thank you very much.

CHAIR RODRIGUEZ: Commissioner Huang, do you have any final questions to pose?

COMMISSIONER HUANG: Yes, Mr. Dreeben, if you wouldn't mind indulging more lightning round, this won't be like Justice Kagan's lightning round, sorry to disappoint, but I'll try to serve up a couple of questions, and I know Commissioner Crespo has one more question to ask as well, so let's try to do this quickly if you don't mind.

On the categories of cases that you described the Court taking, or maybe it's wishful thinking that they would take in some of those categories, what do you think the role is of the elite Supreme Court bar? Professor Richard Lazarus among others has done work showing that there was a very big disparity in success rates,

and getting cert grants. Does that effect a particular category, or another better, or worse? And actually that's the end of the lightning round, so that we can save time for Commissioner Crespo.

MR. DREEBEN: I don't think that it affects any category particularly, just people who practice in front of the Supreme Court seek to achieve a little bit of a mind meld, and an understanding of how to reach the Court. Generally it's by applying the standards that the Court is going to apply itself, and they're simply better at it just for the same reason that brain surgeons who do 100 brain operations a year are going to be better than somebody who is walking up, and doing their first.

CHAIR RODRIGUEZ: Commissioner Crespo, do you want to get in a last question?

COMMISSIONER CRESPO: Sure, and thank you to Commissioner Huang for guarding that last minute 20. For Mr. Vladeck, this is really just a point of clarification question. Among the

proposals you listed, one was returning to a world where circuit justices dominate and where single Justices are doing most of the work on the shadow docket. And I suspect it's just lack of either knowledge or imagination on my part, but I was trying to understand how that would address some of the core concerns you're getting at. So, could you just spin out a few more sentences on why a single Justice world is better?

MR. VLADECK: Sure, and I think, Commissioner Crespo, as you know, there was a period of time, especially through the 1950s until the early 1980s where that was the norm for shadow docket cases. Where a circuit justice would act alone and would receive the papers by themselves, oftentimes would hear oral arguments in chambers, which hasn't happened since 1980, and would issue an opinion, many of which we still cite today for establishing some of the rules we've been talking about for the last hour and a half, respecting that decision.

The great virtues of that is it was a

more flexible process, where you only needed one Justice to accommodate whose schedule you had to accommodate. The opinion was useful to the parties, but not precedential on behalf of the Court, which meant that the full Court was not bound by what an individual justice did. The parties had an opportunity to be heard, much in the same way as they would in a plenary review context, at least an amount that was possible under the circumstances.

And if it ever needed to come to pass, the full Court could have necessarily come back and overruled the individual circuit justice. The key that -- folks sort of hear that and it causes not something where you see these days, they assume it's not realistic because applicants will just go to either Justice Sotomayor, or Justice Thomas, but the reality is that at least from the 1950s until the 1980s, the Justices with maybe one exception, were incredibly responsible about acting not necessarily as they would have if it were up to them, but as they thought the

entire Court would.

So, I think there's a lot to commend what used to be the norm in this context, which is having these emergency applications handled by the Justice specifically assigned by statute to handle the emergency applications for the relevant Court case.

CHAIR RODRIGUEZ: Well, thank you so much to all of the witnesses for an incredibly full and rich panel. I know that the Commissioners appreciate all of your insights. We will now break until 3:20 when we will resume with Panel 4 and a new set of witnesses.

Thanks again, everybody.

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

CHAIR BAUER: Welcome back to the balance to the last panel of our public hearing. Thank you to the previous panelists, and we welcome the next panel.

The next panel is concerned with

issues in equity and transparency in the operations of the Supreme Court. It will touch on issues of equity and transparency, such as recusal practices and balances in representation, participation of amici, questions of the adoption of the code of judicial conduct, and similar issues. But, yet again, the panelists are free to speak any of the issues that are before the Commission within its charge.

And so, with that, what I would like to do is proceed. Again, the format is going to be the same. We will have opening statements of three to five minutes from each witness, followed by questions from Commissioners, each of whom will be given ten minutes to ask their questions.

So, with that, I would like to ask all of the witnesses to please turn their cameras on.

So, we will begin. Our first witness will be Deepak Gupta. He's the founder of the law firm of Gupta Wessler and a lecturer at Harvard Law School. Mr. Gupta, the floor is yours.

MR. GUPTA: Thank you, Mr. Co-Chair. And may it please the Commission.

As an advocate who often goes to bat for consumers, workers, and civil rights plaintiffs before the Supreme Court, I'm really glad that the Commission is devoting some attention today to issues of access to justice and transparency.

You've heard today from some of our most distinguished scholars on topics like the legitimacy of judicial review in a democracy. I won't speak to any of that. People like me who practice before the Court are probably the last people in the world that you should ask for advice on such topics. Our job is to work within the system, so we're necessarily compromised.

But what I can offer is my perspective on some problems that, while complex, have, in my view, some commonsense solutions that are far less elusive and on which I'm hopeful we can achieve some measure of consensus.

My thesis today is simple. The Court

and its ecosystem is too insular, too opaque, and too skewed in favor of large corporate interests. There are some ways that we can make it less so, and doing so would be good for the Court's legitimacy in the eyes of the public, and for the Court's ability to deliver on the promise engraved above its entrance: equal justice under law.

The first problem is one of diversity. Not since the early 19th century has practice before the Court been so dominated by such a small group of elite repeat-player lawyers who are overwhelming White and male. This group is totally unrepresentative of America and even less of the legal profession at-large.

And in the rare instance when the Justices have complete control over who will argue, when they appoint counsel, they tend to choose from an unrepresentative group with whom they have personal relationships, they're own former law clerks.

While counsel are only appointed once

or twice a term, these appointments offer a window into the Court's insularity. Of the roughly 70 advocates appointed by the Court since 1926, a mere eight have been women.

When I was invited by the Court to argue in 2019, I was the first Asian American and only the fourth person of color appointed in the Court's history. The Court should continue to expand and diversify the pool beyond former Supreme Court law clerks. And in my view, it should use an outside advisory panel to suggest candidates.

The Court should seek similar diversity in hiring law clerks and it should publish its statistics on law clerk diversity. Institutions and firms that hire attorneys who appear before the Court should do the same.

The second problem, related problem, I want to address is one of imbalance. The elite Supreme Court bar overwhelming consists of lawyers associated with large corporate law firms. And that corporate dominance ends up

shaping the contours of American law. Only the wealthiest clients can afford these lawyers, and conflicts prevent these lawyers from representing plaintiffs. For example, consumers who sue a bank or workers who sue an employer for wage violations.

This is of particular concern at the cert stage when repeat players who know the ropes enjoy a distinct advantage. There are thousands of petitioners filed each year, but when the Court decides which ones to grant, we end up seeing the same names, again and again.

Redressing this imbalance isn't easy, but we can start by encouraging the development of a specialized plaintiffs and public interest appellate bar, including by increasing funding for appellate practices and organizations like legal aid and public defender officers.

The third and final problem I want to address is that aspects of the Supreme Court's work unnecessarily lack transparency. You just heard about this on the last panel, but I think

it's important to consider in this context, too, because complexity and secrecy work to the advantage of the more powerful, who can hire experts who know the unwritten rules.

My written testimony describes solutions to increase accessibility to, and transparency of, the Court's decision-making, especially in the cert process and the so-called shadow docket.

Last October, I argued a case that was broadcast live on C-SPAN. Among the first live broadcasts in the Court's 230-year history. Our experience with those arguments in the pandemic has shown us that the sky won't fall if the Court broadcasts its proceedings live. Just as the supreme courts of the United Kingdom and Canada do, and as state supreme courts have done for years.

If the Court is going to make momentous constitutional decisions that affect the daily lives of Americans without their votes, the least it can do it allow us a glimpse into

the process. The court itself can and should consider its own reforms to aid transparency. These proposals don't require any acts of Congress.

I'll admit that I am skeptical of what can really emerge from this Commission process, but I do hope we can all agree that the Supreme Court and its ecosystem is in need of diversification, balance, and transparency. And I urge the Commission to highlight these concerns in its final report. Thank you.

CHAIR BAUER: Thank you very much, Mr. Gupta. Our next witness is Ms. Amy Howe, and she is the cofounder of SCOTUSblog, for which she continues to report. She is speaking here on her own behalf; however, her views are informed by conversations with other members of the press that follow the Supreme Court. And so, with that introduction, let me turn this over to you, Ms. Howe.

MS. HOWE: Thank you, Commissioner Bauer. Good afternoon. Thank you again for

inviting me to testify about an issue that's always important to me, but especially at the end of June, in a term in which we have not seen the Justices take the bench because of the pandemic.

You have my written testimony, so I'm not going to repeat it verbatim here. Instead, I want to focus on a few brief and key points. The first is a very basic one that goes to why transparency is important.

In his book, "Making Democracy Work," Justice Stephen Breyer wrote that the Court can't take for granted that the public will accept its decisions as legitimate. The Supreme Court itself, he said, must help to maintain the public's trust in the Court. An important part of securing and maintaining that trust, I believe, is for the public to be able to see and understand what's happening at the Court.

As I describe in my written testimony, the Supreme Court has taken a variety of steps to make its actions more transparent to the public. But I think it's important to note that perhaps

the biggest step towards greatest transparency that the Court has taken in recent years, making live audio of oral arguments available in real-time, came about just last year as a response to the pandemic. With the courtroom closed to the public for the foreseeable future, the Justices needed to hold our oral argument remotely, and they couldn't hold the oral arguments without providing some form of public access.

The question of whether the Justices will continue to provide live audio of oral arguments, and add live audio of opinion announcements when they return to the courtroom, is, in my view, the most pressing transparency issue facing the Court right now. It's, to me, unfathomable that we could go back to a world in which we have to wait until the end of the week to hear the audio of oral arguments.

But live video of oral arguments and opinion announcements would be even better than live audio. I've always been a proponent of cameras in the courtroom, but I became an even

more fervent one after SCOTUSblog courtroom access project in 2019 and 2020, when we tracked efforts by members of the public to obtain one of the 50 seats set aside for the public at oral argument.

I talked with people who spent the night outside on the sidewalk in February or flew in from Puerto Rico because they wanted to try to see the Supreme Court in action on an issue that was deeply personal to them. And if we've learned one thing from the Court's use of live audio for a full term, plus the May argument session in 2020, it's that none of the parade of horribles that are often cited as arguments against cameras in the courtroom, but which apply fully to live audio, as well, came to pass. As Mr. Gupta just said, the sky did not fall.

Although my remarks here and in my written testimony are sometimes critical of the Court, they stem in no small part from my experience as a reporter covering the Court. When the Supreme Court is in session, I get to

attend the overwhelming majority of the oral arguments and sit in very good seats. I see Justices who come to the bench well-prepared and excellent lawyers from all over the country. I just think that everyone else should have the opportunity to see them, too. I look forward to answering your questions.

CHAIR BAUER: Thank you very much, Ms. Howe. Our next witness is Professor Allison Larsen. She's professor of law and director of the Institute of Bill of Rights at the William & Mary Law School. Professor Larsen, you have the floor.

MS. ORR LARSEN: Thank you so much. Thanks for inviting me to testify today. I'm honored to be here.

I think the aspect of my work that's most relevant to this Commission is my research on Supreme Court amicus briefs. And just for the record, we can say amicus or amicus or amicus, just like Justice Breyer says it; it's all the same to me.

Amicus briefs have been through a tremendous growth spirt over the past 30 years. And it's growth on a number of different levels. So, the number of briefs filed have increased dramatically, the range of entities filing them has increased, and the rate at which the Justices cite them in their opinions has increased as well.

For virtually every case now the Justices are awash in a sea of amicus briefs. To put things in perspective for you historically, amici average about one brief per case in the 1950s and five briefs per case in the 1990s. In 2015, in the Obergefell case, that number was 147. For sake of comparison, Brown v. Board was six.

Why does any of that matter and merit your attention? It matters, I think, because the kind of amicus briefs that the Justices rely on the most are briefs that provide facts, generalized facts about the way the world works, which are called legislative facts. And many

people applaud them for this, for the briefs providing the sort of specialized knowledge, and I can see why. The decisions affect many people, and so, many people should be allowed to weigh in.

The trouble, however, is that these amicus facts come in at the 11th hour and they're submitted by motivated actors who are barely subjected to adversarial testing at all. So, the factual sources are chosen by somebody with a dog in the fight. They're not chosen because they're the industry standard, most peer reviewed, most accurate state of our knowledge today.

And with the vast amount of information available online now, it's not very hard to assemble evidence, whether of strong or dubiuos reliability, that will support a preexisting point of view.

The secret is out that the Justices like these briefs, the briefs that supplement their factual knowledge. And so many amicus just stretch in order to make these factual claims,

even if it's beyond their institutional capacity to do so.

As part of my research, I did a deep dive into some of the amicus briefs that the Justices use to support their arguments, and I found examples where the reliability is pretty shaky. Sometimes the study was funded by the amicus itself, sometimes the numbers cited weren't publicly available. And often they cite a minority view in the field without recognizing that there are countervailing authorities, too.

This is going to get worse before it gets better, because facts are not just easier to access in the digital age, they're also easy to legitimize. Factual claims that may have once been deemed outrageous assertions from fringe players, are now easily distributed in a way that makes them seem mainstream.

I just want to be clear here that I'm not arguing for the abolition of amicus briefs, nor do I think it's realistic to ask the Justices to shut their eyes to anything outside the

record. I also don't think this is a partisan issue. Justices appointed by Presidents of both parties use amicus briefs freely.

Instead, I think the problem is that the Supreme Court's hunger for factual information has outgrown what the amicus process can reliably provide. So, we're driving an old tool through a new data-rich terrain. And the rules governing amicus briefs have just not caught up.

The good news, though, is I think there are concrete reforms within your reach that might really ameliorate the problem. And the key to making this all work is transparency. So, as I describe in my written testimony, I think the amicus process can be improved with some stronger disclosure rules. And I'm happy to talk about the details of that in the Q&A.

But leaving things the way they are, I think, would be a mistake. Over the past 30 years the world has undergone a revolutionary change in how information is transmitted and

received. To ignore this change, and leave the Justices in a factual free-for-all, risks exasperating confirmation bias and tainting Supreme Court decisions with unreliable evidence. Thank you.

CHAIR BAUER: Thank you very much, Professor Larsen. Our next witness is Professor Judith Resnik. She is the Arthur Liman Professor of Law at Yale Law School. Professor Resnik, you have the floor.

MS. RESNIK: Thank you. I'm glad to have spent the day with you and to be talking with you now.

I fit well in terms of following because change is the leitmotif. There was a risk at the beginning of these sessions that the idea was that there's a problem that we are facing, oh my goodness, could nine change, as if hundreds of changes have not taken place throughout the federal system, at the Supreme Court as well as at the lower courts.

In the submitted testimony I provided

photographs and charts and the like to try to capture a few. Here, I just want to sketch that when the 20th century began there were fewer than 120 judges around the entire United States, included the Justices. And by the century's end there were more; by now, there are more than 870 of those judges. On top of which, at the beginning of the century, there were fewer than about 30,000 cases in the beginning of the 20th century. And we look at a docket of 300,000 and more cases every year.

And with the addition of these new judges did not come tremors about legitimacy, efficacy, judicial impartiality, but rather a salute, picking up on earlier themes, of the possibility of diversifying and expanding the judicial capacity of the United States.

Why did these changes get pushed? Because Congress has endowed so many of us with rights that didn't exist at the beginning of the 20th century.

So, the filings are up, there are new

tiers of judges, magistrate and bankruptcy judges. And term-limited federal judges exist throughout our system.

To summarize the first point, given the redesign across the spectrum, it's odd to think that the Supreme Court doesn't need some redesign. And of course, in fact, as you just heard, it has redesigned a good deal itself, or been presented with new materials.

So the second point is changes of the Court. Unlike a hundred years ago, the Court has carte-blanched over its docket, basically, as its mandatory docket has shrunk and its discretionary docket has grown. And its caseload has shrunk, despite the growing caseload around the country.

And more than that, and maybe not so much in focus, the federal appellate courts issue about 50,000 cases a year. Of that 50,000, 80 percent are marked not for publication, not precedential; i.e., not important.

Yet the Court takes, every year, about 14 percent of its cert grants come from those not

important cases. So there's a genuine disjuncture in the conversation between the courts of appeals and the U.S. Supreme Court.

And in terms of the cases that are picked, we know that the Justices and the judges alone don't agree on what's important. Yet the Court has changed a lot, which is the second point.

And a third point is that the Chief Justice's powers have grown stunningly over the course of the last century with the creation of something called the Judicial Conference of the United States picking committees, picking people to sit on courts, dozens and hundreds of statutes that authorize particular roles for the chief.

And, moreover, the Supreme Court's rulemaking, about which we've just heard some, does not actually conform to the rulemaking processes of the rest of the federal system, where it's notice and comment and transparency as well.

To focus on what can be changed, a lot

can be changed. Some of it volitionally by the Court and some of it through statutes given congressional authority under Article III of the Constitution, and a fixed set of statutes that's already done.

The proposals that you see are many. The chief justiceship could rotate, as it does in many state courts, and as the lower federal courts' chief judges rotate. The Chief Justice and the Court could voluntarily adopt a better rulemaking system for itself. There could be both more Justices sitting on panels. You heard something of the examples from before. And you don't have to cross the oceans, any ocean, or borders in order to take examples from state and federal systems of panels sitting rotation and the like. You can be tenured to the federal system but not necessarily to a particular bench. And of course the cert process, many people have suggested changes in this.

The key fact is that democracy doesn't tell us how to select judges. You can't inherit

it, you can't exclude, but it doesn't tell you how. But it does tell you that a few people holding power for so long is a genuine problem. And the key point is that the Court's power has expanded radically. And it is time for the Court and the Congress and the population, working together, to insist on forms of change. Thank you.

CHAIR BAUER: Thank you very much, Professor Resnik. Our next witness is Professor Russell Wheeler. He's president of the Governance Institute and a visiting fellow in the Brookings Institution's governance studies program. Professor Wheeler, you have the floor.

It could be the mute function. Professor Wheeler, can you hear us?

(Audio interference.)

CHAIR BAUER: Your audio --

(Audio interference.)

CHAIR BAUER: Yeah, your audio is mal functioning at the moment.

Now you're muted. It may make sense

--

(Audio interference.)

CHAIR BAUER: Professor, you're not -- I think it might make sense for you to disconnect and dial back in, because at the moment the connection is very poor. So we'll just take 30 seconds here and see if Professor Wheeler can dial back in successful and restore the audio.

(Pause.)

MR. WHEELER: Is that better?

CHAIR BAUER: Yes. Much better, Professor Wheeler. Thank you. We can hear you very clearly now.

MR. WHEELER: You may not be happy about that, but, anyhow, I'll proceed.

CHAIR BAUER: Please. Please do.

MR. WHEELER: I appreciate the chance to talk about the two topics you asked me to discuss. A code of conduct for the Supreme Court and the Supreme Court recusal practices.

These are both areas in which there is a lot of misleading information, by the way. As

to a code of conduct, there is of course a code of conduct for the federal judiciary which by its terms does not apply to the Supreme Court.

There is also -- and I should say that code, because most people don't understand this, this code is purely aspirational. The Judicial Conference of the United States has no statutory authority to require compliance with that code.

There is also a mechanism, separate from the code, to receive complaints of misconduct by federal judges, administered pursuant to the 1980 Judicial Conduct Act.

Now, as to a code of conduct for the Justices, some argue that the Justices have plenty of sources of advice as to when they face an ethical problem. The code itself, advisory opinions, colleagues, and others.

And there is no need, the Chief Justice has said, for one more, the Court to have its own code. Others respond, of course, that there is some symbolic value in the Court putting in black and white its conception of its ethical

obligations and its commitment to abide by them.

I think the touchier question is whether or not there is any mechanism to receive complaints of misconduct and impose sanction for misconduct as there is for judges of a lower court. I think most people agree, if that were to be, if the Congress were to put that into effect, it would almost surely have to involve lower court judges, pardon the expression, perhaps selected by the Judicial Conference, to receive complaints of misconduct by the Justices and determine whether action was appropriate.

The Justices, to the degree they've spoken on it, are uniformly opposed to that concept on the view that lower court judges shouldn't be evaluating the complaints of misconduct by Supreme Court Justices. And they give a variety of reasons for that, which I've tried to sketch out in my paper.

A response might be that already under the Judicial Conduct Act the lower court judges, district judges, review the conduct of circuit

judges, so it wouldn't be such a leap to have circuit and district judges evaluate complaints about the conduct of Supreme Court Justices. And as many others have said, if you look to the states, that's basically the way all the state systems operate, and they seem to be operating fairly well. So that's one aspect of the problem.

As to recusals, again, there are pros and cons. Currently, federal judges, under the disqualification statute, decide for themselves whether to grant a disqualification motion filed pursuant to statute, obviously decide on their own whether to recuse sua sponte.

And I think the Supreme Court is generally of the view they want to maintain that practice of deciding for themselves, unlike in some other courts, in some state systems, for example, in which disqualification motions are referred to another judge for decision.

Of course, at the Supreme Court, the Justices referring such a motion to another body

might violate the so-called "one supreme court" mandate of the constitution, because the disqualification or recusal decision is a judicial decision, not an administrative decision. The response to that, of course, is that people simply shouldn't be judges of their own case. So, that's what happens when a judge decides a disqualification motion or decides all by him or herself to recuse in a case because there may be a conflict.

And they point out that this argument of one supreme court really hasn't been fleshed out very much. And ever since Chief Justice Hughes announced it in the 1930s in opposing the court-packing plan, it's been thrown around, but perhaps not very much analyzed.

The other aspect of recusals, of course, is whether or not the judge who recuses, who denies a disqualification motion, should have to explain why. The arguments for that are fairly obvious. On the one hand it just promotes transparency; and on the other, as well, it

encourages judges to think through their reason for denying a motion. What may seem obvious may not been seen obvious and they have to explain it.

On the other hand, judges and Justices point to recusal matters and disqualification matters which turn on delicate personal matters, family matters, they say they shouldn't have to put those matters on the record. It might discourage them from recusing if they had to do so. And there are arguments, which I highlighted in my paper, but I'll stop now and, of course, be happy to try to answer any questions you may have.

CHAIR BAUER: Thank you very much, Professor Wheeler. We'll now turn to the Commissioners who will be asking questions. I'll ask them to please come into the conversation at this point.

The first of our questioners is Professor Margaret Lemos, who is the Professor G. Seaks Professor of Law at Duke University School

of Law. So, Professor Lemos, please proceed.

COMMISSIONER LEMOS: Thank you, Commissioner Bauer. And I'd like to thanks as well to all of the witnesses from this Panel for your really thoughtful and informative testimony.

Mr. Gupta, I'd like to start with you, if I might, and ask you to say a little bit more about the concerns you've raised about the fact that a relatively small group of elite lawyers seems to play an outside role in the cases the Court hears.

And so I'm curious in particular about what effect you think that might have on the Court and its decision making. Whether at the cert stage, when the Justices are deciding which cases to take, or later on, on the merits.

And among other things, I'm curious whether you think the problem at the cert stage, if there is one, is a problem with false positives in the sense that the Justices are being persuaded by the advocate or perhaps by their clerks, to take cases that are not in fact

worthy of their limited attention, or whether it's more of a problem of false negatives in the sense that the Justices are missing out on cases that they really ought to be deciding?

MR. GUPTA: Thank you, Professor Lemos, that's an excellent question. I think it's a combination of both.

So, it's very difficult to measure this sort of stuff empirically and to make causal claims, but I think some of the best research that's been done is by Professor Richard Lazarus in Harvard in two articles.

One, which is provocatively called Docket-Capture at the High Court. And by analogy to sort of agency capture where you have powerful interests that are well represented and that the agency is hearing from those folks more than others who may represent the public interest.

And one example that I think I've always found pretty compelling that Professor Lazarus gives is the example of a series of cases filed by a really well respected Supreme Court

practitioner, Carter Phillips, who happened to represent a couple of railroads.

And he filed petitioners over and over again about an obscure statute called the FELA, the Federal Employers Liability Act. And persuaded the Court to take these cases on pretty minor questions of tort liability that the Court probably otherwise would not have had on its radar, would not have been interested in.

And I think that's just a small window into the ability of expert advocates who are repeat players to send the signals that the Court is looking for and to really shape the docket. And so, the fact that a single advocate representing a single client can get, can shape the Court's agenda and get an issue onto the Court's docket is pretty remarkable. I think the public would be surprised by that.

But to go to the second part of your question, I also think that there are, there are cases that are just not making it to the Court that otherwise would be filed. And so, there are

whole categories of litigants that do not have an expert bar, that knows the, what I like to think of as the dark arts of the cert process.

This is the phase where I think, more so than the merits phase, where the particular kind of lawyering that Supreme Court advocates know how to do makes a difference because the Court is not interested as much in who's right or who's wrong, which is what lawyers are used to briefing, they're interested in things like, is this a good vehicle, are there true splits.

And the Court necessarily relies on repeat player advocates because the Justices just don't have enough time to process all of those petitions. And so, it's a combination of expertise, credibility, familiarity.

And if that know-how and familiarly is not evenly distributed, it does have a, I think, a measurable effect on the Court's docket. Even if it's hard for me to reduce that to any kind of mathematical or empirical proof.

COMMISSIONER LEMOS: Thank you, Mr.

Gupta. Professor Resnik, I'd like to ask you a question about cert as well. Picking up on some things that were explored in the panel we just heard before this.

You have expressed concerns about the Court's unfettered discretion to select which cases adheres. And you mentioned a proposal that we heard about on the last panel of giving federal appellate judges, and maybe state judges as well, or some subset of them, a hand in selecting cases for the Supreme Court's review.

Can you say a little bit more about what you see is the problem, or problems, with the Court's current processes for cert and why you think it would be an improvement to give other judges a voice in that process?

MS. RESNIK: Yes, I would be, you heard that the cert pool may be skewed, as Mr. Gupta said, by who can, who's a repeat player versus a one-shot lawyer in that process or no lawyers.

We should recognize that in about a

quarter of the filings of the state, at the trial level and half on appeal, there are no lawyers whatsoever. So when we try to talk about the resources and the problems of skewing the docket because these are unlawyered cases, then 80 percent of those cases that are in the courts of appeals end up with the courts of appeals saying, and these aren't important, and then the Supreme Court takes them.

So I think that it's really important to see that the Court is currently sitting on a dysfunctional system and its dysfunction echoes through the docket of the Supreme Court. And the idea that it's developed its process of picking cert and therefore it is the process that it is, it would rattle our cages to change, is a problem rather than saying, what are the ways to fix it.

And you have a kind of smorgasbord of options in terms of how to fix it. And one that was proposed by a bunch of law professors more than a decade ago, Paul Carrington and Roger Cramton get pride of place in moving it forward,

is to say, why don't we have some judges who are sitting on the courts of appeals rotate through the system to give a better insight on it.

And it looks like it could be an importantly two-way street, because the Supreme Court could say, wait a second, we think that's important. Telling the courts of appeals, you may be ducking issues we think are important.

It's also the case that it diffuses the centrality of power of nine people, which has gotten so distorted over the century.

And so there are different ways to do it. Including, I believe, that the Court could invite more information from the courts of appeals.

We heard about the amicus practice -- I'm sorry, I'm geographic so I'm pointing to where you are on my screen -- and we could think of ways in which the Court could, first of all, own that it's sitting on a problem, use its role model leadership and work with Congress. Chief Judge Katzmann who recently died kept calling for

the, work with Congress courts to develop a whole set of better practices, of which cert is one.

COMMISSIONER LEMOS: Thank you. Mr. Gupta, let me come back to you with another cert question while we're on this topic.

You've argued for disclosure of the Justices' votes on cert, largely for reasons of transparency. I'd like to invite you to just say more about that and why that information would be helpful to the public or to the legal system.

And I'd also be curious to hear your views on one proposal that's sometimes made to disclose which cases make it onto the so called discuss list. The sort of short list of cases that the Justices actually talk about with each other.

As you know, one objection to disclosing the votes on cert is that it might be somewhat misleading because there is this large number of cases that the Justices probably don't give their full attention to. And so, I'd be grateful to hear your views on the discus list as

well as the votes on cert.

MR. GUPTA: Sure. So I want to be clear that I'm not advocating for any legislation, I'm advocating that the Court may wish to consider these transparency reforms, indeed that it should, it would be a good idea.

And I'm favor of both proposals. And I think they're complementary. Because actually for the reason you have suggested in the question.

If the Court discloses both the votes and the list of cases that are discussed, then there is less likely to be an inappropriate or mistaken inference that the Court gave a whole lot of thought to a case and denied it.

Of course, a denial of cert is not supposed to be read as any judgement on the merits. That would be true regardless of whether the cases are disclosed or not.

I think we know from experience, from the lower courts, there are many kinds of discretionary review decisions where those votes

are disclosed. And I don't think that has harmed the deliberation in those courts or public perceptions of the legitimacy of those courts, so it's hard for me to see how that would occur here.

I do think this is a court in a democracy and transparency is generally a good thing. We know what the votes on cert were in times past because we know that from the disclosure of the Justices' papers.

And I don't think that that reflects badly on the Court as an institution. And it's hard for me to see why that would be any different if the Court were to decide to do that today.

COMMISSIONER LEMOS: Thank you. Professor Larsen, let me see if I can sneak in one question for you before my time runs out.

We've been talking a bit about imbalances and representation by the actual attorneys for the parties. I'm curious whether in your work on amici, whether you have come

across any evidence that certain interests are better represented by amici than others?

Or to put that differently, whether there are certain interests that are typically not well represented by amici?

MS. ORR LARSEN: Well, I think the answer is yes, but there is an important distinction between the merit side and the cert side.

So, on the merit side, I've written about this before. Since the docket is shrinking and lots of people want Supreme Court work, it's not hard to find a Supreme Court specialist to take your case for free once you have a cert grant.

And so, there are some issues where the bar is often, is too often conflicted out. Consumer protection which I heard is one of them.

But on the merits, you often see very qualified specialized lawyers on both sides of the beat.

On the cert side I think there is an

imbalance. And I think there is a problem. And it's the one we've been talking about before.

And it has to do with amicus briefs because there's a thud factor when the law clerk gets a cert petition with a big stack of amicus briefs and that plays a, it plays an important part mentally in sort of the calculus of whether it's a grant or not.

And those briefs are filed by people who can afford them because they are, they're still a shot in the dark. They don't have a cert grant yet.

So I do think there is a really important distinction between the merit stage and the cert stage. And the imbalance, I see it, is on the cert stage, not on the merit stage.

COMMISSIONER LEMOS: Thanks.

CHAIR BAUER: Thank you very much, Professor Lemos. The next questioner is Professor Olatunde Johnson at Columbia Law School. The Jerome B. Sherman Professor of Law on the faculty there. So, Professor Johnson.

COMMISSIONER JOHNSON: Thank you, Commissioner Bauer. And thank you to this whole panel for your perspectives and your insights.

I wanted to start with Mr. Gupta. It's actually a follow-up of the previous line of questioning around cert.

And one of the things you say in your written testimony is that the certiorari process is opaque, right. And so part of that might be dealing with those kind of after the fact, back-end reforms, of the kind that you were just talking about, disclosing the votes, disclosing the prominent discuss list.

I wondered if you thought there should be some changes to the announced standards for granting certiorari or more clarification?

So, as you know, Supreme Court rules talk about a circuit conflict and important questions. The Supreme Court can also, in theory, grant cert for correcting an error. Maybe that's done less on the certiorari docket.

Are there ways or are there

suggestions that you have about how those standards could be less opaque from your practitioner perspective?

MR. GUPTA: You know, I think ultimately the standards are what are written down on paper, but because this is such a discretionary decision, so much more content to what the Court is doing is going to be beyond written standards.

So I do, I'm in favor of transparency. I think the Court should, and does from time to time, tell us why it's taking a case or why it's not taking a case.

Usually that comes either in the text of the merits opinion that explains, sometimes briefly, why a case was taken. And then also, we get a lot of information from the single Justice or multiple Justice dissents that are written when the Court denies cert.

But the problem is that it's folks like me and my counterparts and the corporate Supreme Court bar, who read all of those opinions

and understand how to interpret those signals. And then of course it's the law clerks. The people who are responsible for overseeing the process, who know the most about it.

Those law clerks, when they leave the Court, are very likely to take a $350,000 bonus on top of their base salary and go to a number of firms that have practices before the Court. Now I'm not saying that the law clerks are disclosing to people confidences from within the Court, but they understand the process very well, and that expertise is unequally distributed.

So I'm skeptical that writing down standards is going to fix the imbalance. I think it has to come in having more balance in Supreme Court expertise across different categories.

COMMISSIONER JOHNSON: Okay, thank you for that. I'm going to, I want to ask some questions of Ms. Howe. Thank you for your testimony about transparency from the perspective of the press.

One of the things that you say, in

your written testimony, but also as you're speaking here, is on the importance of video or televised coverage, and you talk about your own experience going in and having that kind of live watching of the oral argument. And also about the success of audio and the lack of parade of horribles.

So, that raises, for me, a series of questions I just want to ask too. I mean, one is, since there has been resistance to televised arguments, and I want to get to some of the specific concerns, what do you think is really gained from video?

Because, I mean, you were there live, right, and that's a whole experience, but what do you think is the added advantage of video over, let's say audio?

MS. HOWE: Sure. And I think it's a great question. Thank you for the question.

I think that there are nuances to the Justices' body language, in particular, that you simply can't capture on the audio. And I know

that people who argued at the Court over the last term or so, and I see Mr. Gupta nodding his head said that, certainly it was better than no argument at all but that it wasn't the same as arguing in person and being able to look at the Justices and see their responses to the answers to your questions.

It's a very difficult thing to sort of put your finger on.

COMMISSIONER JOHNSON: Yes.

MS. HOWE: But there are just intangibles and contexts to seeing the arguments and seeing the Justices' responses that you can't get from live audio.

COMMISSIONER JOHNSON: Okay. And we're talking, I mean, certainly from the perspective of the person who is arguing, it's really hard when you see on Zoom, lack of social queues, even in that, on audio is even more.

I guess I was interested in, from the public's perspective. But let me merge that with another question which is, because I think it

relates, is that we've often heard that that's almost what the Court is trying to avoid, right, is the idea that oral argument will have outsized importance if you have video, because people will be looking at their facial expressions.

And then they've also, in addition to the concerns that you articulated for us before, have expressed concerns about privacy, people recognizing their faces, publicly and also more generally about litigants' privacy. That they then sort of sign up to the celebrates in this instance.

I mean, how do you assess those as someone who is a really close observer of the Court?

MS. HOWE: Okay, so let me unpack that question, so to speak. I mean, I think first of, like in addition to sort of the nuances, I want to go back to a point that I made, both in my written testimony and in my testimony here, there are 50 seats reserved for the members of the public in the courtroom. And people wait in line

sometimes for days to get a seat in the courtroom for the oral argument and the challenge to California's Proposition 8.

The first person in line waited in line for 114 hours. And someone paid him several thousand dollars to do that.

The first nine out of ten people in line for the Obama care argument were paid line-standers. People say, they're open to the public, but in a certain sense, for some of the high profile cases, they're not really open to the public.

For issues like these that effect how people live their everyday lives, people want to see these arguments. And video, for many people, is really the only way to do that.

In terms of the Justices' privacy, I think they are members of the highest court in the land. I'm not sure that that is necessarily something that should factor into their consideration of whether or not people should see these arguments.

And then in terms of the litigants, I don't think that the litigants themselves, first of all, would necessarily be shown. They're seated in the gallery. Many of the television oral arguments in the Ninth Circuit, you see the judges and you see the lawyers who are arguing, they don't show the gallery at all.

And I would add that often after the oral arguments in big cases, many of the litigants come down the front steps of the courthouse, of the Supreme Court of the United States, and talk to the press out front. You know, many people are not actually looking for privacy in these cases.

COMMISSIONER JOHNSON: Yes, thank you. That's helpful. I actually, I want to ask another question of you, and if we have time at the end I can ask some questions of others.

I want to give you some space just to talk about some of the other transparency related issues that you would identify as top of the list that came up in your written testimony. For

example, financial disclosure.

What are the ways in which the current system is inadequate, and then also, the lack of reporting on public appearances, speeches and things like that?

MS. HOWE: Sure. Both of these go to Justices' recusal practices from a slightly different angle than some of the other ways that have been touched upon.

And I think that most of the logistics and the ability to know, in many ways, why the Justices are recusing themselves, one way is sort of useful to think about it is a continuum. You know, maybe the Justices aren't going to explain why they're recusing themselves, but if they're not going to do that, we need to give members of the public adequate information for us to, for the members of the press at least, to try and figure out why they're recusing themselves.

And so, for the financial disclosures there is sort of two issues. Is first, sort of just the logistics.

As I indicated in my written testimony, if you want to get a copy of the Justices' financial disclosures you have to submit a request to the administrative offices of the U.S. Courts and then they send the disclosures on a thumb drive.

In 2021 you would think we could at least put them online. And then the issue of having them in real-time, rather than as a historical snapshot of the previous year.

And then, similarly, the Justices' speaking engagements so that we can know what they're saying and who they're talking to in real-time, rather than finding out about it after the fact.

COMMISSIONER JOHNSON: Okay, thank you. So I'm not going to --

MS. HOWE: I'm sorry, I got a little energetic about this.

(Laughter.)

COMMISSIONER JOHNSON: Energy is good. So I am not going to take up any more time

because I'm out of time.

CHAIR BAUER: Thank you, Ms. Johnson.

COMMISSIONER JOHNSON: Thank you very much.

CHAIR BAUER: Our next questioner is Professor Walter Dellinger. He's a Douglas B. Maggs Emeritus Professor of Law at Duke University Law School and a partner at the law firm of O'Melveny & Myer. Professor Dellinger, the floor is yours.

COMMISSIONER DELLINGER: Thank you. Professor Larsen, your work as (audio interference) in the legal world is --

CHAIR BAUER: We might be having some difficulty --

(Simultaneously speaking.)

CHAIR BAUER: We might be having some difficulty, Professor Dellinger, hearing you. Can you possibly raise the volume?

COMMISSIONER DELLINGER: Let's see, can you hear me Professor Larsen?

MS. ORR LARSEN: I can hear you but

you're slightly, I should say the thud factor was your phrase and I should have given you credit.

(Laughter.)

COMMISSIONER DELLINGER: Am I clear now?

MS. ORR LARSEN: Let's see --

COMMISSIONER DELLINGER: Ms. Larsen?

MS. ORR LARSEN: I think I can hear you. That was a little better.

CHAIR BAUER: Your fuzzy. You just may want to raise a your voice a little bit because it's a little muffled, sir.

COMMISSIONER DELLINGER: Okay. And we may want to repeat the question.

But this (audio interference) thing, amicus group that you were thought to have a scholarship. I'm wondering, why you think that is happening, and to respond to no particular reason just that, unlike (audio interference) the Court can be (audio interference) time when the courts are ultimately using the case as a jumping off point, are there other factors?

MS. ORR LARSEN: Are there other factors besides -- I'm so sorry, Walt, the last bit I lost. Are there other factors besides what?

COMMISSIONER DELLINGER: Besides the fact the Court is offering reasonable cases not to side on particular issues, but to proclaim on a larger --

MS. ORR LARSEN: Oh. Like what are these using these factual things for? Is that what you mean?

COMMISSIONER DELLINGER: What is the reason for the growth of amicus briefs?

MS. ORR LARSEN: Oh. Oh, I see. I think there is several reasons. I think part of it is exactly what you're saying, that the type of answers they're providing, the cases they're taking are more law declaration and not case specific. I think that's part of it.

I also think technology is part of it. I think how easy it is to access information and assemble a brief now, it's much easier to do in

2021 than it was even in 1981. So I think that's part of it.

I also think, I think the docket shrinking is part of it. So as they take fewer cases and you have specialists that want the work, amicus is a way to do it. To file a brief like that.

So I think there are several factors working into the growth of it. But it's like an 800 percent increase. And it's tremendous growth. It's hard to just say increase and have that word mean enough in describing the change over the past 30 years.

COMMISSIONER DELLINGER: (Audio interference) amicus briefs are for judges, Justices, to get their information from all the legal bloggers who are (audio interference) for the law clerks?

MS. ORR LARSEN: Yes. So I have written about this too, this virtual briefing. That happens outside of all the briefing, include amicus briefs.

CHAIR BAUER: Ms. Larsen, could I ask you to just repeat the questions you heard so that --

MS. ORR LARSEN: Yes. Sure.

CHAIR BAUER: -- everybody can be clear on what --

MS. ORR LARSEN: And I hope I heard it right. I could be doing one of those things where you answer a question you want to answer but actually --

(Laughter.)

MS. ORR LARSEN: I think, Walter asked about, is there a real difference between the amicus brief and the virtual briefing that happens online, on blogs and Twitter and things like that.

And I think both of them are worrisome for different reasons. So I worried a little bit about the online blogging and briefing the Court through Twitter. I worry about with a coauthor because I'm old fashioned in value of that adversarial system.

I think there is something to be gained when you read two briefs from two sides, from two different people and you poke holes in each one.

And in an era where we're sort of in our own little echo chambers anyway and we're reading news that's served to us because it makes us feel good and we're reading people that agree with us already, I think briefing the Court online, completely outside of the traditional adversarial system, risks that, like exasperating confirmation bias. It risks that the Justices will just look to the same voices instead of forcing themselves to listen to challenging voices.

And that's why I think I favor amicus briefs, even with their flaws, over a free for all virtual briefing world.

COMMISSIONER DELLINGER: Amy Howe. Amy, in the debate over whether to allow real-time audio, the justice system consider the fact that the announcement of attendance, and even the

arguments, are market sensitive information and that to allow the select few to gain access to the Supreme Court and can leave during the announcement (audio interference) and can leave during oral argument, that is market sensitive information which also is made available simultaneously to the public at large. Is there any concern about that?

MS. HOWE: That's a great question. And I'll repeat the question. The question is whether or not there is any concern about the idea that the announcement of opinions, and in oral arguments, contain market sensitive information. And you can walk out if you're in the courtroom, you hear something being, an opinion being announced, you can walk out with that information.

I don't know. You are probably better sourced inside the Court than I am, but I do think that some of that has probably has been, I think that that almost certainly was a problem as recently as, I'm going to say ten years ago, when

there was a gap between when opinions were released in the supreme, this is sort of really, sort of down in the weeds, but when opinions were released in the courtroom and on the first floor of the Court in the Court's public information office or the order was released with the Court on the first floor of the Court, and when they were published online.

And now that is, there essentially is no gap. So that I don't think that, I think it would be very difficult to act on that information in the market. But I do think that it was once, there was once the potential for a big problem with that.

COMMISSIONER DELLINGER: And could be still with oral arguments.

MS. HOWE: And still could be at oral arguments. Which could be eliminated as a problem.

COMMISSIONER DELLINGER: I'll ask one last question because I have to shout. And it's for Professor Resnik.

In the (audio interference) factor 14 percent of places the Justices think are important enough to hear, they were scheduled or labeled not for publication. Which means they can't be cited by individuals.

How does that square with the notion that why the cases are being decided alone, if you can't cite what the Court did? Given an opportunity like yours, how can we have a system where the (audio interference) cases decided alone?

MS. RESNIK: Again, I will repeat the question. Is about this I think, certiorari being granted in a significant percent, a seventh or so of the Court's docket, in cases that the appellant courts noted as, not for publication.

There was a brouhaha engaging with the First Amendment when the Court's used to say, not for citation, and people backed away from that to say, you can cite it for what it's worth but we're telling you it's worthless as of precedent.

And my beacon in this is, Richard

Arnold's, who was a judge, formally chief judge of the Eight Circuit, wrote an opinion that said, that Constitution Article 3 says there is something called the judicial power. And appellant judges don't have the power to say, you win this time, but I don't remember mean it. I haven't reasoned and deliberated it enough it know that this is a principle decision.

Also, in the expertise of this room and far beyond it, we know that with the non-publication can come bargaining at the appellant court. I'll sign on if you don't publish it. Or hopefully we won't publish it so we won't get the Supreme's attention, when in fact they still look at it and now we'll go to the thud factors and the Court sure processes as well.

So we're looking at a really problematic, worrisome decision making process that has exacerbated over the years because when it was first promoted in the '60s, and it was 40 percent and now it's more than 80 percent of the cases. And these are only, frankly, 50,000

cases, which in a world of our size isn't that many cases with our wonderfully resourced and need for more resources on the courts of appeals.

And if judges say we don't do this because we don't have time, of course the answer, as Judge Arnold said was, then we need more judges. We need to deal with the cases.

I just think we should see, the good news of the 20th century. Because a lot of people thought the federal courts could help them.

And what we see in the dysfunction in the 21st is the federal courts haven't stepped up through Congress and the Court to staff and marshal the resources that are needed. And this is one measure of the dysfunctional system.

CHAIR BAUER: Thank you very much, Professor Dellinger. Our next questioner is Professor David Levi. He is the Levi Family Professor of Law and Judicial Studies and the director of Bolch Judicial Institute at Duke University Law School. Professor Levi, the floor

is yours.

COMMISSIONER LEVI: Thank you very much. I'm acutely aware that I think I'm the last questioner on a very long and very interesting day, and I thank the panelists.

The day wouldn't be complete without a deeper dive into rules of recusal and the codes of conduct, which is something of a specialty topic, but we're very lucky to have Russell Wheeler with us her today, who has been an expert on these, these matters.

Mr. Wheeler, might I start with recusal? And we all know that the consequences of recusal at the Supreme Court are quite different than for the lower courts where another judge will simply come in and handle the matter. We don't have another Justice to come in and sit on the Supreme Court. So there is quite a bit of interest in this, and it's understandable because of these consequences.

Are there constitutional limits on Congress's ability to prescribe rules for the

Court on recusal, whether these are procedural or substantive rules?

MR. WHEELER: Well, I'm probably the best one to ask that question, but we do have the judicial disqualification statute. You know, 450, 455 in Title 28, which does tell all Justices and judges when they're supposed to recuse, when it's waivable and when they have to recuse. And financial situations it's pretty strict.

The Chief Justice said in his 2011 year-end report that no one has ever tested whether or not Congress can actually impose those restrictions on the Supreme Court, on the theory that the Constitution creates the Supreme Court and Congress creates the lower courts. So it's never really been tested.

On the other hand, judges have been complying with it all along. They file their financial disclosure reports, that's not recusal I realize, but it's the same sort of thing. Congress has said, you file financial disclosure

reports with the judicial congress, and they've been doing it.

So I don't know how it would be tested necessarily. Well, I can see how it would be tested, but it hasn't been tested yet.

But I think since the Congress obviously, and no one doubts that they can limit the term of the Court, the can define its officers, they can say when it's supposed to convene a number of Justices.

It's pretty hard for me to think that they can't say on the same token that these are disclosure rules that you have to follow. After all, you're governing a judicial process not an administrative process.

COMMISSIONER LEVI: So, when a Justice recuses, they can file a statement of reasons if they wish to --

MR. WHEELER: Right.

COMMISSIONER LEVI: -- but they rarely do. I've seen that, at least Justice Kennedy and maybe some of the other Justices agree with this,

that when they recuse for personal reasons, they ought not to file a statement because it would feel as if they are lobbying or in some way contaminating the other Justices. And I wonder if you have any views on that?

MR. WHEELER: Well, no. I mean, that seems to me that's the perspective of the Justice that I really wouldn't have a view on.

This is one area, this whole area, putting aside the Supreme Court, this is a whole area in which the states have spent an awful a lot of time dealing with these matters of recusal and disqualification. Part of the reason for that is that court state judges get campaign contributions so there are more disqualification motions.

But generally speaking, the states have been able to fashion a variety of rules governing referring disqualification motions to other judges and requiring judges to state, give some reason about why they're honoring or denying the motion to disqualifying why they're recusing

themselves.

I think you and I talked earlier, that perhaps could even be, there's some statement of why it's being done so that somebody has confidence that they actually thought it through. That it's not one of those the judges talk about opinions that won't write, well, maybe this is disqualification denial that doesn't look so good once you try to put it on paper.

COMMISSIONER LEVI: And at least perhaps the Justices would consider identifying whether it's a financial conflict or it's a prior service conflict they served on the panel, perhaps that had some connection to the case at hand. Or that it's another reason. It's a personal reason. Something of that sort.

MR. WHEELER: Yes. It comes down just, so transparency reason. The notion that when the Justices assume this office, people get to know a little more about them then they would otherwise, and you want to be sure that the public's business is being done on an upright

manner. I mean, we doubt pretty much that it is most of the time, but there are advantages to having it on the record.

COMMISSIONER LEVI: You know, you mentioned the state systems, so in Texas I gather, on the Texas Supreme Court the recusal decision is made initially by an individual Justice. And if they grant the motion than that's it. But if they deny it, it's referred to the entire court. Do I have that right?

MR. WHEELER: Yes. Texas ruled appellant procedure, Rule 16.3. I encountered it when I was doing some work on the states.

It's noteworthy, Texas does that. If you get a disqualification motion, the Justice either grants it, steps off the case or refers it to the rest of the Court to decide without the participation of the subject judge.

The thing is, not many other supreme courts have come up with much. And that may speak to the difficulty of formulating rules for courts of a last resort as opposed to

intermediate courts, because there you always have a situation. It's easier to replace, replace the judge for example.

COMMISSIONER LEVI: Let's talk a bit about the code of conduct. As you say, it has confused many people, including judges.

The word code suggests that it's law and that it's enforceable, but actually, the code of conduct, these are very broad principles of aspirational conduct. And they're stated in a very general sort of fashion that judges should resolve cases expeditiously and that they should be attuned to the appearance of justice, that sort of thing.

MR. WHEELER: Right.

COMMISSIONER LEVI: So, even for a lower court judge, these rules aren't directly enforceable as, let's say, a criminal statute could be.

MR. WHEELER: Right.

COMMISSIONER LEVI: We have a code of conduct committee that's a part of the judicial

conference structure. And according to the Chief Justice's 2011 letter, the Justices avail themselves already of code of conduct committee. If they have a question they may ask that committee.

And since it is aspirational already, I'm wondering whether it makes a difference if the Court were to formally adopt the code of conduct, they occasionally have issued a resolution in which the Court will adopt some ethical standard, they've done this in the past, not often, but they could formally adopt the conduct of conduct.

MR. WHEELER: Right.

COMMISSIONER LEVI: Would that just be symbolic or do you think that would actually have some impact on --

MR. WHEELER: I think it would have the same impact that the code of conduct has now. It's a statement that these are the rules that we, these are the guidelines that we expect judges to observe. They're very general

guidelines.

We setup an advisory committee that judges can, from which judges can seek advice on whether a particular action does or not comply with the code. Which judges do, I think.

Probably because they want to do the right thing, and partly because they don't want their name in the newspaper. I think it would have the same effect on the Supreme Court.

I mean, I think it's, I don't know why the Court hasn't done it already. And Justice Kagan did say in 2019, in the appropriations hearing, which seem to be the form of all these things discussed, that the Chief Justice in 2019 was considering a code. The court hasn't had any appropriations hearings since 2019 so we haven't learned much more about that. But it's obviously, I think even perhaps under consideration.

It may be the Court doesn't want to adopt the code for the reasons I mentioned. Simply because it doesn't want to appear to have

been pressured into doing so.

I think the much tougher question is the question of enforcement, not of the code, the judicial conduct statute is not setup to police the code but it has its own standard. And that gets much more dicer, I think.

I indicated in my paper, I think it's not quite as obvious that it can't be done, but it's obviously, this is an area in which, as Ryan Nebart (phonetic) said, approximate solutions to insoluble problems. And guess what we're looking for in this area.

COMMISSIONER LEVI: So, let's just talk about that for a second. When you're a lower court federal judge you're subject to a complaint procedure.

And they're often are, they are many complaints that can be filed and they go to the chief judge of the circuit and then there is a process for moving on from there. There can be sanctions. And there are many complaints. Most of them are dismissed and found to be without

merit.

You say in your written testimony that you'd be concerned that the Supreme Court would be kind of a lightning rod for these kinds of complaints and that they would be weaponized. Can you explain what your concern is?

MR. WHEELER: Well, one just very briefly, you're right. Great, it's not in addition to the majority the great majority, the great number of complaints that are filed are, by any standard, non-meritorious. There are a few needles in the haystack.

Every once in a while members of Congress, for example, file a complaint against a judge. It was Congressman Sensenbrenner's complaint filed because he thought, he filed a judicial misconduct complaint in the Seventh Circuit, and we don't have to go into reasons why, which was dismissed, and he got very mad about it and told the judicial conference he thought he was getting the shaft.

And so Chief Justice Rehnquist

appointed the Breyer committee. So that led to something, some consequence.

I just think if there were a complaint procedure, a lot of legislatures, for example, would say, I can file an impeachment resolution against Justice A or Justice B, but nothing is going to happen.

If I file a complaint procedure we'll get a little bit of publicity. Under the statute they'll probably have to release, subjected to some limited inquiry. It will get some more press attention than it would otherwise.

That would induce, I think, members of Congress to do it. And I think it would be all sorts of interests groups because of the higher visibility of the Supreme Court. It just ups the stakes.

Then I think you would have, you have a small bureaucracy process in these complaints. Most of them would be non-meritorious as well, but it would just give a lot more visibility to the process.

And that's a downside of it. Whether it's a fatal downside I think is a different question.

COMMISSIONER LEVI: Thank you very much. Back to you, Professor Bauer.

CHAIR BAUER: Thank you very much, Professor Wheeler. Before we conclude, Professor Johnson, did you have a question that, I see a hand up. Or is that just a technical glitch?

COMMISSIONER JOHNSON: My hand doesn't need to be up. Is it?

CHAIR BAUER: I saw it briefly, but that's no problem at all. Then we'll conclude.

(Laughter.)

COMMISSIONER DELLINGER: Chairman Bauer, I just want to apologize, I've identified the problem with my computer and it will not happen in the subsequent hearings. I apologize.

CHAIR BAUER: We ultimately made out the questions, which were excellent questions, and elicited very good answers from the panelists, so thank you very much.

That concludes the panel discussions for today. And thanks very much on behalf of the Commission to all of the witnesses for their testimony and there written statements. And we also want to thank members of the public who have submitted comments.

Please keep in mind, again, that the testimony, as well as the public comments, are posted to the Commission website.

Our next public meeting is scheduled for Tuesday, July 20th beginning at 8:30 a.m. Over the course of that day we're going to hear from six other panels.

And those panels, and the order in which we will hear them, one will be devoted to perspectives from practitioners and views on the confirmation process. Then two panels that are going to present perspectives on the fundamental question of court reform, a panel on term limits and turnover on the Supreme Court, a panel on the composition of the Supreme Court, and then some closing reflections in the last panel on the

Supreme Court and constitutional governance.

We will have three more public meetings thereafter at which the Commission will deliberate on the issues it is taking up for analyses in the report to be submitted to the President. Those meetings have been tentatively scheduled as Friday, October 1, Friday, October 15 and Wednesday, November 10th.

And once again, I want to remind you that further information on these meetings, the witnesses who will be appearing on July 20th, the draft materials that the Commission will take up for deliberation, all of these will be posted regularly as they become available on the Commission's website.

I want to also note in closing here, the Commission will continue to accept public comment until November 15th. However, comment is most useful to the Commission if it is submitted prior to our deliberative meetings scheduled for October and November.

So if at all possible, we'd very much

like to see the comments before then. However, we will accept them through November 15th.

Many thanks again. And on behalf of the Commission, we hope you will all join us again on July 20th. Thank you very much.

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

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 pages 1 to 396 inclusive are to the best of my belief and ability a true, accurate, and complete record of the above referenced proceedings as contained on the provided audio recording.

Neal R. Gross
