

PRESIDENTIAL COMMISSION ON
THE SUPREME COURT OF THE UNITED STATES

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3RD PUBLIC MEETING

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TUESDAY
JULY 20, 2021

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The Commission met via Video
Teleconference, at 8:30 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's Antonin
Scalia Law School
KEITH E. WHITTINGTON, Princeton University

DANA FOWLER, Designated Federal Official

ALSO PRESENT:

PANEL 1

KENNETH GELLER, Mayer Brown
MAUREEN MAHONEY, Latham Watkins
WADE HENDERSON, Leadership Conference on Civil
and Human Rights, and the Leadership
Conference Education Fund
JEFF PECK, Tiber Creek Group
ILYA SHAPIRO, Cato Institute, and the Robert A.
Levy Center for Constitutional Studies
BENJAMIN WITTES, The Brookings Institution

PANEL 2

NAN ARON, Alliance for Justice
CHRISTOPHER KANG, Demand Justice
JOHN MALCOLM, The Heritage Foundation
GABE ROTH, Fix the Court

PANEL 3

CRAIG BECKER, AFL-CIR
CURT LEVEY, Committee for Justice
SHARON MCGOWAN, Lambda Legal
DENNIS PARKER, National Center for Law and
Economic Justice

PANEL 4

AKHIL AMAR, Yale University
TOM GINSBURG, University of Chicago School of
Law
VICKI JACKSON, Harvard Law School

PANEL 5

RANDY BARNETT, Georgetown University Law Center
DANIEL EPPS, Washington University in St. Louis
MICHAEL KLARMAN, Harvard Law School
MARIN LEVY, Duke Law School
NIEL SIEGEL, Duke Law School

PANEL 6

ROSALIE ABELLA, Supreme Court of Canada
JAMAL GREENE, Columbia Law School
LARRY KRAMER, William and Flora Hewitt
Foundation
MARGARET MARSHALL, Choate, Hall & Stewart
STEPHEN SACHS, Harvard Law School

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2 (8:32 a.m.)

3 MS. FOWLER: Welcome to the third
4 meeting of the Presidential Commission on the
5 Supreme Court of the United States.

6 My name is Dana Fowler and I am the
7 designated federal officer for this advisory
8 committee.

9 We would like to thank all of our
10 invited speakers, our public attendees, and
11 stakeholders for joining us today, including
12 those who have provided public comment.

13 Before we begin hearing from our
14 speakers, just a few administrative reminders.

15 This meeting is being recorded via
16 video conference, and is also being livestreamed
17 at our website, www.whitehouse.gov/pcscotus.

18 This commission is considered a
19 federal advisory committee and is governed by the
20 requirements under the Federal Advisory Committee
21 Act, or FACA.

22 My role as the designated federal

1 officer is to manage the day-to-day
2 administrative operations of the committee,
3 attend all committee meetings, and ensure the
4 committee operates in compliance with FACA.

5 All of the commissioners have received
6 training regarding FACA requirements and their
7 ethics obligations as special government
8 employees.

9 In addition, each commissioner has
10 completed a financial disclosure report that has
11 been reviewed by ethics attorneys to identify any
12 potential conflicts of interest.

13 Now, in order to begin, I will take a
14 roll call.

15 Commissioners, if you could please
16 turn on your cameras? I will call you all in
17 alphabetical order.

18 Please unmute when you hear your name,
19 and let us know if you're present by stating here
20 or present. Michelle Adams?

21 COMMISSIONER ADAMS: Here.

22 MS. FOWLER: Kate Andrias?

1 COMMISSIONER ANDRIAS: Here.

2 MS. FOWLER: Jack Balkin?

3 COMMISSIONER BALKIN: Here.

4 MS. FOWLER: Bob Bauer?

5 CHAIR BAUER: Here.

6 MS. FOWLER: William Baude?

7 (No audible response.)

8 MS. FOWLER: Commissioner Baude was
9 running a little late this morning. He'll be
10 joining us shortly. Elise Boddie?

11 COMMISSIONER BODDIE: Here.

12 MS. FOWLER: Guy-Uriel Charles?

13 COMMISSIONER CHARLES: Here.

14 MS. FOWLER: Andrew Manuel Crespo?

15 COMMISSIONER CRESPO: Here.

16 MS. FOWLER: Walter Dellinger?

17 (No audible response.)

18 MS. FOWLER: Commissioner Dellinger?

19 (No audible response.)

20 MS. FOWLER: Okay, we'll mark
21 Commissioner Dellinger as absent. Hopefully he's
22 joining us later this morning. Justin Driver?

1 COMMISSIONER DRIVER: Here.

2 MS. FOWLER: Richard Fallon?

3 COMMISSIONER FALLON: Here.

4 MS. FOWLER: Caroline Fredrickson?

5 COMMISSIONER FREDRICKSON: Here.

6 MS. FOWLER: Heather Gerken?

7 COMMISSIONER GERKEN: Here.

8 MS. FOWLER: Nancy Gertner?

9 COMMISSIONER GERTNER: Here.

10 MS. FOWLER: Jack Goldsmith?

11 (No audible response.)

12 MS. FOWLER: Commissioner Goldsmith
13 will not be joining us at the moment. We will
14 mark him as absent. Thomas Griffith?

15 COMMISSIONER GRIFFITH: Here.

16 MS. FOWLER: Tara Leigh Grove?

17 COMMISSIONER GROVE: Here.

18 MS. FOWLER: Bert Huang?

19 COMMISSIONER HUANG: Here.

20 MS. FOWLER: Sherrilyn Ifill?

21 (No audible response.)

22 MS. FOWLER: Commissioner Ifill?

1 (No audible response.)

2 MS. FOWLER: Okay. We'll mark
3 Sherrilyn absent for the moment. Thank you very
4 much. Olatunde Johnson?

5 COMMISSIONER JOHNSON: Here.

6 MS. FOWLER: Michael Kang?

7 (No audible response.)

8 MS. FOWLER: Commissioner Kang?

9 (No audible response.)

10 MS. FOWLER: Okay. I will note
11 Commissioner Kang is absent at the moment.
12 Alison LaCroix?

13 COMMISSIONER LaCROIX: Here.

14 MS. FOWLER: Margaret Lemos?

15 COMMISSIONER LEMOS: Here.

16 MS. FOWLER: David Levi?

17 (No audible response.)

18 MS. FOWLER: Commissioner Levi's
19 joining us I think a little bit later this
20 morning. Trevor Morrison?

21 COMMISSIONER MORRISON: Here.

22 MS. FOWLER: Caleb Nelson?

1 COMMISSIONER NELSON: Here.

2 MS. FOWLER: Richard Pildes?

3 COMMISSIONER PILDES: Here.

4 MS. FOWLER: Michael Ramsey?

5 COMMISSIONER RAMSEY: Here.

6 MS. FOWLER: Cristina Rodriguez?

7 CHAIR RODRIGUEZ: Here.

8 MS. FOWLER: Kermit Roosevelt?

9 COMMISSIONER ROOSEVELT: Here.

10 MS. FOWLER: Bertrall Ross?

11 (No audible response.)

12 MS. FOWLER: Commissioner Ross will
13 not be joining us at the moment, hopefully later
14 today. Thank you. David Strauss?

15 COMMISSIONER STRAUSS: Here.

16 MS. FOWLER: Laurence Tribe?

17 COMMISSIONER TRIBE: Here.

18 MS. FOWLER: Michael Waldman?

19 COMMISSIONER WALDMAN: Here.

20 MS. FOWLER: Adam White?

21 COMMISSIONER WHITE: Here.

22 MS. FOWLER: Keith Whittington?

1 COMMISSIONER WHITTINGTON: Here.

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

4 COMMISSIONER DELLINGER: Walter
5 Dellinger is here.

6 MS. FOWLER: Oh. Good morning,
7 Walter. Thank you.

8 COMMISSIONER DELLINGER: I was here,
9 my audio wasn't working. Thank you.

10 MS. FOWLER: Thank you, commissioners.
11 You may now turn off your cameras.

12 I now have the pleasure of introducing
13 Commissioner Rodriguez, co-chair, for opening
14 remarks.

15 CHAIR RODRIGUEZ: Thank you so much,
16 Ms. Fowler. Good morning everybody.

17 Welcome to our second of two days of
18 public hearings for the Presidential Commission
19 on the Supreme Court of the United States.

20 My co-chair, Bob Bauer, and I are
21 delighted to be gathered with the members of the
22 commission again to hear from a broad range of

1 distinguished witnesses who will speak to the
2 matters under our consideration.

3 As many of you know, the commission
4 was formed via executive order on April 9, 2021
5 by President Biden, and the order tasks the
6 commission with providing him an account of the
7 contemporary public debate over the rule of the
8 Supreme Court in our Constitutional system.

9 We're charged with providing an
10 analysis of the principal arguments for and
11 against reform and in our considerations, we were
12 thinking through the legality, the efficacy, and
13 the potential consequences for our system of
14 government of various reform` proposals that are
15 part of the contemporary discussion, many of
16 which we'll hear people discuss throughout the
17 day.

18 We've been asked to draw from a broad
19 range of views and to assess a broad spectrum of
20 ideas, and we're not charged with making specific
21 recommendations, but rather with providing a
22 rigorous appraisal of the arguments and proposals

1 that animate the debate today.

2 Before we begin our very long day of
3 testimony, I would again like to acknowledge the
4 many comments from the public that we have
5 received, including scores that have come in
6 since our last public meeting on June 30.

7 Since we were formed in April, we've
8 received hundreds of unique comments from members
9 of Congress and public officials, from advocacy
10 organizations, from subject matter experts, and
11 from members of the general public.

12 The comments support a variety of
13 reform proposals, as well as retaining the status
14 quo.

15 Those that advocate for reform
16 emphasize the importance of counteracting what
17 they identify as the politicization of the Court,
18 and the reforms emphasize by commentators who
19 believe the Supreme Court is in need of some form
20 of reform, include legislation that would expand
21 the size of the Supreme Court and elimination of
22 life tenure for Supreme Court justices, including

1 by setting term limits between ten and 22 years.

2 Many of the comments, however, support
3 the status quo, or don't believe that Court
4 reform is necessary, and caution against
5 reforming the Court.

6 Many of these comments advocate
7 legislation that would propose to amend the
8 Constitution to fix the number of justices at
9 nine.

10 We welcome further comments from the
11 public throughout the life of the commission. We
12 will continue to accept comments until November
13 10.

14 However, comments are most valuable to
15 the commission if they're submitted before the
16 deliberative meetings that are scheduled for
17 October and November, and preferably no later
18 than November 1.

19 Public comments may be submitted to
20 the commission via [regulations.gov](https://www.regulations.gov), and all of
21 the comments received to date are also available
22 for the public to view on [regulations.gov](https://www.regulations.gov).

1 To find these comments, you may go to
2 the commission's website, where the link is
3 posted, or you can log on to regulations.gov and
4 search for PCSCOTUS.

5 In addition to the public comments, a
6 number of other scholars and experts will be
7 submitting written testimony in the coming months
8 to the commission, and that will be posted on our
9 website when it is received.

10 So, with that, I am delighted to turn
11 to the business of the day.

12 We are incredibly grateful to have the
13 participation of so many witnesses on six
14 different panels today, and we also appreciate
15 the written testimony that they have submitted,
16 which is available for public review on the
17 commission's website.

18 So we have a great deal of ground to
19 cover today, and my co-chair and I will do our
20 very best to manage the time allocated for
21 opening comments by the witnesses, and then for
22 the question time that's allocated to individual

1 commissioners, so that we can be sure to stay as
2 close to schedule as possible, while also
3 covering the many of the topics of the day
4 officially and thoroughly.

5 So our first panel of the day will
6 address perspectives from Supreme Court
7 practitioners and views on the confirmation
8 process, and I would now ask the witnesses on
9 this panel to please turn on their cameras.

10 Each of our witnesses on this panel
11 have three to five minutes to provide opening
12 statements, after which we will turn to a panel
13 of three commissioners for questioning.

14 I will call on the witnesses in
15 alphabetical order, and their complete
16 biographies are on the commission website, as is
17 their written testimony.

18 So, our first witness is actually a
19 pair of witnesses, Kenneth Geller, a partner at
20 Mayer Brown LLP, and Maureen Mahoney, a partner
21 at Latham and Watkins, both of whom also served
22 in the Solicitor General's Office.

1 They will be presenting the views of
2 a group of attorneys who practice regularly
3 before the Supreme Court, and I will call on each
4 of them in turn to provide opening remarks.

5 Mr. Geller, I'd like to begin with
6 you, and you now have the floor. Thank you for
7 being here.

8 MR. GELLER: Thank you, Chair
9 Rodriguez, and good morning, commissioners.

10 My name is Kenneth Geller, and along
11 with Maureen Mahoney, I'm the co-chair of a
12 committee of experienced Supreme Court
13 practitioners.

14 Our committee was formed at the
15 suggestion of the co-chairs of this commission to
16 advise the commission on the wisdom and
17 practicality of a number of suggested proposals
18 for Supreme Court reform from the perspective of
19 lawyers with extensive experience of appearing
20 before the Court.

21 In addition to Maureen and myself, the
22 committee consists of the following members.

1 Beth Brinkmann, David Burman, Kelsi
2 Brown Corkran, Michael Dreeben, Miguel A.
3 Estrada, Jeffrey Fisher, Gregory G. Garre, Deepak
4 Gupta, Caitlin Halligan, Peter Keisler, Joshua
5 Matz, Michael McConnell, Virginia Seitz, and
6 Donald Verrilli.

7 This distinguished and diverse group
8 is made up of Supreme Court and appellate lawyers
9 from across the political spectrum.

10 It includes two former solicitors
11 general who served under the presidents of both
12 parties, a former principal deputy solicitor
13 general, three former deputy solicitors general,
14 and six former assistants to the solicitor
15 general, as well as the former state solicitor
16 general.

17 We have both prosecuted and defended
18 criminal cases, and one of us is a former federal
19 appellate judge.

20 We've collectively argued more than
21 400 cases before the Supreme Court, dating from
22 the 1970s to the most recent term, and we filed

1 thousands of merits briefs and certiorari
2 petitions.

3 More than a dozen of us have served as
4 law clerks at the Court, and one of us has served
5 as co-author of the principal of the last five
6 editions of the standard treatise covering
7 practice before the Court.

8 Now, unlike others who have been
9 testifying or will be testifying before the
10 commission, we have not asked to appear here to
11 advocate for or against any changes to the
12 structure or internal operations of the Court.

13 Instead, as I noted a moment ago, we
14 are here as a resource for the commission and at
15 its invitation to give you our collective views
16 on a set of reform proposals that the commission
17 itself has identified and asked us to consider.

18 To complete that task, members of our
19 committee met on six occasions over the past two
20 months and spent at least ten hours debating the
21 issues presented.

22 It was a lively exchange of views and

1 all things considered, a surprising amount of
2 agreement on core principles.

3 Indeed on most of the proposals, the
4 committee's views were supported unanimously or
5 by a large majority.

6 Several of the proposals gave rise to
7 disagreements among members, but those
8 differences were generally differences of degree
9 or emphasis.

10 In sum, no member of the committee
11 subscribes to every aspect of our report, but all
12 members agree that the report accurately captures
13 the consensus views of the committee.

14 Now, as I remarked a moment ago, our
15 committee is composed of practitioners from
16 across the political spectrum who have all had
17 the privilege to observe the Court's operations
18 up close over a long period of time.

19 I think it's fair to say that this
20 common experience is what led our committee to
21 unanimously oppose all but two of the numerous
22 proposals that we were invited to address.

1 The committee concluded that many of
2 these proposals would cause serious harm to the
3 Court and to our ability as practitioners to seek
4 redress for Constitutional violations.

5 We also concluded that most of these
6 proposals had not been shown to be necessary, and
7 that the Court is in the best position to
8 determine how and when to change its internal
9 processes.

10 And we concluded as well that most of
11 these proposals would be subject to serious
12 Constitutional challenge, and that Congress
13 should continue its historic practice of
14 respecting the Court's authority to control its
15 own proceedings.

16 The committee did however make some
17 recommendations for change that the Court itself
18 may wish to consider, and also concluded that two
19 of the proposals forwarded to us for
20 Congressional action warrant serious
21 consideration.

22 My co-chair, Maureen Mahoney, will now

1 give you a more detailed overview of our
2 committee's conclusions, after which we would be
3 happy to respond to any questions. Thank you.

4 CHAIR RODRIGUEZ: Thank you very much,
5 Mr. Geller. Ms. Mahoney, the floor is yours now.

6 MS. MAHONEY: Thank you for the
7 opportunity to speak with you today. The
8 proposals our committee examine generally fall in
9 to three categories.

10 Changes in the Court's composition,
11 jurisdiction, or internal procedures.

12 Turning first to the Court's
13 composition, our committee unanimously opposes
14 proposals to enlarge the Court.

15 While there are legitimate concerns
16 surrounding the political polarization of the
17 nomination and confirmation process, increasing
18 the number of justices represents an escalation
19 of the problem, not a solution, and a larger
20 bench could make arguments less productive,
21 deliberations more difficult, and yield even more
22 opinions with less clarity in the law.

1 The committee also unanimously opposes
2 proposals to impose term limits by statute. Such
3 a statute would face serious Constitutional
4 challenges and create unacceptable instability
5 because it could be changed by a subsequent
6 Congress.

7 A majority of the committee
8 nonetheless believes that a Constitutional
9 amendment imposing 18 year terms, with each
10 president getting to fill two seats per four year
11 term, warrants serious consideration.

12 The majority of the committee
13 recognized that a variety of difficult issues
14 would have to be resolved to effectuate such a
15 change and did not embrace any particular
16 proposal.

17 Turning to the jurisdictional
18 proposals, the committee unanimously opposes
19 statutes that would strip the Court of
20 jurisdiction to strike down unconstitutional
21 legislation, authorize Congress to supersede the
22 Court's holdings, or require a supermajority to

1 strike down legislation.

2 Such statutes would spark serious
3 constitutional challenges and would fundamentally
4 subvert the Court's power of judicial review,
5 which is essential to all of us.

6 Our committee also unanimously opposes
7 proposals to regulate the Supreme Court's
8 certiorari jurisdiction.

9 Over time and through experience,
10 Congress has given the Court near-plenary control
11 over its docket, which has allowed it to focus
12 its resources on identifying and resolving the
13 legal questions that are most important to our
14 nation.

15 Congress got it right, it shouldn't
16 change it.

17 The committee also unanimously opposes
18 proposals to give the Supreme Court mandatory
19 appellate jurisdiction over death penalty appeals
20 because they would overwhelm the Court's docket
21 and force it to decide fact-intensive issues best
22 resolved in the lower courts.

1 A majority of the committee, however,
2 concludes that Congress should give serious
3 consideration to heightening the standard of
4 review for evaluating stays of execution entered
5 in the federal courts based on the profound
6 consequence of any error.

7 With respect to the final group of
8 proposals, the committee unanimously opposes the
9 adoption of legislative rules governing the
10 Court's internal procedures, but recommends that
11 the Court itself might wish to consider some
12 changes in practice, starting with the Court's
13 emergency docket.

14 The committee unanimously opposes
15 Congressional rules mandating oral arguments or
16 written opinions.

17 Congress has allowed the Court to make
18 its own rules since 1789. Any intervention now
19 is Constitutionally suspect.

20 Due to the exigent nature of the
21 emergency docket, the Court needs to design its
22 own procedures to be fast and to be flexible, but

1 the committee encourages the Court to consider
2 holding telephonic arguments on some occasions,
3 and issuing more opinions when feasible,
4 especially when entering injunctions.

5 The committee also unanimously opposes
6 any legislative changes to the Court's recusal
7 and ethics policies.

8 This also implicates significant
9 Constitutional concerns, and we see no evidence
10 of a problem with the Court's current practices.

11 The committee also unanimously opposes
12 Congressional mandates to televise oral
13 arguments.

14 Legislative efforts to strip the Court
15 of its historic authority to control procedures
16 in its own chambers would precipitate an
17 unnecessary Constitutional confrontation.

18 The Court's in the best position to
19 determine whether cameras would impair its own
20 deliberative processes.

21 A substantial majority of the
22 committee is also unwilling to recommend to the

1 Court that it change its policy of prohibiting
2 televised arguments.

3 We nevertheless believe that live
4 audio broadcasts of oral argument, a COVID-19
5 innovation, have been beneficial to the public,
6 and we favor their continuation and possible
7 expansion to opinion announcements.

8 Finally, the committee unanimously
9 opposes proposals for public standards to govern
10 amicus appointments, and for the creation of an
11 Office of the Defender General.

12 The committee does, however, believe
13 the Court should continue to expand the pool from
14 which it draws appointed amici, and believes that
15 disparities in resources between defenders and
16 prosecutors in criminal cases would be more
17 effectively addressed by increasing federal
18 funding for the development of Supreme Court
19 expertise in public defenders' offices.

20 In conclusion, like all institutions,
21 the Court is not perfect, but its greatest
22 strength by far is its independence.

1 Subversion of that independence would
2 irreparably damage the Court, and with it, our
3 Constitutional order.

4 We evaluated the proposals with an eye
5 toward that independence, while also recognizing
6 certain respects in which such reforms warrant
7 serious consideration.

8 We welcome your questions. Thank you.

9 CHAIR RODRIGUEZ: Thank you, Ms.
10 Mahoney, and thank you very much to the group as
11 a whole for your serious thought and deliberation
12 on these many matters.

13 Our next witness is Wade Henderson,
14 who's the interim president of the Leadership
15 Conference on Civil and Human Rights, and the
16 Leadership Conference Education Fund, which he
17 also chaired for two decades.

18 Mr. Henderson, the floor is yours.

19 MR. HENDERSON: Thank you. Good
20 morning, Commissioner Rodriguez, and members of
21 the commission.

22 Thank you for the opportunity to

1 testify today.

2 The late Congressman John Lewis called
3 on each of us to remember that every generation
4 must do its part to help build the beloved
5 community.

6 As you consider a path forward for our
7 nation's highest Court, I urge you to help
8 realize the promise of our democracy.

9 The Supreme Court has sweeping power
10 over every aspect of our lives.

11 Throughout our nation's history, the
12 Court has recognized our civil and human rights
13 in decisions like Brown v. the Board of
14 Education, which ended legal apartheid in our
15 schools.

16 But the Court has also done tremendous
17 harm.

18 In both Plessy v. Ferguson and
19 Korematsu v. the United States, the Court chose
20 to subjugate Black and Asian Americans under the
21 guise of promoting the rule of law.

22 More recently, in Shelby County v.

1 Holder and Brnovich v. the DNC, a majority of
2 justices eviscerated key provisions of the Voting
3 Rights Act, the landmark civil rights law that
4 prohibits racial discrimination in voting.

5 The Court's decisions have devastating
6 consequences for people of color, and other
7 communities who, for too long, have been excluded
8 from decision-making and the ranks of power.

9 Now, to understand the Senate's advice
10 and consent role, it is important to ground the
11 discussion in both why and how the judicial
12 confirmation process has changed.

13 In recent years, Senate Republicans
14 have rigged the process as part of a broader
15 strategy to redraw the composition of the Federal
16 Judiciary and short-circuit other Democratic
17 methods of change.

18 Their efforts are largely in response
19 to the progress made by the Civil Rights
20 Movement, and to maintain a system of power that
21 benefits a privileged few.

22 We saw the mark shift in the Senate's

1 advice and consent role during President Obama's
2 second term.

3 Then, Senate Majority Leader Mitch
4 McConnell and Senate Republicans doubled down on
5 obstruction, which reached a disgraceful peak in
6 2016 when Senator McConnell refused to consider
7 President Obama's Supreme Court nominee,
8 then-Judge Merrick Garland.

9 He took the unprecedented position
10 that no president should have their nominee
11 considered during a presidential election year.

12 This raw power grab escalated across
13 the next four years.

14 In 2017, President Trump selected
15 Justice Neil Gorsuch from a curated and
16 ultraconservative shortlist to fill that seat.

17 Senator McConnell confirmed him by
18 changing the rules to alter the filibuster.

19 In 2018, the Senate majority once
20 again discarded norms to confirm Justice Brett
21 Kavanaugh.

22 The Senate Judiciary Committee

1 obscured documents and thwarted a full FBI
2 investigation into allegations of sexual assault.

3 And last year, after the passing of
4 Ruth Bader Ginsburg, Senate Republicans proceeded
5 with speed unmatched in recent history to confirm
6 Justice Amy Coney Barrett, while millions were
7 already voting in a presidential election.

8 Now, the evidence is clear.
9 Republicans dramatically hollowed out the process
10 to stack the Court.

11 The new Court's decisions will shape
12 the direction of the law, and whether people's
13 rights will be recognized for generations.

14 The discussion about the future of the
15 Supreme Court and all of our federal courts is
16 not an academic one. It is about humanity and
17 dignity.

18 We are now at an inflection point. As
19 the commission continues its critically important
20 work, all options for how the Court functions
21 must be considered.

22 We urge you to engage and center

1 historically marginalized people who are most
2 impacted by the Supreme Court and to focus on
3 strengthening our democracy.

4 Our nation needs judges and justices
5 who will deliver equal justice and protect the
6 rights of everyone, no matter their race or
7 background.

8 That is why the Leadership Conference
9 and our Fair Courts Task Force are working to
10 advance two priorities.

11 First, it is vital that the Federal
12 Judiciary to be made up of fair minded judges and
13 justices who are committed to the civil and human
14 rights of all people, and who possess diverse
15 backgrounds and experiences that will inform
16 their role on the bench.

17 Furthermore, we urge Congress to pass
18 legislation to modernize our Federal Judiciary by
19 shoring up ethics and transparency.

20 We must also undertake structural
21 change of the judiciary and the Supreme Court,
22 including the expansion of our lower courts.

1 The commission is presented with a big
2 task, one that will help set the course for what
3 comes next.

4 For the Court to work for all of us,
5 we must act and we must act in the interest of
6 everyone, not just the powerful few.

7 Our communities and our democracy
8 depend on it. Thank you.

9 CHAIR RODRIGUEZ: Thank you very much,
10 Mr. Henderson.

11 Next we'll hear from Jeff Peck, the
12 former chairman of the Tiber Creek Group, and
13 former general counsel to the Senate Judiciary
14 Committee. Mr. Peck?

15 MR. PECK: Good morning. Thank you
16 for the opportunity to testify.

17 For today's purposes, I will summarize
18 the research and recommendations set forth in my
19 written statement.

20 I conducted 25 interviews, 13
21 Republicans and 12 Democrats.

22 I sought out individuals spanning a

1 broad range of nominations to secure bipartisan
2 perspectives from multiple political eras.

3 Interviewees worked on the 17
4 nominations between O'Connor in 1981, and Barrett
5 in 2020.

6 I also took into account my own
7 experience on the Bork, Kennedy, Souter, and
8 Thomas nominations.

9 Senate rules and the rules adopted by
10 the judiciary committee provide a general
11 framework, but they are only the beginning, not
12 the end.

13 With guides to Senate as an
14 institution are norms of behavior, the foremost
15 two of which are, in the words of Steven Levitsky
16 and Daniel Ziblatt, mutual toleration and mutual
17 forbearance.

18 For that reason, and based on my own
19 experience in the Senate, I began with the
20 general reluctance to propose more formality and
21 the belief that the Senate can basically work
22 this out.

1 The Senate, however, is in
2 institutional crisis.

3 Norms are broken with regularity.
4 Mutual tolerance and forbearance are often the
5 exception, not the imperatives they once were.

6 Accordingly, I recommend flexible but
7 essential rules to standardize certain processes
8 while maintaining sufficient flexibility for
9 exigent circumstances.

10 The objective is to reduce the level
11 of partisanship and political tribalism by
12 introducing greater regularity, clarity, and
13 accountability.

14 First, I propose new rules for the
15 Senate Judiciary Committee.

16 Hearings should start no sooner than
17 30 days, and no later than 50 days after the
18 Senate receives the president's nomination.

19 A nomination made during a Senate
20 recess that is longer than three days should
21 extend the minimum and maximum periods by the
22 length of the recess.

1 The nominees' complete written record
2 should be delivered no later than ten days before
3 the hearings begin.

4 Delays in production should extend the
5 minimum and maximum periods by the length of the
6 delay.

7 The committee should vote no sooner
8 than ten days and no later than 21 days after the
9 hearings conclude.

10 Senate consideration should begin no
11 sooner than ten days and no later than 21 days
12 after the committee files its report.

13 These timeframes could be shortened or
14 lengthened for cause by joint agreement of the
15 chair and ranking member, and the timeframes I'm
16 proposing should apply under all circumstances,
17 including nominations in a presidential election
18 year, up to August 1 of that year. More on that
19 in a minute.

20 These new rules and my judgment could
21 be altered only by unanimous consent in order to
22 eliminate the ability of the majority party to

1 jettison the new policies for political
2 expediency by simple majority vote.

3 I've also proposed that these new
4 timeframes not go into effect until 2025, so if
5 adopted now, neither Republicans or Democrats
6 know whether the particular rules might favor
7 them in the future or disfavor them.

8 If thoughtful people take issue with
9 the number of days I've proposed here, no doubt
10 they will, and I'm sure good modifications will
11 emerge. This is art, not science.

12 My focus is on the principle. Should
13 there be timeframes set by rules? If we can
14 agree on that, then we can debate and decide the
15 precise numbers.

16 Second, regarding the proper scope of
17 questioning of Supreme Court nominees, I don't
18 think a rule is feasible here.

19 Rather, the appropriate norm, a
20 standard of responsiveness, if you will, ought to
21 be philosophical particularity.

22 Time this morning does not permit me

1 to get into this topic into detail, but it's
2 discussed extensively in my written statement.

3 Third, a new memorandum of
4 understanding should clarify the FBI's role by,
5 number one, memorializing the bureau's
6 independence, second, by creating communication
7 protocols governing the FBI's dialogue with the
8 White House and the judiciary committee, and
9 third, by spelling out more specifically the
10 parameters for the FBI's investigation, including
11 requiring a more fulsome investigation and
12 process at the outset, so that matters that have
13 historically come to light later in the process
14 are more likely to be uncovered on the front-end.

15 Fourth, when it comes to the full
16 Senate, I have the following proposals.

17 First, the current simple majority
18 vote requirement should be maintained.

19 Senate rule should explicitly require
20 all nominees receive a judiciary committee
21 hearing, a committee vote, and an up or down vote
22 on the merits in the Senate.

1 Let me repeat that.

2 Senate rules should explicitly require
3 all nominees receive a Senate Judiciary Committee
4 hearing, a committee vote, and an up or down vote
5 on the merits in the Senate.

6 The Senate Majority Leader, whoever he
7 or she may be, should not be able to decide which
8 nominations get considered and which get to be
9 declared null and void.

10 The Senate should consider all
11 nominations in a presidential election year,
12 except for those made after August 1.

13 Given my proposed judiciary committee
14 timeframes, nominations after August 1 are not
15 likely to be considered thoroughly and fairly
16 before the American people select the next
17 president, and an August 1 cutoff date also takes
18 into account the early voting that many states
19 now allow.

20 Thank you, and I look forward to
21 answering your questions.

22 CHAIR RODRIGUEZ: Thank you, Mr. Peck.

1 We appreciate it.

2 Our next witness is Ilya Shapiro, who
3 is the vice president of the Cato Institute and
4 director of the Robert A. Levy Center for
5 Constitutional Studies.

6 Mr. Shapiro, the floor is yours.

7 MR. SHAPIRO: Thank you, Co-Chair
8 Rodriguez and Co-Chair Bauer, who I know is in
9 the background.

10 Thanks for this opportunity to testify
11 about the role the confirmation process plays in
12 Supreme Court debates.

13 My testimony is based on my recent
14 book, *Supreme Disorder: Judicial Nominations and*
15 *the Politics of America's Highest Court*, a copy
16 of which I'd be happy to provide to any
17 commissioner who would like one.

18 Now, I have seven lessons from our
19 long history of confirmation battles.

20 First, politics has always been part
21 of the process.

22 From the early republic, presidents

1 have sought people in line with their own
2 political thinking.

3 There's never been a golden age when
4 merit as an objective measure was the sole
5 consideration, and Senate control is most of the
6 ball game.

7 Historically, fewer than 60 percent of
8 nominees are confirmed under divided government,
9 and about 90 percent under united, and that
10 disparity is even more stark in presidential
11 election years.

12 Twenty percent under divided, 90
13 percent under united, and the Garland blockade
14 therefore was hardball politics, but by no means
15 unprecedented.

16 Second, confirmation fights are now
17 driven by judicial philosophy.

18 This is a relatively new phenomenon
19 because fights transcend any particular nominee,
20 and it's no longer accepted that a president gets
21 to have his choice as long as he meets certain
22 neutral criteria.

1 With the parties adopting incompatible
2 judicial philosophies, it's impossible for a
3 president to find an uncontroversial nominee.

4 Third, modern confirmations are
5 different because the political culture is
6 different.

7 The inflection point for our legal
8 culture, as for our social and political culture,
9 was 1968, which ended a 70 year near perfect run
10 of nominations.

11 Until that point, most justices were
12 confirmed by voice vote.

13 Since then, there hasn't been a single
14 voice vote, and the inability to obtain the
15 qualifications has led to manufactured outrage
16 and scandal mongering.

17 Fourth, hearings have become Kabuki
18 theatre.

19 Public hearings have only been around
20 for a century, and they weren't regular practice
21 until the 1950s when Dixiecrats used them to rail
22 against *Brown v. Board*.

1 These days, senators try to get
2 nominees to admit that controversial cases are
3 settled law, whether Roe from a Democrat or
4 Heller from a Republican, and that's before we
5 get to gotcha questions or last minute
6 accusations of sexual impropriety.

7 Fifth, every nomination can have a big
8 impact. The confirmation process has little to
9 do with being a judge.

10 As Don McGahn put it, it's a Hollywood
11 audition to join a monastery. Regardless, as
12 Justice White was fond of saying, every justice
13 creates a new Court.

14 That's why every vacancy is important,
15 even if it wouldn't necessarily flip a five to
16 four or six to three result.

17 Sixth, the hardest confirmations come
18 when there's a potential for a big shift.

19 Think of it this way. Regardless of
20 which party controlled the Senate, would there
21 have been as big a political firestorm last fall
22 if President Trump were replacing Justice Thomas

1 rather than Justice Ginsburg?

2 Seventh, the Court rules on so many
3 controversies that political battles are
4 unavoidable.

5 Under the Framers' Constitution, the
6 Court hardly ever had to block a federal law, but
7 as the Court let the government grow, so has its
8 own power to police the programs its own
9 jurisprudence enable.

10 In that light, modern confirmation
11 battles are all a logical response to political
12 incentives.

13 The ever expanding size and scope of
14 federal government has increased the number and
15 complexity of issues brought under Washington's
16 control, while the collection of those new
17 federal powers into the administrative state has
18 transferred ultimate decision-making authority to
19 the Courts.

20 The imbalance between the Executive
21 Branch and Congress has made the Supreme Court
22 the decider both of controversial social issues

1 and complex policy disputes.

2 And this at a time when we have a
3 culmination of several trends where divergent
4 interpretive theories map onto partisan
5 preference at a time when the parties are more
6 ideologically sorted and polarized than at least
7 the Civil War.

8 So, should we reform the confirmation
9 process?

10 I've come to the conclusion that we
11 should get rid of hearings altogether, that
12 they've served their purpose but now inflict
13 greater cost than any informational benefit.

14 With instantly searchable records that
15 nominees now have, is there any need to subject
16 them and the country to an inquisition? Or maybe
17 senators could hold the hearings in closed
18 session.

19 There's a reason why the intelligence
20 committee hearings that are closed are much more
21 effective, and senators can actually discuss and
22 negotiate than the public-facing Kabuki theatre,

1 as I've called it.

2 In the end, all the reform discussion,
3 I'm happy to talk about term limits or Court
4 packing or anything else, but all the reform
5 discussion boils down to rearranging the deck
6 chairs on the Titanic.

7 And this Titanic is not the
8 appointment process, but the ship of state. The
9 fundamental problem is the politicization not of
10 the process, but of the product.

11 The judicial debates we've seen in the
12 last few decades were never really about the
13 nominees themselves, they're about the Court's
14 direction.

15 The reason we have these heated
16 battles is that the federal government is making
17 too many decisions for such a large, diverse,
18 pluralistic country.

19 Let Congress decide truly national
20 issues like defense or actually inter-state,
21 actual commerce, but let states and localities
22 make most of the decisions that affect our daily

1 lives.

2 Let Texas be Texas and let California
3 be California.

4 That's the only way we're going to
5 diffuse tensions in Washington, whether in the
6 halls of Congress or in the marble palace of the
7 highest Court in the land.

8 Thanks very much, and I look forward
9 to your questions.

10 CHAIR RODRIGUEZ: Thank you very much,
11 Mr. Shapiro.

12 And our final witness before we
13 proceed to questioning is Benjamin Wittes, who's
14 a senior fellow in governance studies at the
15 Brookings Institution. Mr. Wittes?

16 MR. WITTES: Co-Chairs Rodriguez and
17 Bauer and members of the commission, thank you
18 for your invitation to testify today.

19 I am a senior fellow in governance
20 studies at the Brookings Institution and the
21 editor of Lawfare, a web resource devoted to
22 national security legal matters.

1 By background, I am not a lawyer, or
2 much less, a law professor or an appellate
3 practitioner, I'm a legal journalist.

4 In that capacity, however, I did write
5 about judicial confirmations for a number of
6 years on behalf of The Washington Post's
7 editorial page during both the Bill Clinton
8 administration and the George W. Bush
9 administration, and I thus had a unique kind of
10 360 view of the confirmation process.

11 I spoke regularly with White House
12 officials responsible for nominations with the
13 Senate staffers who were handling them, with the
14 activist groups who were supporting and opposing
15 them, and critically, and I think very unusually,
16 I also spoke regularly with the nominees
17 themselves -- a dirty little secret -- nominees
18 do not in fact maintain quite the silence that
19 they are often believed to -- I saw very directly
20 the modalities, and frankly the brutalities of
21 the confirmation process, and how it created
22 cycles of retribution among political actors.

1 I ultimately wrote my reflections on
2 the process in the 2006 book, Confirmation Wars:
3 Preserving Independent Courts in Angry Times.

4 Having spent many years advocating
5 reforms and changes to the confirmation process,
6 after writing that book I ceased actually to
7 believe that constructive change is likely on the
8 subject, and have as a result largely stopped
9 writing and working in this space.

10 You've asked me to address the subject
11 of the United States Senate's processes for
12 advising and consenting on the president's
13 nominations to the Supreme Court and the role
14 that the confirmation process plays in debates
15 over whether and how to reform the Supreme Court.

16 This framing of the question
17 necessarily focuses on the Supreme Court itself,
18 which I understand to be the mandate of the
19 commission, but it is essential to take a
20 slightly broader view of the question.

21 The confirmation process for Supreme
22 Court justice is not in fact a different process

1 from the one for lower court judges, it is rather
2 a particularly high stakes and high profile
3 iteration of a game played dozens of times a year
4 by the same repeat players.

5 The White House, the Senate majority,
6 the Senate Minority, and a single novitiate who
7 often has no idea what he or she is in for.

8 I want to make five broad points.
9 First, the decay of the confirmation process is
10 intimately connected with calls for Court reform,
11 enlargement and related schemes.

12 The decay of the process is in fact
13 the but-for cause of the current agitation.

14 Second, the decay of the confirmation
15 process has been a bipartisan affair in which
16 neither Democrats nor Republicans have refrained
17 from escalations, and which both sides perceive
18 themselves as playing defense, and routinely take
19 offensive measures believing they are engaged in
20 preemptive self defense.

21 At the risk of being accused of
22 both-sidesism, I highlight some of the abuses and

1 escalations of both sides in my written
2 statement.

3 Third, in the escalatory cycle that
4 has developed, Court enlargement or related
5 changes are the logical next step. I think they
6 are all but inevitable, frankly.

7 They're likely to happen exactly as
8 soon as one political party or the other controls
9 the levers of power sufficiently to make them
10 happen because both sides believe, probably
11 correctly, that the other side would take these
12 steps.

13 If given the chance, both are likely
14 to take them themselves as a preemptive measure
15 as soon as the chance presents itself.

16 Fourth, the best way to head off a tit
17 for tat cycle of Court enlargements and related
18 manipulations is to do reform in a negotiated,
19 deliberative fashion, with an eye toward de-
20 escalating matters and lowering the stakes.

21 The alternative to waiting until one
22 side or the other has the power to act

1 unilaterally is to design the system of
2 nominations and confirmations in a fashion that
3 is both durable and reduces the incentives to
4 gamesmanship.

5 Finally, to this end, I propose a
6 simple test of whether a given Court altering
7 proposal represents a constructive de-escalatory
8 intervention, or merely invites a retributive
9 response when power alignments shift.

10 When confronted with any reform
11 proposal, I urge the commission to ask the
12 following question.

13 What response will this proposal, if
14 enacted, engender when the House and Senate and
15 presidency are in different hands?

16 Thank you. I am happy to take your
17 questions.

18 CHAIR RODRIGUEZ: Thank you very much,
19 Mr. Wittes, and thank you again to all of the
20 witnesses. There's a great detail to discuss.

21 So, with that in mind, I'll ask the
22 commissioners who will be asking questions to

1 turn on their cameras.

2 We will begin with Commissioner
3 Caroline Fredrickson, distinguished visiting
4 professor from practice at Georgetown Law Center
5 and a senior fellow at the Brennan Center for
6 Justice at the NYU School of Law.

7 Commissioner Fredrickson?

8 COMMISSIONER FREDRICKSON: All right,
9 well thank you very much, Commissioner Rodriguez,
10 and thank you to all of the witnesses for
11 extremely helpful statements that you gave today,
12 as well as the testimony that you've provided to
13 the commission in advance. It's enormously,
14 enormously helpful.

15 I have the very, very difficult role
16 of engaging with three of you in now what is less
17 than ten minutes.

18 So, I want to get right to my
19 questions.

20 I'd like to start with Mr. Geller and
21 Ms. Mahoney, and I know you were dividing up in
22 some way the very expansive set of issues that

1 you took on, and first, thank you for that.

2 I think that your report was
3 enormously helpful on so many different issues,
4 and such an illustrious group of people who
5 contributed.

6 And I was very interested in your
7 discussions of jurisdiction-stripping in
8 particular -- and I ask whichever of you wants to
9 respond to this -- to talk a little bit further
10 about what you think the limits are in Congress's
11 power, because clearly the Constitution leaves to
12 Congress the ability to shape the Court's
13 jurisdiction in many ways, and yet, you don't
14 seem to acknowledge a great role there.

15 Is it that you think that through the
16 norms and practices that have arisen since the
17 adoption of the Constitution, the Court's own
18 rulings have kind of eliminated the ability for
19 Congress in any further way to shape the Court's
20 jurisdiction, or what do you think the contours
21 are for the Court or for Congress in the future
22 to shape the Supreme Court's jurisdiction?

1 And again, acknowledging that your
2 report was extremely concerned by these proposals
3 and suggested great Constitutional problems would
4 surround any Congressional approach to
5 jurisdiction stripping. Thank you.

6 MR. GELLER: Thank you, Commissioner.
7 As you suggested, Congress has a tremendous
8 amount of power under the Constitution to control
9 the appellate jurisdiction of the Supreme Court.

10 The proposal, as it was submitted to
11 our committee, was to strip the Supreme Court of
12 the power to consider the Constitutionality of
13 particular legislation, and that is what we
14 addressed and what we unanimously thought was a
15 problem, both from a Constitutional standpoint
16 and a prudential standpoint.

17 It would allow Congress to immunize
18 its own enactments from Constitutional scrutiny,
19 and the proposal also, as we understood it,
20 would've been limited to the Supreme Court so
21 that lower federal courts would still have been
22 allowed to consider the Constitutionality of

1 state and federal legislation with the upshot
2 that there would be many, many lower court
3 decisions, presumably going different ways on a
4 Constitutionality of particular legislation that
5 the Supreme Court would not be able to resolve
6 because its jurisdiction to consider
7 Constitutionality had been removed.

8 So, we think there are Constitutional
9 problems in immunizing the Courts from
10 determining the Constitutionality of legislation,
11 and we also see great problems in allowing the
12 lower courts to consider Constitutional issues
13 without those issues being reviewable by the
14 Supreme Court.

15 COMMISSIONER FREDRICKSON: Thank you
16 very much, I appreciate that answer.

17 There are other proposals for
18 jurisdiction stripping that address quite a
19 number of other issues.

20 I take it that your committee did not
21 look at those sort of subject matter specific
22 jurisdiction-stripping proposals?

1 MR. GELLER: Right, that was not
2 within the purview of what we were asked to
3 consider.

4 COMMISSIONER FREDRICKSON: Okay.
5 Thank you very much.

6 I'll turn now to Mr. Henderson, and
7 then hopefully if I have time, I'll come back to
8 Ms. Mahoney.

9 Mr. Henderson, again thank you for
10 your testimony that you provided the commission.
11 Again, enormously helpful.

12 I'd like to talk to hear from you
13 about your suggested reforms to address some of
14 the concerns you raised, in particular around
15 diversity of the judiciary.

16 And you mention that one of the
17 reforms that you think Congress should undertake
18 going forward is to expand the lower courts.

19 Generally our commission is focused on
20 the Supreme Court, but because the lower courts
21 provide the bench for elevation, I think it's a
22 very important question.

1 Are there certain reforms around lower
2 court expansion that you see, in particular,
3 beyond just adding seats, that would address some
4 of your concerns around the diversity of the
5 judiciary?

6 MR. HENDERSON: Well, thank you,
7 Commissioner Fredrickson, for your question.

8 As I had noted in my formal testimony,
9 the Courts rely on public trust for legitimacy,
10 and diversity among judges contributes to that
11 perspective and helps to balance decision-making
12 by the Court.

13 As I'm sure this commission noted, in
14 the last presidency, 234 judges were confirmed to
15 the federal seats, lifetime federal seats.

16 Of that number, 85 percent of them
17 were white, and 65 percent of that number were
18 white male.

19 Certainly from our perspective, it is
20 important that the Court reflect the diversity of
21 the country as a whole.

22 There has been so much change, such

1 dramatic change over the past 50 years that the
2 failure to provide that kind of perspective,
3 including perspectives on the background of
4 individuals who are appointed to the bench, we
5 believe it is necessary to provide all manner of
6 diversity.

7 Not just racial and ethnic diversity,
8 but gender, sexual orientation, and other forms,
9 and we think it's important that a demonstrated
10 commitment to civil and human rights be taken
11 into account on behalf of the individuals who
12 would be affected by decisions of the Court.

13 We think it's especially important
14 that background experiences be reflected.

15 Judges who are public defenders,
16 judges who have served in various public interest
17 capacities who have previously been excluded from
18 the bench should be considered.

19 So, we think without adopting a
20 particular proposal to achieve that result, we
21 think the Senate Judiciary Committee, and the
22 Senate as a whole -- which has the only advice

1 and consent role aside from the president and
2 selecting nominees -- I take those matters into
3 account as they reflect on the judiciary as a
4 whole.

5 COMMISSIONER FREDRICKSON: Thank you
6 very much, Mr. Henderson, and I'll pose one more
7 question in the remaining minute that I have, and
8 perhaps we can come back to it if we have more
9 time. This may be for Ms. Mahoney.

10 One of the areas where you do suggest
11 there could be a reform is around the death
12 penalty document and the stays of execution.

13 You don't necessarily suggest specific
14 standards.

15 Do you recommend adopting the
16 heightened standards of AEDPA adopted to this
17 particular situation, or do you have a different
18 set of standards that you would recommend that
19 the Court adopt?

20 MS. MAHONEY: There was a division in
21 the committee on this issue.

22 The minority didn't think that there

1 was a need to change the standard, but the
2 majority believed that there should be a
3 heightened standard because of the consequences
4 of error, but I think they want serious
5 consideration of a higher standard.

6 They certainly were considering AEDPA
7 as a possible way of looking at it, saying that,
8 you know, that there would have to be a finding
9 that the decision was unreasonable, but they
10 didn't conclude that AEDPA was a perfect fit, and
11 instead just said it should be seriously
12 considered by Congress.

13 I think that's the way it was left.

14 COMMISSIONER FREDRICKSON: Thank you
15 very much, and done very well within the
16 timeframe, so thank you.

17 CHAIR RODRIGUEZ: Well done. Thank
18 you, Commissioner Fredrickson.

19 We'll next turn to Commissioner David
20 Strauss, who is professor at the University of
21 Chicago School of Law. Mr. Strauss?

22 COMMISSIONER STRAUSS: Thank you very

1 much, Co-Chair Rodriguez.

2 Let me add my thanks to all of the
3 witnesses for their really enormously valuable
4 contributions today.

5 I'd like to start with Mr. Shapiro,
6 and here's my question.

7 Your testimony paints a pretty bleak
8 picture, which may be entirely justified, but if
9 I read you correctly, there are hints in what you
10 say, that at least in certain times in our
11 history, norms of compromise and consultation
12 develop that mitigated some of what would
13 otherwise be partisan division and acrimony.

14 So I'd just like to ask whether it
15 would be a good thing to try to develop such
16 norms today?

17 It may be impossible, it may be
18 impossible to get from here to there, but just
19 indulging the assumption that we could, would it
20 be a good thing?

21 And I have two things in particular in
22 mind.

1 One would be a norm that when the
2 president's party controls the Senate, the
3 president should nonetheless try to nominate
4 people who can command a supermajority in
5 bipartisan support rather than going for broke
6 and nominating the people who are the most
7 favorable to his party's positions that he can
8 get through his caucus, and should that be a
9 norm?

10 And then the alternative scenario,
11 when the other party controls the Senate, should
12 it be a norm that the Senate should never take
13 the position that it will simply not confirm a
14 nominee by president of the other party, that a
15 conscientious senator should never say that?

16 That just -- this presence of a
17 different party, I will simply not consider the
18 nomination.

19 Would you think that those would both
20 be good norms to establish?

21 MR. SHAPIRO: Thanks for that
22 question, Professor Strauss, my former professor.

1 Although any errors are my alone, I won't
2 attribute that to him.

3 You know, there never really was an
4 era of good feelings.

5 You know, generally, you know, we
6 think of the, you know, the immediate post-
7 founding period as an era of good feelings when
8 there was only one party.

9 The Federalists kind of faded away,
10 but there are a lot of battles within the
11 Democratic-Republicans, and you see similar
12 things going on in the grand sweep of nominations
13 and confirmation.

14 So, even if some confirmations were
15 easier than others, there was a whole lot of
16 politicking before the actual vote as presidents
17 tried to placate regional interests, intraparty
18 factions, certainly, all sorts of considerations.

19 You know, religion became one. All
20 these different things.

21 The particular seat was geographically
22 allocated, so all of these different

1 considerations, not just judicial philosophy, and
2 not just after the nominee is formally announced.

3 And even then, you still had sometimes
4 close votes, sometimes rejections.

5 You know, Stanley Matthews was
6 confirmed by one vote in the 1880s. George
7 Washington had a nominee rejected.

8 I mean, going back to the beginning,
9 this has been a contentious process, so I don't
10 think we can point to any halcyon age where, you
11 know, there wasn't contentiousness.

12 Politics played differently,
13 absolutely, and the issues at stake certainly
14 were different, but I don't think it's simply a
15 matter of, oh yeah, let's go back to how they did
16 things in the 1820s or the 1940s, or anything
17 like that.

18 Each period had its challenges, and as
19 I said, when there's united government, it's
20 generally easier.

21 The larger a majority in the Senate,
22 the president's party has -- you know, FDR, for

1 example -- the easier things became.

2 As far as norm restoration or
3 creation, I mean, again, you know, the story I'm
4 painting is that the political hardball and the
5 Senate breakdown of norms or what have you, the
6 tit for tat escalations is a symptom of this
7 underlying trends where you have incompatible
8 judicial theories that map onto political
9 parties. It wasn't always the case, certainly.

10 You know, yes, it'd be great to snap
11 our fingers and go back to some period where, you
12 know, everybody was engaged and, you know, had
13 negotiations and things like that, but that was
14 also a period where you had conservative
15 Democrats and liberal Republicans, and regional
16 dynamics were completely different.

17 So, you know --

18 COMMISSIONER STRAUSS: So, if I can
19 interrupt? I get that.

20 MR. SHAPIRO: Sure.

21 COMMISSIONER STRAUSS: I'm actually
22 thinking of the line in your testimony where you

1 say there was a 53 year period when pre-
2 nomination vetting and Senate consultation
3 obviated the most problematic fix, and that was
4 recently, the recent 53 year period.

5 So just assuming -- I grant you it
6 might be very difficult to get there, would it be
7 a good thing if a president came to you and said,
8 you know, should I try to get the person that
9 will most serve my constituency, or should I go
10 for a more consensus pick?

11 If a senator came to you and said,
12 should I just block anyone from the other party,
13 what would you say to that?

14 MR. SHAPIRO: The second is a purely
15 political question. What did your constituents
16 elect you to do?

17 If it was to confirm people of your
18 Constitutional vision and oppose those of a
19 different Constitutional vision, then the answer
20 might be different.

21 If they don't care about that as much,
22 you know, I guess the senator can make up his or

1 her own mind.

2 You know, my view as a
3 constitutionalist is to have, you know, an
4 original meaning, interpretation of the
5 Constitution, restore balance of federalism and
6 separation of powers, these sorts of things, so I
7 would want nominees in that line confirmed and
8 not in that line not confirmed.

9 So, I mean, it's a political dance.
10 There's no deus ex machina to enforce or create
11 these other outside norms, and it's just part of
12 the give and take of the political process.

13 COMMISSIONER STRAUSS: Of course. I
14 get that. Thank you. Then I want to ask a
15 question of Mr. Peck.

16 Mr. Peck, your research that you did
17 for us was very impressive and very helpful in
18 its comprehensiveness and specificity.

19 My first question is oblique to that
20 project, and if I have time I'll ask you once
21 more directly connected to that project, but this
22 is a question that really draws on your

1 familiarity with the confirmation process over
2 the years and having sort of a close view of
3 that.

4 It's occurred to me that one of the
5 problematic things about the way the process and
6 how it works, in particular about the hearings,
7 is the relationship that develops between the
8 nominee and people in the Executive Branch.

9 That the nominee before the hearings
10 is closeted with people in the Executive Branch
11 and the White House, or sometimes the Justice
12 Department, and those people of course are
13 political people, and often partisan people, and
14 they become the nominee's team.

15 They're the people who are going to
16 see the nominee through this incredibly stressful
17 period for the nominee and try to get the nominee
18 to satisfy what could be a lifetime's ambition.

19 And the natural effect of that is that
20 the nominee begins to think of those people, as I
21 said, as his or her team, and were still to begin
22 to think of the other party as adversaries.

1 And of course the hearing sometimes
2 take an adversarial tenor anyway, but it can't
3 help matters if the nominee goes in there
4 thinking those people on the other side are out
5 to get me, and the people on my side are here to
6 protect me.

7 So that's one way in which I think
8 there's an unhealthy relationship that develops,
9 and my question to you would be, do you agree
10 that's a problem? Is there anything to be done?

11 Let me also sort of flag possibly a
12 second unhealthy thing, which is after the
13 confirmation, there has been recently kind of a
14 celebration, a kind of pep rally type celebration
15 at the White House, often with a distinctively
16 partisan flavor.

17 And that sort of further reinforces
18 the sense that the now-justice is on a team.

19 Now that, unlike the first, could
20 actually -- sort of as Mr. Shapiro was just
21 saying, getting from here to there is a problem,
22 but we could simply say, look, once you're

1 confirmed you're a justice, then you should cut
2 off contacts with the White House just as you
3 were if you were a sitting justice, the first
4 seems to be more difficult to manage.

5 So really, a two part question.

6 Am I right in thinking this is a
7 problem, or these are complementary problems? Is
8 there a way out?

9 MR. PECK: Sure. Good to see you,
10 Professor Strauss.

11 COMMISSIONER STRAUSS: Thank you,
12 Jeff.

13 MR. PECK: No question, I think these
14 are both problems. I'll take the second question
15 first because that's easy.

16 Those celebratory moments with only
17 one party sitting in the Roosevelt Room, or
18 wherever they happen to have the celebration, if
19 it's outside in the Rose Garden, those are
20 unseemly I think.

21 You know, yes, the administration that
22 nominated this particular person has won, so to

1 speak, and their nominee's been confirmed, but
2 that -- if I were -- not that I would ever be a
3 Supreme Court nominee and then confirmed, I would
4 elect, if the president invited me, not to
5 participate in that process for exactly the
6 reason that you identified.

7 It certainly reinforces the perception
8 that that nominee is on one team and not part of
9 the other team.

10 Now, when, you know, there's consensus
11 nominations, as there were, you know, for a
12 period of time when nominees were getting 80 or
13 90 votes, and you had members of both parties
14 there, it mitigates that perception to some
15 degree, but I think doing away with it is
16 certainly an easy fix.

17 The harder question is the first one
18 you posed in terms of the kind of preparation and
19 the fact that the nominee essentially becomes a
20 client of the White House.

21 At least that's the perception. The
22 murder boards are conducted by the White House.

1 You know, the White House picks a
2 navigator, if you will, to shepherd that person
3 through the process, and I think, you know, we're
4 not going to eliminate that entirely.

5 There is preparation that the nominee
6 needs to do, but it has gotten to a point where
7 it certainly is at the extreme.

8 You know, if you think of the
9 Kavanaugh nomination, obviously a lot of
10 controversial issues surrounding that, but
11 certainly the perspective was, you know, the
12 nominee was in the White House Counsel's office
13 all the time.

14 There was a very team-like approach
15 between the Justice Department and the White
16 House Counsel.

17 That, and, you know, I think and
18 Kavanaugh enveloped even the FBI, and it does
19 reinforce a very, very partisan, team-like, you
20 know, perception.

21 There's the shirts and there's skins,
22 and the two will never agree. What to do about

1 it?

2 I think, you know, like all of these
3 things, is a challenging question.

4 You certainly could have a situation
5 where the nominee is supported as they are in
6 part today by former clerks or former colleagues.

7 You know, the administration has
8 nominated them.

9 There is some preparation when it
10 comes to the questionnaire and the financial
11 disclosure statement and that sort of thing that
12 is required, but I think putting some norms,
13 putting some guardrails around that so it doesn't
14 create this perception that the nominee is the
15 White House's client, and the lawyers at the
16 White House are doing everything to make sure
17 this nominee gets confirmed under any
18 circumstance, that is a troubling perception, and
19 if we could develop some norms limiting that, I
20 think it would be a good idea.

21 I honestly didn't give a whole lot of
22 thought to that in my research, and I would want

1 to give it a little more thought, but I think
2 you've hit on something that certainly creates a
3 very negative perception, and reinforces the
4 perception of the public, that these are not
5 independent nominees, you know, they're political
6 tools for a particular administration.

7 COMMISSIONER STRAUSS: Thank you, Mr.
8 Peck.

9 CHAIR RODRIGUEZ: Thank you,
10 Commissioner Strauss, and I will now call on my
11 illustrious Co-Chair, Bob Bauer, to ask his ten
12 minutes' worth of questions.

13 CHAIR BAUER: Thank you very much,
14 Commissioner Rodriguez.

15 I'm going to turn to you, first, Mr.
16 Wittes, and I'm going to get straight to it to
17 squeeze as much as I can to this 20 minutes -- or
18 ten minutes, I just doubled it, hopefully, but
19 not successfully.

20 You wrote in your written submission,
21 and I'm going to quote, put simply, there would
22 be no significant debate about Court reform and

1 enlargement today, except the certain academic
2 circles, but for the confirmation process.

3 There was no grave problem with the
4 Courts that require reform. So I wanted to ask
5 you first, how far does this go?

6 There have been questions about the
7 Court's operations and procedures having to do
8 with codes of judicial conduct, transparency, the
9 management of its docket.

10 And the question is, do you think
11 those are legitimate reform issues, or do you
12 think that if we, you know, set that aside --
13 that we basically ought to set that aside, focus
14 on whether there's reform on the grand scale that
15 has been part of the public debate here?

16 Or, do you think we should consider
17 those kinds of reform issues as potentially
18 lowering the temperature and creating space for a
19 more bipartisan look at how the institution is
20 functioning in a democracy?

21 MR. WITTES: Yeah, so to be clear,
22 when I wrote that I was referring to things like

1 the existence of this commission in the first
2 place, right?

3 And the issue of Court reform and
4 enlargement did not become part of the political
5 campaign in 2020.

6 It was not something that candidate,
7 now president, Biden had to address because of
8 docket management issues or institutional
9 concerns about the way the Courts are
10 functioning.

11 Though those issues may be very
12 important in their own right, the political
13 impetus for this discussion is almost entirely a
14 function of the confirmation process and the
15 perceived -- and I believe correctly perceived
16 imbalance that that has produced.

17 And so, I think these other issues are
18 important. I would urge the commission to take
19 them seriously.

20 My point is that the but-for cause of
21 the salience of this issue in our current
22 political discussion is really solely a function

1 of the output of the confirmation process over
2 time.

3 CHAIR BAUER: So let me stay with that
4 for a second and ask a sort of related follow-up.

5 There have been witnesses who think
6 there's just a much wider ongoing problem with
7 the role and operation of the Court in our
8 democracy, so they definitely believe it has been
9 ignited to different levels by, you know, recent
10 political conflict, but they would focus us on
11 these wider concerns, and let me sort of now
12 pivot, although I want to connect it to my last
13 question to what Mr. Peck has proposed in the way
14 of refashioning Senate rules, potentially on a
15 basis in which both parties can't quite predict
16 how it's going to work out.

17 The rules are set to change, say, in
18 2025.

19 Given some of what he proposes,
20 hearings have to be held, votes have to be
21 conducted, the FBI has seen some more impartial
22 role as some would have it.

1 There are specific requirements under
2 the rules for entertaining nominations submitted
3 in an election year, provided that they're
4 submitted before August 1.

5 Do you think that focusing on those
6 kinds of rule changes, and focusing on some of
7 these internal judicial operating procedures
8 could play a useful role in putting the Court
9 reform debate on a sort of less dramatically
10 partisan polarized footing?

11 MR. WITTES: So, yes and no.

12 I spent probably ten years advocating
13 reforms like that and devising what I thought
14 were very clever schemes to ensure the veil of
15 ignorance, and that we wouldn't know who would be
16 helped by which reform, and there was never an
17 appetite on frankly either side for enacting such
18 reforms because both parties are generally
19 convinced that they're going to win the next
20 election and they're going to have power to
21 themselves, or that they have it now.

22 And so, I can't tell you how many

1 editorials I've written or columns I've written
2 advocating just such stuff, and look, I am a fan
3 of what Mr. Peck proposes, and if he wants me to
4 sign a document saying I endorse these ideas, I
5 do.

6 Do I think there's any realistic
7 chance of a negotiated framework of implementing
8 them?

9 I no longer believe that, and what I
10 do believe is that instead of what we're going to
11 get if we focus on reforms like that is an
12 endless back and forth that's not fruitful until
13 one side actually has the power to do something,
14 and then the thing that they will do is not enact
15 those common sense norms-based order kind of
16 reforms, they'll just up the ante once more to
17 their own benefit.

18 And that is I'm sufficiently afraid of
19 that, that my main concern is interrupting that
20 prisoner's dilemma mentality that both sides are
21 operating under, and I don't think we're going to
22 do that through that kind of technical reforms of

1 rules.

2 That said, if we can, I think it would
3 be a wonderful thing.

4 CHAIR BAUER: So if I may, just to
5 conclude the question, I'm going to turn to Mr.
6 Henderson here for a second.

7 You think these kinds of steps are by
8 their nature -- the ones that you and I have been
9 talking about, the Senate confirmation rules and
10 some rules that bear on the Court's internal
11 operating procedures and so forth, they're not by
12 nature the kind that would necessarily ignite
13 sort of an escalatory tit for tat, but you
14 believe that neither side has any incentive to
15 turn in that direction, and therefore, they would
16 just basically be shoved to the side?

17 MR. HENDERSON: Correct.

18 I think the risk is that you have a
19 protracted period of negotiation over those rules
20 that don't provide an agreement, that don't
21 provide, you know, a stable set of rules, then
22 one side wins an election.

1 They sweep aside what the assumptions
2 that were leading, that were guiding those
3 conversations, and they immediately impose their
4 own preferences, which the other side then has to
5 respond to.

6 And that incorporates both the
7 confirmation process and, frankly, the Court
8 enlargement regime.

9 CHAIR BAUER: Thank you very much, I
10 really appreciate that.

11 Mr. Henderson, I'd like to bring you
12 into this specific line of discussion, somebody
13 who's deeply experienced in the confirmation
14 process over the years.

15 When you hear the proposals that Jeff
16 Peck has made and that reflect conversations he's
17 had with both Democrats and Republicans, is it
18 your view that they in a world in which
19 reasonable conversations could be had would have
20 some promise, or do they sort of miss the large
21 picture in your judgment, and we ought to be
22 turning our attention in another direction?

1 MR. HENDERSON: Well, thank you,
2 Commissioner Bauer for your question.

3 I believe that the proposals Mr. Peck
4 has put forth certainly deserve consideration and
5 should be discussed.

6 I do think, however, that the partisan
7 nature of this process, which I think Mr. Wittes
8 has described accurately, as has Mr. Shapiro, to
9 me, make the possibility of achieving a consensus
10 on those positions more difficult.

11 I do like the idea that Professor
12 Strauss has advanced of establishing norms of
13 behavior, perhaps between Supreme Court
14 nominations that might in fact govern how the
15 Senate chooses to exercise its advice and consent
16 role.

17 For example, the notion that a senator
18 should never take a position that he or she would
19 oppose a nominee from the opposing party simply
20 because it is from the opposing party, in my
21 view, is simply, you know, not appropriate, and
22 it's unseemly and should be taken off the table.

1 The idea that we are trying to find a
2 way of advancing a more cooperative process that
3 we think could serve the interest of the country
4 better is an approach that makes sense.

5 But I think Mr. Peck's proposals, as
6 good as they may be, will have some real
7 difficulty in actually being accomplished.

8 CHAIR BAUER: Very good, and did you
9 have -- by the way, just thought I'd ask, was
10 there anything in the report -- it's very
11 comprehensive and an important report from Mr.
12 Geller and Ms. Mahoney that got your attention
13 that you want to comment on before I try to
14 squeeze in?

15 Which I may not be able to do one last
16 question.

17 MR. HENDERSON: Well, I certainly
18 appreciate the views of practitioners, and I
19 think they have concluded, of course, that the
20 process should essentially, if I'm interpreting
21 it correctly, remain essentially the same.

22 I do think however that all proposals

1 that are being discussed should be on the table,
2 and I know like the commission you are weighing
3 and analyzing these initiatives that have been
4 put forth by your witnesses.

5 My only request is that you center the
6 impact of these proposals on people and interests
7 who are most adversely affected.

8 Civil and human rights of American
9 citizens, and others covered by the Constitution
10 voting rights, those issues are so fundamental to
11 our democracy that I would hope that proposals to
12 reshape the Court or the structure of the
13 confirmation process be reflected, or rather
14 refracted through those considerations.

15 I think that would be helpful. And
16 so, I encourage the commission to consider all
17 proposals, but to center them on the impact that
18 they would have on interests, or people, rather,
19 who are most adversely affected.

20 CHAIR BAUER: Thank you very much, Mr.
21 Henderson.

22 MR. HENDERSON: Thank you.

1 CHAIR RODRIGUEZ: Thank you,
2 Commissioner Bauer.

3 We now have 13 minutes left and that
4 means each of the commissioners has just over
5 four minutes, perhaps time for one exchange, with
6 the witness of your choice, and I'll return to
7 Commissioner Fredrickson to begin.

8 COMMISSIONER FREDRICKSON: Okay, thank
9 you, and thanks again to all of the witnesses for
10 a very illuminating discussion.

11 I wanted to come back to Mr. Peck
12 because I feel like we've talked a lot about Mr.
13 Peck's proposals, and with some skepticism, if I
14 can say, about the possibility of them being
15 implemented in any lasting way.

16 And I too spent, not quite as many
17 years as you, but quite a number of years in the
18 Senate as a Senate chief of staff and a deputy
19 chief of staff to the Senate Democratic leader,
20 so I've had some experience with Senate rules and
21 with some of the complications of making changes
22 and some of the increasing partisanship and

1 polarization that has come about in the last many
2 years.

3 So Mr. Peck, based on your experience
4 in the Senate and in this wonderful report you
5 put together with the interviews that you did, do
6 you have an answer to what has been suggested
7 from some of the other witnesses that perhaps
8 these ideas, well-intentioned, are not really
9 achievable?

10 MR. PECK: Sure. Thanks for that, and
11 thanks for the opportunity to address that.

12 Look, I think it's hard not to look at
13 the Senate and our politics today and be anything
14 short of pretty skeptical about any proposal,
15 whether it has to do with the Court, whether it
16 has to do with the filibuster, whether it has to
17 do with the specific areas that I discussed in my
18 report.

19 I think we have two options.

20 We can kind of throw up our hands and
21 kind of give up and say nothing is ever going to
22 change, and certainly in the 30 plus years I've

1 been in politics, I'm as close to that position
2 today as I have been, given the tribal nature of
3 what's happened to our politics today.

4 But we have a second option, and that
5 is to try to think of some alternatives to
6 improve the process, and I wouldn't go so far as
7 to call it a fail-safe, but one way I thought to
8 deal with the skepticism is to try to have this
9 discussion and debate about changing the rules
10 outside the context of their immediate effect, or
11 outside the context of a particular nomination.

12 That's why I proposed implementing
13 them in 2025. We don't know who will take the
14 oath of office on January 20, 2025.

15 We don't know who's going to control
16 the Congress, particularly the Senate, who will
17 chair the Senate Judiciary Committee, who will be
18 the majority leader or the minority leader.

19 So, I am hopeful through that sort of
20 mechanism -- which by the way is not to say that
21 I don't think these rules are necessary now, I
22 think they are, particularly in the ways the full

1 Senate deals with the nomination -- but I try to
2 take it out of, you know, the immediate
3 skepticism and immediate sort of hot debate that
4 our politics provide.

5 You know, in the end, I think a lot of
6 this, particularly in the areas I focused on,
7 depends on who's in the Senate, and one could
8 make the case that we may see, I hope, some more
9 statesman-like members of the Senate emerge, men
10 and women, going forward, and that they are
11 willing to take a more sort of bipartisan
12 thoughtful approach, and look at norms and look
13 at rules that might make more sense.

14 Is what I've proposed a heavy lift?
15 No question it's a heavy lift, and I think if I
16 was proposing that the Senate take it up over the
17 course of the next six months, they'd be dead on
18 arrival in terms of their adoption.

19 But by postponing the effective date,
20 by trying to pull together perhaps a group of
21 senators who would like to work on a bipartisan
22 basis, there might be some foundation there to

1 adopt new rules that improve the process.

2 Again, it's a difficult lift, but I
3 don't think it's impossible, and I think the
4 alternative of just to kind of throw up our hands
5 -- I respect Mr. Shapiro's views, and it's
6 tempting to say we shouldn't have any hearings at
7 all because they are Kabuki theatre.

8 That term came up in countless of my
9 interviews.

10 I just think to kind of give up on the
11 process is not the best answer at this point,
12 despite, you know, some evidence as he points out
13 that certainly the process is not working as it
14 should.

15 CHAIR RODRIGUEZ: Commissioner
16 Strauss?

17 COMMISSIONER STRAUSS: Thank you. I
18 have a question for Mr. Geller and Ms. Mahoney.

19 It is about the so-called shadow
20 docket, the Court's emergency applications and
21 some are dispositions.

22 You make the point in your report that

1 your committee believes that legislative
2 intervention in that area would be inappropriate
3 and the matter should be left to the Court.

4 Taking that very well made point, do
5 you think there is reason for the Court to
6 reflect on its own practices and possibly change
7 them?

8 One criticism that we've heard --
9 there are actually two criticisms that come to
10 mind that we've heard.

11 One is that the Court has increasingly
12 been resolving substantive merits questions in
13 emergency applications, and that's not a good
14 thing.

15 And the other is that the Court has,
16 without fully acknowledging it, changed its
17 definition of irreparable injury so that any
18 inability of the government to carry out its
19 programs counts as irreparable injury, and then
20 has inconsistently applied that standard.

21 So either the views of the committee,
22 if you're comfortable expressing that, or your

1 own views, if you're comfortable expressing
2 those.

3 Do you think those are areas in which
4 the Court should give some serious thought to
5 going in a different direction?

6 MR. GELLER: Thank you, Commissioner
7 Strauss, and it's good to see you.

8 COMMISSIONER STRAUSS: Nice to see
9 you, Ken.

10 MR. GELLER: I think that many of us
11 on the committee, if not most of us, felt that
12 the criticisms of the Court's so-called shadow
13 docket are a bit overstated.

14 Even the name shadow docket it seems
15 unfairly to suggest some impropriety.

16 In fact, the Supreme Court, like every
17 Court, is required on a regular basis to act
18 quickly without full briefing and oral argument
19 on applications for stays and injunctions pending
20 appeal.

21 I don't think the Court's procedures
22 on stays have changed much over the years,

1 although in recent years perhaps because of the
2 flurry of flurry of immigration and COVID crises,
3 cases, among other reasons, there have been more
4 high visibility applications and those getting
5 more publicity.

6 I think that what's happening during
7 the stay process may be somewhat misunderstood.
8 As you suggest, the Court is not making merits
9 decisions.

10 Perhaps some of the things that it
11 writes when it decides these stay applications.

12 Given this impression, it's obviously
13 applying a four-part test, balancing equities and
14 moving very, very quickly.

15 In other words, if disappointment with
16 the way some of these decisions have come out
17 does not suggest that we need to change the
18 processes, but our committee did think there were
19 a couple of things that the Court itself might
20 consider.

21 One is not to have, as the proposal
22 suggested, an oral argument in every case in

1 which a stay application was filed, but there may
2 be cases on occasion where difficult issues of
3 law are raised, or the facts may be somewhat
4 unclear where it would be, we think, advisable
5 for the Court to at least consider the
6 possibility of having oral argument.

7 The fact that the Court has over the
8 last year, because of the pandemic, had oral
9 arguments telephonically and it seems to have
10 worked very well, suggests that the Court could
11 consider doing that on stay applications from
12 time to time.

13 And we also think that the Court might
14 well be somewhat clearer in some of the things it
15 writes in deciding stay or injunction
16 applications, particularly when it's reaching a
17 decision that's different from the lower courts,
18 when it's granting a stay, when one's been
19 denied, or issuing an injunction when one's been
20 denied.

21 It would probably be helpful both for
22 transparency purposes and for other purposes

1 development of the law for the Court to be a
2 little bit more specific in why it's ruled the
3 way it has, but we don't think that any set of
4 widescale revision of the way the Court deals
5 with stays and applications is appropriate or has
6 been suggested by any empirical evidence.

7 COMMISSIONER STRAUSS: Okay, thank
8 you.

9 CHAIR RODRIGUEZ: Commissioner Bauer,
10 you have three minutes and 40 seconds.

11 CHAIR BAUER: Very good. Let me ask
12 again of Mr. Geller and Ms. Mahoney one question,
13 and thank you again for this really, extensive
14 and comprehensive piece of work and all the
15 effort and thought that went into it.

16 Let me ask a question about the
17 position that you take on any restrictions that
18 would be put on justices owning individual stock.

19 You oppose any restrictions or
20 expanded reporting requirements and the like, and
21 you write in your report that there are tax
22 consequences, and you also write that given

1 there's no problem that you see, that if there
2 were issues that had been raised on an isolated
3 basis, no evidence of bad faith, that the
4 justices would be deprived of an investment
5 vehicle -- I'm quoting, that is generally
6 available to the public.

7 Of course, Executive Branch officials
8 also frequently face being deprived of investment
9 vehicles that are generally available to the
10 public, and they oftentimes set up blind trusts,
11 and have to go through a complete review of their
12 financial holdings with the Office of Government
13 Ethics, and the like.

14 What about apart from there being a
15 specific problem that's developed -- and I grant
16 you, it's hard to see what that would be in the
17 immediate past that has to be addressed.

18 A lot of ethics regulation of this
19 kind is premised on just avoiding appearances,
20 avoiding questions being raised.

21 How does your committee weight that?

22 Apparently not that strongly in coming

1 out against any restrictions. Can you talk about
2 that for a minute, please?

3 MR. GELLER: Yeah, sure. We just did
4 not see anything that suggested that the current
5 process was broken in a way that required any
6 sort of significant revisions.

7 The justices comply with the ethics
8 restrictions by and large that apply to other
9 federal judges.

10 In addition, they file annual
11 disclosures of outside income, gifts,
12 reimbursements, investments under the Ethics in
13 Government Act of 1978.

14 So therefore we didn't think that
15 there was a situation present today that required
16 what would be the unusual situation of Congress
17 stepping in and imposing rules on the head of a
18 coordinate branch of government.

19 And we also took into account the fact
20 that the chief justice has announced that the
21 Court itself is currently looking at revising the
22 rules under which it operates in terms of ethics

1 and disclosure.

2 So at a minimum, we thought we ought
3 to wait to see what the Court itself does before
4 we bring out the heavy artillery of Congressional
5 legislation.

6 CHAIR BAUER: Thank you. Do I have an
7 -- I'm sorry. Commissioner, you mentioned --

8 CHAIR RODRIGUEZ: Your time is up.

9 CHAIR BAUER: You said --

10 CHAIR RODRIGUEZ: I'm sorry.

11 CHAIR BAUER: Coming in under the wire,
12 but we're down to 50 seconds, so I don't know.

13 CHAIR RODRIGUEZ: If you could do it
14 in 50 seconds, go ahead.

15 CHAIR BAUER: Yeah, just to follow up
16 on that.

17 That's very, very helpful, and I
18 suppose I just want to ask the question about
19 Congress' role in potentially imposing a
20 requirement like that.

21 Of course, Congress imposes financial
22 disclosure requirements and regulates financial

1 interests of senior Executive Branch officials,
2 and that's also a coordinate branch.

3 Do you see this as essentially opening
4 the door to an assault on judicial independence?

5 What is the risk here that you're
6 concerned about in this direction that does not
7 operate in the other direction toward the
8 Executive Branch?

9 MR. GELLER: Well, I think the analogy
10 to the Executive Branch would be the lower
11 federal courts. I think the analogy here would
12 be to the president itself.

13 I'm not aware that Congress has
14 imposed significant, unique restrictions on the
15 president himself from an ethics standpoint, and
16 the analogy would be to the Supreme Court as the
17 head of a coordinate branch of government.

18 CHAIR BAUER: Thank you.

19 CHAIR RODRIGUEZ: Thank you so much to
20 all of the witnesses.

21 I know the time here reflects an
22 enormous amount of work and thought, and we're

1 very grateful for that.

2 All of the witnesses are invited to
3 submit further statements in writing if they so
4 wish, though it is by no means expected, and
5 commissioners may follow up at a later date to
6 continue the conversation.

7 So we will now have a brief break and
8 we'll resume for panel number two at 10:15.
9 Thank you.

10 (Whereupon, the above-entitled matter
11 went off the record at 10:00 a.m. and resumed at
12 10:15 a.m.)

13 CHAIR BAUER: Welcome back to this
14 public meeting of the Presidential Commission on
15 the Supreme Court of the United States.

16 We're now going to turn to a panel
17 which is devoted to perspectives on Court reform.

18 And so, at this point, I'd appreciate
19 if all the panelists please turned on their
20 cameras, and I will introduce each one of them in
21 turn to give their three to five minutes of
22 testimony, and thank you very much for

1 participating today.

2 Let me begin by introducing Nan Aron,
3 the founder and president of the Alliance for
4 Justice.

5 Ms. Aron, thank you very much for
6 joining us, and please proceed.

7 MS. ARON: Thank you, Chairs Rodriguez
8 and Bauer, and distinguished members of the
9 commission.

10 Thank you for the opportunity to
11 testify today. It is wonderful to be here with
12 so many dear friends and champions of justice
13 with whom I've worked over the years.

14 Today, I ask the commission to endorse
15 real reforms to the Supreme Court up to and
16 including the number of justices.

17 First, I understand the gravity of the
18 reforms that I'm advocating for. I do so with
19 great reluctance, not zeal.

20 I've been president of Alliance for
21 Justice for 42 years, and conservative justices
22 have always commanded a majority, yet no matter

1 how contentious a nomination fight, we have never
2 supported Court expansion.

3 I've dedicated my career to fighting
4 for a fair and independent judiciary, and I've
5 often made the same arguments advance before this
6 commission.

7 I'd always believed that expanding the
8 Court would damage the institution and further
9 politicize the judiciary, and I fear an untenable
10 arms race.

11 Now, however, I believe reform is the
12 only action, that the risks are simply outweighed
13 by the reality of our current crisis.

14 The Court today is partisan,
15 politicized, and anti-Democratic.

16 Look no further than its composition.
17 Since 1992, a Republican candidate for president
18 has only won the popular vote once, yet two
19 thirds of the bench is comprised of Republican-
20 appointed justices.

21 Two are on the bench after Republican-
22 appointed justices handed the presidency to the

1 Republican candidate in Bush v. Gore.

2 Justice Gorsuch sits on the Court
3 because Republicans refuse to consider Merrick
4 Garland, and then change the Senate rules to
5 confirm Gorsuch.

6 To confirm Justice Kavanaugh,
7 Republicans hid documents and hamstrung the FBI's
8 ability to properly investigate credible
9 allegations of sexual assault.

10 Justice Barrett was confirmed only
11 after Republicans broke from their own principle
12 on Merrick Garland to confirm her days before an
13 election, and now Mitch McConnell has pledged not
14 to confirm any Biden nominee, should a
15 Republican-led Senate consider a vacancy in 2024.

16 It would be one thing if these
17 justices then turned around and were fair and
18 impartial.

19 However, in scores of democracy cases,
20 they've consistently undermined democracy and
21 aided the very party that appointed them.

22 In fact, Republicans are using this

1 unDemocratic and partisan majority on the Court
2 to cement their own power and enact an unpopular
3 agenda that they cannot achieve legislatively.

4 Years after the Powell Memorandum
5 urged the business community to capture our
6 Courts, these Republicans appointed justices have
7 consistently ruled in ways that aid the wealthy
8 and powerful.

9 Let me remind this commission, we have
10 a Justice Kavanaugh, who in his confirmation
11 hearing, threatened revenge on his political
12 opponents, who has been described by his former
13 law clerk, now a D.C. Circuit judge, as a warrior
14 who will, quote, not surrender in a way, end
15 quote, being fought.

16 If a justice has declared war and has
17 repeatedly ruled to undermine our democracy,
18 civil rights, workers, and consumers are we those
19 who care about the independence of the judiciary,
20 supposed to just remain silent?

21 Second, there's been a lot of
22 discussion about talks surrounding Court reform

1 on abstract notions of norms and traditions.

2 This discussion ignores the real world
3 harm that the Court is doing to people around the
4 country, victims of wage theft and
5 discrimination, families who otherwise would be
6 eligible for Medicaid, voters who have to risk
7 their health to exercise the franchise.

8 What good are norms if they protect
9 the Court that twists the law to advance a policy
10 agenda eroding and eliminating the rights and
11 protections of millions?

12 Given the stakes, the country cannot
13 afford for this commission to become purely an
14 academic exercise.

15 This commission must aim higher than
16 simply producing a carefully worded report taking
17 the form of a glorified law review article.

18 Real people's lives are at stake.
19 Hear from them.

20 Members of the commission, if you
21 believe in protecting and preserving our
22 Constitution and the integrity of our system of

1 government, I believe you too will conclude
2 reform is imperative.

3 In short, if the Court continues to
4 work hand in fist with Republicans to undermine
5 fair and free elections, then the only possible
6 conclusion is reform is imperative.

7 If the Court day after day continues
8 to bend the law to side with the wealthy and
9 powerful over civil rights and the rights of all
10 workers and consumers, then the only possible
11 conclusion is that reform is imperative.

12 If the Court continues to subvert the
13 will of the majority of the American people and
14 quash the power of their elected representatives,
15 then the only possible conclusion is reform is
16 imperative.

17 Unfortunately, unless there are real
18 reforms to the Court, including expanding the
19 number of justices, something completely
20 Constitutional and done regularly throughout our
21 history, our system of government and our rights
22 and legal protections will be eroded for

1 generations. Thank you very much.

2 CHAIR BAUER: Thank you, Ms. Aron.

3 Our next witness is Christopher Kang,
4 the co-founder and chief counsel of Demand
5 Justice, and as deputy counsel in the Obama
6 administration, was very much involved in the
7 judicial selection process.

8 And so the floor for five minutes is
9 yours, Chris Kang.

10 MR. C. KANG: Thank you, Co-Chair
11 Bauer and Co-Chair Rodriguez, and to all of the
12 commission for the invitation to be here today.

13 I am Chris Kang, co-founder and chief
14 counsel of Demand Justice, and we are fighting to
15 bring balance and legitimacy to our Courts
16 through Court reform and by diversifying the
17 bench.

18 To be honest, this is not where I
19 thought I would be.

20 I knew going into law school that I
21 wanted to work in government, I wanted to work in
22 and through institutions to advance change.

1 I've worked on the Senate Judiciary
2 Committee on the Senate floor.

3 I worked in the White House Office of
4 Legislative Affairs, and then the White House
5 Counsel's Office where I led President Obama's
6 judicial nominees for a majority of his
7 presidency.

8 After I took a break from government,
9 I watched Republicans steal a Supreme Court seat
10 from President Obama and then unilaterally change
11 the Senate rules to confirm Neil Gorsuch when he
12 was unable to gain a sufficient bipartisan
13 support.

14 And I looked around and I thought,
15 where's the Democratic response, where is the
16 progressive movement rising up to fight this
17 theft of a Supreme Court seat?

18 And that is why I founded Demand
19 Justice.

20 You know, at the time, I had bought
21 into the conventional wisdom that the problem was
22 that Republicans cared and understood the impact

1 of the Courts, but Democrats just didn't get it,
2 so I thought that with my experience and
3 background I could help connect the dots.

4 But you know, that's not the problem.
5 The problem is not that Democrats don't care,
6 it's not that progressives are unable to organize
7 around the Courts, the problem is that we're
8 actively told that we shouldn't organize around
9 the Courts, that the Courts are not a political
10 institution, and therefore there cannot be a
11 political response, there cannot be a political
12 solution, and really there can't even be
13 criticism of the Court and the justices.

14 You know, what crystallized this for
15 me was a symposium we held on Court reform in
16 2018.

17 This is where we first came out in
18 support of Supreme Court expansion, but the
19 moment that struck me in particular was a comment
20 made by Penn State law professor Eleanor Brown,
21 and she said this.

22 She said, we've all been sold this

1 notion that there's an impartial, independent
2 judiciary working for the common good.

3 People on the left have
4 disproportionately bought this fiction, people on
5 the right have never bought that fiction.

6 If people on the left buy the fiction
7 and people on the right do not buy the fiction,
8 it means people on the right are behaving in
9 activist ways.

10 They're always acutely aware of the
11 stakes to implication in a way that people on the
12 left are not.

13 You know, the reason that that stuck
14 with me is because I was somebody who had bought
15 that fiction.

16 Working the Obama White House, we
17 constantly sought to turn down the politics on
18 judicial nomination.

19 And perhaps the best example of that
20 was after I left the administration and President
21 Obama nominated Merrick Garland to the Supreme
22 Court, a fine jurist to be sure, but a 63 year

1 old moderate judge, former prosecutor recommended
2 by Republicans to fill the Supreme Court vacancy,
3 and we all see how that turned out.

4 So, I realized the problem is not just
5 Democrats versus Republicans and how they're
6 approaching the Court.

7 If progressives are disproportionately
8 buying the fiction of an independent judiciary,
9 then who is selling it?

10 The answer quite frankly is people
11 like those in this meeting, legal elites,
12 academics, Supreme Court practitioners who
13 benefit from not criticizing the Court, and many
14 of the elite journalists who cover the Court, and
15 see men tamper, manufacturing public trust and
16 projecting an image of moderation before the
17 final partisan shoe drops every single term.

18 Now to be clear, I'm not referring to
19 particular commissioner or witness or everyone.
20 There clearly have been examples of those who
21 have brought this uncomfortable truth to bear,
22 such as Professor Niko Bowie last month, but

1 that's the point.

2 We're acceptant. There's a broad
3 legal elite culture that fosters and promotes the
4 myth of an independent, apolitical judiciary that
5 must be preserved.

6 And I will say that I believe
7 passionately in the ideal of an independent
8 judiciary.

9 I fought for years to hold the line,
10 thinking that that would help maintain the
11 legitimacy of the Courts, but I was wrong.

12 The reality today is far different
13 from the ideal, and that is my concern, that the
14 debate around Court reform has become too
15 academic, too theoretical, too detached from the
16 impact of the Court and its decisions on people's
17 everyday lives.

18 We simply do not have an apolitical,
19 independent Court.

20 We have a Court that consistently
21 rules in favor of the Republican party, the
22 wealthy, the powerful, and corporations.

1 Republicans do not deny their
2 politicization of the Court, they revel in it
3 because they benefit from it.

4 But more alarmingly, the Court
5 decisions are not just for Republican, they're
6 anti-democracy.

7 From Shelby County to allowing voter
8 roll purges, to allowing partisan gerrymandering,
9 to making it harder to vote during a pandemic,
10 and this pattern continued this year with
11 Brnovich, our democracy is under assault by this
12 Supreme Court.

13 So we cannot evaluate reform proposals
14 under a rubric of whether or not they will
15 preserve this Court.

16 We need reform sufficient to expand
17 democracy injustice. We need to expand the
18 Supreme Court.

19 As a candidate, President Biden said
20 he was not a fan of expanding the Court, and I
21 agree, I'm not a fan of expanding the Supreme
22 Court either, but doing so is rooted in our

1 Constitution, it's rooted in our history, the
2 size of the Court has been changed seven times
3 before, and this is the Constitutional response
4 to a political Court, and it is the only way to
5 restore balance and provide relief right away.

6 We cannot continue to look the other
7 way while Republicans continue to use the Courts
8 to pursue their radical agenda, and I know that
9 this commission will not make recommendations, so
10 I know that it's not going to deliver the results
11 we need to right these wrongs, but thankfully in
12 our democracy, our future is not meant to be
13 decided in rooms like these alone, but in the
14 country as a whole where momentum is building and
15 a grassroots movement is on the rise for Supreme
16 Court reform. Thank you.

17 CHAIR BAUER: Thank you very much, Mr.
18 Kang. Our next witness is John Malcolm.

19 He is the director of Heritage's Edwin
20 Meese Center for Legal and Judicial Studies, and
21 he is also the Ed Gilbertson and Sherry Lindberg
22 Gilbertson senior legal fellow.

1 And so, Mr. Malcolm, you have the
2 floor.

3 MR. MALCOLM: Thank you.
4 Distinguished commissioners, congratulations on
5 your well deserved appointment.

6 I hope you won't take it personally
7 when I say this undertaking risks feeding the
8 misperception that Supreme Court justices are
9 just partisans in robes and that it's okay to
10 manipulate the judiciary, hoping it will produce
11 decisions that fulfill a particular political
12 agenda.

13 Let's face it. This commission was
14 established because President appointed three
15 justices, resulting in six Republican and three
16 Democrat appointees.

17 That prompted President Biden to
18 declare the Court is getting out of whack.

19 I doubt those insisting the Court is
20 out of whack would be saying so if a President
21 Hillary Clinton had replaced justices Kennedy,
22 Scalia, and Ginsburg, resulting in a six to three

1 split in favor of Democrat-appointed justices.

2 Saying the Court isn't out of whack
3 doesn't mean I agree with everything the Court
4 does. Far from it. Just read Dred Scott,
5 Plessy, or Korematsu.

6 While these cases are universally
7 reviled, and rightly so, we all could name cases
8 where the Court has reached results that we like
9 and others that we dislike, and we would likely
10 disagree about many of those, and that's why any
11 reforms should focus on the needs of the Court,
12 not on decisions the Court has rendered or might
13 render.

14 Engaging in open-ended discussions
15 about reform without first identifying the
16 defects to be remedied could erode public
17 confidence in the Court as trustworthy,
18 apolitical, and independent.

19 Some proposals would do great damage,
20 while others would do little to no harm. I will
21 focus on three. Court packing, jurisdiction
22 stripping, and term limits.

1 The biggest threat to the judiciaries'
2 independence is Court packing.

3 Displeased with some recent opinions,
4 Court packing proponents want to replace the
5 current Court with a larger, more reliably
6 liberal body that will be more likely to issue
7 rulings they like.

8 Disagreement with this or that
9 decision is the most dangerous reason to
10 manipulate the Court.

11 I'm sure, for example, that all of you
12 would have objected had the Senate succumbed to
13 the demand to impeach Earl Warren after that
14 Court issued several decisions that rankled many
15 conservatives.

16 Significantly those who claim the
17 Court is out of whack haven't explained how.
18 Does it mean an imbalance between justices
19 appointed by different parties?

20 If so, there have been times when the
21 imbalance was far greater.

22 All nine justices who served from 1945

1 to 1955 had been appointed by Presidents
2 Roosevelt and Truman, yet the Eisenhower
3 administration didn't threaten to pack the court.

4 From October 1991 until August 1993,
5 there were eight Republican appointees and only one
6 Democratic appointee, yet the Clinton
7 administration didn't threaten to pack the court.

8 And any attempt to pack the court
9 would undoubtedly be met with tit for tat
10 retaliation the next time Republicans control the
11 White House and Congress, which is exactly what
12 happened with ending the filibuster for judicial
13 nominations.

14 Regarding jurisdictions stripping,
15 legal scholars have long debated whether the
16 Constitution gives Congress the authority to
17 decide what cases the Court can consider.

18 Thankfully, we have not had to resolve
19 this issue, at least not yet. The threat of
20 jurisdiction stripping has a lamentable history.

21 During the Warren Court, there were
22 attempts to strip the Court of jurisdiction to

1 decide cases involving racial desegregation,
2 religious freedom., reapportionment, and the
3 right to political subversives and criminal
4 defendants.

5 While some might favor stripping the
6 Court of jurisdiction to consider a case
7 challenging Roe v. Wade, others might favor
8 stripping the Court of jurisdiction to consider
9 the Constitutionality of a pro-life statute that
10 effectively overturns Roe.

11 Denying the Court the ability to
12 decide whether a law is Constitutional would
13 effectively end its ability to ensure the
14 Constitution remains the supreme law of the land.

15 Term limits for justices are less
16 objectionable.

17 It would likely require a
18 Constitutional amendment, would apply to future
19 justices regardless of who is president, and
20 would require broad bipartisan acceptance.

21 Many respected scholars support
22 staggered 18 year terms. While the potential

1 benefits are real, I doubt it would be a panacea.

2 Eighteen years is still a long time,
3 and tying the Court's membership to the results
4 of each presidential election might actually ramp
5 up partisan rhetoric and lead to even more
6 contentious confirmation hearings.

7 In conclusion, the Supreme Court
8 shouldn't be treated like a political football.
9 There have been times the Court's credibility has
10 proven to be invaluable.

11 For example, the Court was a
12 stabilizing influence during the school
13 desegregation effort following *Brown v. Board of*
14 *Education*.

15 The Court spoke. Some agreed, others
16 didn't. But because the public had confidence in
17 the Court, they all ultimately obeyed the ruling.

18 We shouldn't take this for granted.
19 Politicizing the Court risks undermining that
20 credibility so it won't be there the next time we
21 need it, and we will.

22 Any reform that diminishes the

1 independence of the Supreme Court should be
2 rejected.

3 Thank you for inviting me to testify
4 here today and I look forward to answering your
5 questions.

6 CHAIR BAUER: Thank you very much, Mr.
7 Malcolm. And our next witness is Gabe Roth.

8 He's the executive director of Fix the
9 Court, previously managed the coalition for Court
10 transparency, which was a national alliance of
11 media and legal organizations that advocated for
12 the broadcast of Supreme Court proceedings.

13 Mr. Roth, five minutes is yours.

14 MR. ROTH: Thank you, Bob, and to the
15 members of the commission, thank you all for
16 inviting me to testify about my research and
17 experience on federal Court reform.

18 I guess I'm here kind of as a palette
19 cleanser or an optimist, which is a weird role
20 for me and for those who know me, but I am here
21 to talk about consensus and what we can do to
22 build a Court that we could have some more faith

1 in.

2 A little about my background.

3 I am executive director of Fix the
4 Court, which is a national non-partisan
5 organization that advocates for non-ideological
6 fixes to make the federal courts, and primarily
7 the Supreme Court, more open and accountable to
8 the American people.

9 My background, though, is in
10 journalism and political consulting, not the law.

11 For years, I had to explain to clients
12 that no, you can't watch the Supreme Court on
13 C-SPAN 8.

14 You'll have to fly to Washington and
15 spend six or 106 hours in line just for the
16 chance to watch your case being argued.

17 But about seven years ago, I realized
18 that broadcast was not in fact at the heart of
19 what made the Court the most powerful, least
20 accountable institution in Washington.

21 It was their life tenure, lack of an
22 ethics code, and the black box surrounding their

1 conflicts of interests, finances, and junkets.

2 Almost no one at the time was diving
3 into this work from a non-partisan perspective,
4 so in 2014 I started Fix the Court.

5 The impetus behind fix the Court has
6 always been fairly simple.

7 Public officials in a democracy need
8 public scrutiny, and since federal judges and
9 justices are public officials, they should not be
10 exempt from it.

11 That scrutiny will build trust in the
12 third branch as a whole at this critical juncture
13 in our history.

14 Now, oddly enough, a blueprint for
15 reform might already exist among the recent rules
16 and regulations enacted in Congress for Congress.

17 The public can watch Congressional
18 committee hearings and floor activities in both
19 houses live.

20 Senators and representatives must
21 release within a month extensive details about
22 the transportation, food, and lodging that third

1 parties pay for.

2 These travel reports are posted online
3 for the public to see.

4 Congress men and women must report
5 within 45 days when they buy or sell a stock.
6 These reports go online. Members must post their
7 annual financial disclosures online, as well.

8 Congressional staff are covered by a
9 series of anti-harassment, anti-discrimination,
10 and anti-retaliation laws.

11 Committee chairs, in some cases, have
12 term limits.

13 These reforms show not only what's
14 possible but what's needed in the Federal
15 Judiciary, plus judicial reform is already deeply
16 popular.

17 Seventy percent of Americans believe
18 livestreaming in SCOTUS should be required, about
19 the same percentage supports ending life tenure
20 in SCOTUS, and about 90 percent want the justices
21 to adopt a formal ethics code.

22 Importantly, across party lines, three

1 in four Americans say the Courts should be
2 subjected to as much public scrutiny as the
3 president and members of Congress are.

4 Of course, the Courts themselves could
5 implement these reforms, and it has been my
6 fervent wish that judges, justices, and judicial
7 administrators would act as partners in my modest
8 modernization efforts.

9 But time and again, they've thrown up
10 roadblocks, in many cases lobbying against
11 reform. I'd argue that the Judicial Conference
12 has the best lobbying shop in town.

13 Now historically, Court reform efforts
14 have been tied to partnership. John mentioned
15 Impeach Earl Warren signs that we all remember.

16 But there's been a bit of a change in
17 recent years.

18 Many of the highly visible reform
19 efforts, though seemingly partisan, have been
20 facially neutral when applied more broadly.

21 Liberal attempts, including some led
22 by Nan, who's on the panel, to push Justices

1 Thomas and Scalia off certain cases due to their
2 associations with mega donors on the GOP side,
3 show that the public should know more about all
4 judges' and justices' travel.

5 Conservatives failed to get Justice
6 Kagan to recuse from the ACA Cinematic Universe,
7 but it showed that all justices should be more
8 thoughtful about potential conflicts of interest.

9 Buoyed by these partisan/non-partisan
10 efforts, as well as greater attention from the
11 press and public and the judiciaries' work,
12 lawmakers or the ones who actually care about
13 making laws, have begun to coalesce around the
14 idea that reform should not simply be used as a
15 tool to expose the other side's misdeeds, but a
16 more consistent application of best practices in
17 government oversight.

18 And this experience is what sets me
19 apart from all the other witnesses. Reform isn't
20 theoretical or academic for me, it's my job.

21 I am doing the work every day with
22 both parties to see where lawmakers are, and

1 what's legislatively possible.

2 Legislative, since, again, the Courts
3 are not acting in good faith here.

4 Here's a sample of what I've been
5 hearing from the Hill.

6 Quote, my deep respect for the
7 judiciary does not mean there are no improvements
8 we can make to the Court system, particularly
9 when it comes to transparency.

10 That's Congressman Nadler, a Democrat
11 of New York.

12 Quote, when it comes to transparency,
13 when it comes to the ethics of the judiciary, we
14 have an obligation.

15 We cannot simply say, let's impeach a
16 judge from time to time. That's Congressman
17 Issa, a Republican of California.

18 No one doubts that Congress has the
19 authority to regulate the administration of the
20 federal courts, so it should, and I believe it
21 soon will.

22 After all, life tenure must not

1 insulate the judiciary from basic measures of
2 oversight.

3 Also, there shouldn't be life tenure,
4 and that topic is covered in my written
5 statement.

6 In my view, fixing the Court is not
7 adding four justices or six justices or 29
8 justices, it's ensuring that members of the third
9 branch are held to the same high standards of
10 ethics and transparency as those in the other two.

11 I want to thank the commission again
12 for inviting me here today, and I look forward to
13 your questions.

14 CHAIR BAUER: Thank you very much, Mr.
15 Roth.

16 And now I would ask the commissioners
17 who will be asking questions to turn on their
18 cameras, please.

19 And I will introduce them in the turn
20 in which they will be asking the questions, and
21 we'll begin the questioning with Professor
22 Michael Kang.

1 He's a William G. and Virginia K.
2 Karnes research professor at Northwestern
3 Pritzker School of Law.

4 Professor Kang, the floor is yours for
5 ten minutes.

6 COMMISSIONER KANG: Thank you, Bob,
7 and thanks to all our panelists for helping us
8 with our work and giving us their perspective and
9 experience.

10 I'd love to start with Ms. Aron if I
11 could.

12 Ms. Aron, you've been deeply involved
13 for a while with the federal appointments and
14 confirmation process, and as I think everyone
15 agrees, the process has become more political and
16 partisan over the years.

17 And I think a worry that a lot of
18 people have about any reform is that
19 hyperpartisanship that we have in the country
20 could overwhelm any reforms, the size,
21 composition, term length of the Court.

22 And I think the idea here is if you

1 change the size of the Court, it expands under
2 Democrats, then might lead to a spiral where the
3 Republicans retaliate, and you either change it
4 back or increase the size even larger, and we end
5 up kind of just exacerbating the situation.

6 Alternatively, some scholars and
7 advocates are arguing that, instead of changing
8 the size or term length of the Court, a better
9 approach might be to decrease the overall
10 importance of the Court through so-called
11 disempowering measures.

12 I think in your testimony you said you
13 reluctantly support Court expansion, but I was
14 wondering if you could give us your opinion about
15 these kinds of disempowering measures?

16 And I think the most prominent
17 examples are jurisdiction stripping, where you
18 limit the number of cases that the Court takes,
19 and therefore, reduces influence, requires
20 supermajority on the Court before it can strike
21 down legislation, which makes it harder for the
22 Court to, you know, overrule Congress.

1 Or some have suggested that we should
2 give Congress an override of Supreme Court
3 decisions, and so the idea here is you reduce the
4 power of the Court, and it reduces the stakes
5 with the Court for both sides by making it less
6 important, and we sort of make some headway on
7 the kind of partisan fight that we currently have
8 over Court politics.

9 And I was wondering if you could tell
10 us kind of where you see the strengths and
11 weaknesses of these kinds of disempowering
12 measures, clearly vis-a-vis, changing the
13 composition, term length, personnel of the Court.

14 Is that a better approach, a worse
15 approach, and how should we think about that?

16 MS. ARON: I'd like to first address
17 the first part of your question because I think
18 it's important to know that the system of
19 choosing judges has always been a contentious
20 one, it's always been a partisan one.

21 George Washington's first nominee to
22 the Supreme Court didn't make it through, so the

1 very design of the Constitution Article 2,
2 Section 2 ensures that there will be a healthy
3 debate, and partisanship will always be part of
4 that.

5 Number two, a point that you make,
6 Michael, is that, well, there'll be an arms race.
7 If we expand the Court now, Republicans, once
8 they're in power, will do the same.

9 The fact remains they're going to do
10 it anyway.

11 Who would have thought that Mitch
12 McConnell would hold up a seat for a whole year
13 on the Supreme Court, block the appointment of
14 Merrick Garland to ensure that a Republic-
15 appointed president would get his choice?

16 PARTICIPANT: You're on mute.

17 MS. ARON: No, I'm not. Am I on mute,
18 Michael?

19 COMMISSIONER KANG: No.

20 MS. ARON: No. I mean, I don't think
21 any of us would've expected that to happen. They
22 will do it regardless of what.

1 They will expand the Court if they
2 think it's in their interest.

3 If the Court by some miracle were to
4 have two new Democratic-appointed justices, they
5 would expand the Court. They know no bounds.

6 Even McConnell, as I've said, has
7 indicated, you know, block any nominee put forth
8 by President Biden.

9 So, that brings us to smaller reforms,
10 and I would include in those smaller reforms
11 Supreme Court ethics, which I didn't mention in
12 my verbal testimony, which I think is incredibly
13 important.

14 There are ethics codes for lower court
15 judges, we should have one for the Supreme Court.

16 Two, I think these other issues
17 jurisdiction stripping, term limits, are
18 interesting. I think they should be considered.

19 I know back in the 1980s, we fought
20 jurisdiction stripping when some members tried to
21 remove certain cases involving civil rights and
22 abortion from the federal Court, so I do think

1 these are interesting ideas, I think they bear
2 more conversation, but at the end of the day,
3 given the monumental existential crisis we find
4 ourselves in at the moment, expanding the Court I
5 believe is the only action.

6 COMMISSIONER KANG: Thank you. I
7 think I'd love to shift over for a second to Mr.
8 Malcolm.

9 As part of our work, we've looked
10 quite a bit at the history of reform proposals to
11 alter the Supreme Court, and of course political
12 actors support or oppose reform based largely on
13 whether the Court at the moment is serving their
14 interest.

15 And I think your argument in your
16 testimony has been that that's exactly what's
17 going on right now in the Supreme Court reform
18 proposals.

19 I think I would also say though that
20 it's been true that political conservatives have
21 supported proposals to restrict the Court at
22 times in the past.

1 Things like jurisdiction stripping, as
2 Ms. Aron just alluded to.

3 And I think more generally have been
4 critical of judicial activism or activist judges.

5 Obviously today, conservatives might
6 be happier with the Supreme Court than at other
7 times, given the composition of the Court, but I
8 wanted to ask you whether -- from your
9 perspective -- and I think from a conservative
10 perspective -- whether there's any value in
11 generally reducing the role of the Supreme Court,
12 and maybe shifting power back relatively speaking
13 to the political process, whether it's Congress,
14 the Executive, or the states, and moving power
15 away from the Supreme Court and the federal
16 courts?

17 I guess I'm asking how you see the
18 structural question in principle, apart from the
19 partisan politics of the moment?

20 MR. MALCOLM: Great question. Thank
21 you, Professor Kang.

22 I pointed out actually that there were

1 conservatives that led the effort to strip the
2 Court of jurisdiction during the Warren era.

3 I do want to comment very briefly on
4 breaking norms.

5 So that, you know, President Obama,
6 when he was a senator, was leading a filibuster
7 for Justice Alito, and when he was chairman of
8 the Senate Judiciary Committee, Joe Biden
9 announced George H. W. Bush when he was running
10 for re-election, that if there was a vacancy on
11 the Court, don't bother sending him a name
12 because the Senate Judiciary Committee would not
13 take up that name.

14 So, the norm breaking has been going
15 on for a long time and it's quite bipartisan.

16 I think your question is an excellent
17 one, I just wouldn't propose doing it the way you
18 did in your question to Ms. Aron, which is to say
19 have supermajority votes to strike down a statute
20 and you know, I think our Constitutional rights
21 should not be subjected to the elected branches,
22 other than they should keep the Constitution in

1 mind when they pass laws to make sure that the
2 laws that they are passing, at least by their
3 lights, are Constitutional, but I think the
4 Constitution should not require a supermajority
5 in order to, you know, uphold them.

6 What I do think should happen is --
7 and Mr. Shapiro in the first panel alluded to
8 this -- is that the Supreme Court has taken on,
9 and if you will, Constitutionalize many issues
10 that I believe under the framework of the
11 Constitution were probably left to the people and
12 their elected representatives, so part of me
13 would say, you know, Court, heal thyself, and you
14 know, stick to textualism and the original public
15 meaning of the Court, and don't be quite so hasty
16 to jump in and Constitutionalize an issue that
17 would be best left to the people to decide as I
18 believe the framers intended.

19 COMMISSIONER KANG: Great, thank you
20 so much. This is probably going to be my last
21 question.

22 Mr. Roth, you suggested a number of

1 proposals to improve judicial policies and
2 procedures, clarifying recusal, increasing access
3 to the Courts, financial disclosures.

4 I wonder if you had any thoughts about
5 policy and procedure to improve the confirmation
6 process itself?

7 We've talked so far about changing the
8 structure or power to the Court, and the idea
9 here is if you reduce the importance of the
10 Court, then maybe partisanship will decrease and
11 the process will improve as a result.

12 It's probably true that the Court's
13 going to remain pretty important even if the
14 structure or powers of the Court are changed a
15 lot, so I was wondering if there was anything
16 that can be done in terms of the process itself?

17 Whether it's through regulation or new
18 norms, as we discussed a little bit in the
19 morning.

20 Jeff Peck had some suggestions about
21 timeframes for confirmation hearings and votes.

22 I was wondering if there's anything

1 along those lines that can be done in the
2 confirmation process, and whether you think those
3 would be effective in improving the process in
4 the end?

5 MR. ROTH: I mean, I think it's worth
6 trying. Right?

7 The recent term limits bill that was
8 introduced by Congressmen Khanna-Beyer-Kennedy
9 back in September of 2020 had -- and it would
10 kind of be hard to enforce, but at least it's
11 stated -- you know, if the Senate didn't act on a
12 confirmation within 120 days, it would be
13 forfeiting its advice and consent, and that was
14 actually based on a speech that Brett Kavanaugh
15 and Alberto Gonzalez wrote for George Bush in
16 October of I think 2001, where they said, you
17 know, 180 days really should be the limit of
18 advice and consent.

19 So I think that if there's some way
20 just to sort of limit advice and consent where
21 you have people being added to the Court
22 regardless of the partisanship on a regular

1 basis, I think overtime that would actually lower
2 the temperature. Right?

3 I think the goal that I have with the
4 term limits proposal of 18 years is to make
5 Supreme Court nominations more like regular
6 Senate business.

7 So whatever we can do to do that in
8 terms of what -- you know, changing the confines
9 of advice and consent possibly, either through
10 norms or new laws, or obviously an amendment
11 would work, but that's hard.

12 I think that's worth looking into, and
13 you know, just to throw something out, in some of
14 the research that I've done, you know, I did a
15 bunch of focus groups after the Kavanaugh
16 confirmation hearing just to talk to people in
17 Iowa and Pennsylvania and New York about term
18 limits, and we said, you know, that 18 year term
19 limits means a new justice every two years.

20 I said, oh, that's way too much,
21 that's too much, you know, SCOTUS confirmation,
22 too much contention.

1 And then the next question was, tell
2 me something about the Neil Gorsuch confirmation,
3 which had happened like I think 14 or 16 months
4 prior. No one remembered anything.

5 And so, I think that, you know, within
6 the framework of terms limits bills, of norms,
7 of, you know, working within the Senate Judiciary
8 Committee, turning a Supreme Court confirmation,
9 or even lower court confirmations, into something
10 that more closely resembles regular Senate
11 business is something that I think I would
12 support and I think would benefit us over time
13 because again, I'm not just talking about the
14 Supreme Court here.

15 The lower courts are at such a deficit
16 when it comes to the number of judges that they
17 need.

18 I mean, estimates range from 70 to 270
19 judges that were down in terms of access to
20 justice, so having more judges and justices being
21 added on a more regular basis I think is
22 something that should be considered and something

1 that can happen via legislation.

2 COMMISSIONER KANG: Thank you.

3 CHAIR BAUER: Thank you very much,
4 Professor Kang.

5 Our next commissioner to ask questions
6 is Professor Margaret Lemos, the Robert G. Seaks
7 professor of Law at Duke Law School.

8 And so, the floor is yours, Professor
9 Margaret Lemos.

10 COMMISSIONER LEMOS: Thank you,
11 Co-Chair Bauer, and thanks very much to all of
12 our witnesses.

13 Your testimony, both the written
14 testimony and your comments here today, are
15 hugely helpful for us.

16 Mr. Kang, I'd like to start with you
17 if I might.

18 In your written testimony, and again
19 in your oral remarks, you've argued that
20 Democrats need to abandon the fiction of an
21 apolitical Court.

22 You say we can't preserve an

1 apolitical Supreme Court because we cannot
2 preserve something that doesn't exist.

3 And I want to be sure that I
4 understand the claim exactly. Do you think that
5 the Supreme Court is inherently a political
6 institution?

7 So not just not apolitical, but just
8 unavoidably political all the way down.

9 Or is the argument that while it might
10 be possible to imagine a world in which the
11 Supreme Court were independent and not entirely
12 political, that is not our world because the
13 Republican party has politicized the Court and
14 will continue to do so?

15 I take it largely through its approach
16 to judicial appointments. And so, in that world,
17 Democrats have no choice but to take a simpler
18 approach?

19 I'm guessing it's more the second, but
20 I'd love to hear from you about the contours of
21 the claim.

22 MR. C. KANG: It definitely is more

1 the latter, that there is a theory of an
2 independent apolitical judiciary that I think
3 could be possible.

4 I think it's something that could be
5 worth aspiring to, but I think that the trap
6 we're in now is that, again, there's this
7 asymmetry here, and but look, I completely agree
8 with Mr. Malcolm that politicizing the Court
9 undermines the legitimacy of the Court.

10 I think that's the problem we have
11 right now.

12 Republicans have politicized the
13 Supreme Court so it is no longer legitimate. We
14 have this asymmetry here where we're in a race to
15 the bottom.

16 Republicans are politicizing the Court
17 and Democrats think, well, the only way we can
18 depoliticize it is if we don't engage, and that's
19 not working, that's not the way that
20 Constitutional hardball works.

21 There's no way to depoliticize the
22 Court by unilaterally trying to stop it.

1 And so that is where I think that
2 Democrats have to engage in this fight and really
3 take up and organize around the Court, and put in
4 some necessary reform in order to eventually.

5 I think that if there were an
6 opportunity to restore balance to the Court,
7 there might be a possibility in conjunction with
8 term limits to one day depoliticize the Court and
9 sort of lower the temperature, but where we're at
10 right now is simply unsustainable.

11 COMMISSIONER LEMOS: So let me follow
12 up on just that point -- and recognizing that
13 none of us has a crystal ball here -- but what do
14 you predict in terms of consequences if Congress
15 were to add seats to the Supreme Court right now?

16 So this is sort of a version of the
17 question that Commissioner Kang started us with.

18 Do you buy the idea that if Democrats
19 show themselves to be willing to engage in
20 Constitutional hardball, that that will, you
21 know, cause the Republican party to back off
22 similar expansions to the Court's size so that we

1 don't end up with a 100 person Court, or is your
2 vision something different from that?

3 Perhaps showing a willingness to
4 engage in Constitutional hardball then opens up
5 other lines of policy that might not otherwise be
6 possible. For example, term limits.

7 MR. C. KANG: I mean, I think that if
8 last fall Republicans credibly thought
9 legitimately that Democrats would expand the size
10 of the Supreme Court, they would not have rushed
11 through the confirmation of Justice Barrett after
12 60,000,000 Americans had already voted.

13 Republicans had a 5-4 majority on the
14 Court, and if they thought they were legitimately
15 at risk of being on the wrong side of a 7-6
16 Court, they might not have.

17 The problem is that Democrats have
18 never responded.

19 Democrats did not respond to the theft
20 of the Garland seat. They did not respond to
21 the changing of the Senate rules to confirm
22 Gorsuch.

1 They did not respond to Brett
2 Kavanaugh being confirmed despite not only
3 credible allegations of sexual assault, but
4 credible allegations of perjury.

5 None of those responses happened, so
6 Republicans last fall thought, why not grab
7 another Supreme Court seat?

8 Why not solidify our majority instead
9 of 5-4 with John Roberts in the middle, 6-3 and
10 Brett Kavanaugh is the median justice? Like, why
11 not?

12 And I think there have to be real
13 opportunities for Democrats to engage in this
14 fight, and not just threaten retaliation, and
15 sort of be able to engage here, but actually do
16 it, to show there are real consequences?

17 That is the only way we're going to be
18 able to restore some balance in how both sides
19 are treating the Court.

20 COMMISSIONER LEMOS: Thank you for
21 that. So I want to now switch gears now to hear
22 about something completely different, and that's

1 the ethics reforms, and that actually several of
2 you have argued for.

3 You haven't mentioned that in your
4 testimony today, Mr. Kang, but that's one of the
5 steps that Demand Justice has outlined for
6 Supreme Court reform.

7 And so I want to ask you particularly
8 about the idea of a, quote, binding code of
9 ethics for the Supreme Court.

10 As you and others have highlighted,
11 the Supreme Court is alone among the federal
12 courts in not having a formal code of ethics
13 because the code of conduct that applies to the
14 lower federal courts by its terms does not apply
15 to the Supreme Court.

16 But as you know, that code of conduct
17 is advisory.

18 It provides guidance to lower court
19 judges, but it's not as self binding in the way a
20 statute would be, and instead, there's a
21 different statute that creates a mechanism for
22 filing complaints about misconduct for lower

1 court judges.

2 And so, I'd love to just hear from you
3 a little bit about what your vision is for what a
4 formal code of conduct would look like for the
5 Supreme Court?

6 Do you think it would be enough for
7 the Court to just say, either on its own steam or
8 through a director from Congress, we are formally
9 bound by this code of conduct, or do we need some
10 sort of enforcement mechanism, and what would an
11 enforcement mechanism look like for the Supreme
12 Court?

13 MR. C. KANG: So, I'm not a
14 Constitutional scholar and be able to speak about
15 the enforceability, but I think it's become clear
16 that we cannot trust the Supreme Court to police
17 itself, and you look no further than how this
18 judiciary has responded to the allegations and
19 the incidents of sexual harassment within the
20 judiciary, and their inability to even track
21 these complaints, more or less respond to them,
22 shows that the judiciary is not capable of

1 policing itself.

2 But I think there's a real problem
3 here with the Supreme Court not even being bound
4 theoretically by any code of conduct. Right?

5 There were legitimate complaints,
6 ethics complaints raised against Brett
7 Kavanaugh's conduct, his testimony, the sexual
8 assault allegations.

9 Because he was confirmed to the
10 Supreme Court, the Court was forced to dismiss
11 those allegations.

12 What kind of world is that that a
13 circuit board judge, if he had not been
14 confirmed, would have been subject to these
15 complaints and they would've been investigated
16 and dealt with, but because he was elevated to
17 the highest board, they were dismissed.

18 Ethics reform is absolutely essential
19 to restoring the legitimacy of the Supreme Court.

20 The reason why I don't dwell on that
21 in testimony is because it's insufficient to
22 reform the Supreme Court, and we need much more

1 important structure reform to really bring
2 balance and legitimacy back to it.

3 COMMISSIONER LEMOS: Mr. Roth, can I
4 ask you the same question about an ethics code?

5 Issues of ethics and recusal has been
6 a real focus of the Court and you've done a lot
7 of extremely informative work on it.

8 And so, I'm curious what your views
9 are on an enforcement mechanism, whether one is
10 needed, and if you think the answer is yes, what
11 it might look like for the Supreme Court?

12 MR. ROTH: I mean, I think the
13 enforcement mechanism already exists with the
14 impeachment power in Congress. Right?

15 If a justice was found to do something
16 unethical, impeachment proceedings could begin,
17 but the reason Ethics of Court and other groups,
18 I think, support ethics reform at the Court is
19 because symbolism matters.

20 It's just weird that top judges in the
21 country don't have, you can call it a formal code
22 of conduct, a binding code, whatever you want to

1 call it, that that doesn't exist for the
2 judiciary.

3 You know, Justice Breyer says, oh, he
4 consults the code, and Chief Justice Roberts says
5 he thinks about the code, and everyone sort of
6 interprets it different, right?

7 You know, some law ethicists get calls
8 from Supreme Court justices when they have
9 ethical issues, and some justices just go down
10 the chambers and ask their colleague.

11 So, there's no -- you know, this is
12 part of the whole -- these nine Supreme Court
13 justices are running nine law offices conceit
14 that we hear.

15 And I think that having a formal code
16 of conduct that all the justices say that they're
17 going to follow, just like there are formal gift
18 rules, right?

19 The most recent gift rules for the
20 federal government were passed in 1989, and then
21 Chief Justice Rehnquist said, well, we're not
22 going to, you know, opine on whether or not it's

1 Constitutional for Congress to pass gift rules,
2 but we nine are going to follow it, and that
3 ninth is a resolution that was -- it's in my
4 testimony -- written in 1991.

5 The justices continue to follow it,
6 they continue to follow the gift rules regardless
7 of the Constitutional issues, the one Supreme
8 Court clause, all that.

9 They're still following the gift
10 rules.

11 Similarly, I think that just saying,
12 like, you know, Justice Kagan in 2019 said
13 Justice Roberts is studying whether or not we
14 could have a separate code of conduct for the
15 Supreme Court.

16 Great. There hasn't been any follow-
17 up.

18 I've asked the justices many times
19 since, and everyone's like either silent or, oh,
20 we're still thinking about it. So, you know, I
21 think symbols matter.

22 Having the top of the food chain in

1 the third branch without this code is egregious,
2 and it'll send a message to the 870 -- or if you
3 include the senior judges, 1,370 other judges
4 throughout the country that they need to take
5 their ethics more seriously.

6 Every day, every month there are
7 issues in the lower courts, from double-dipping
8 salaries, to going on junkets across the world
9 that are hard to track, to not filing financial
10 disclosure reports, that are happening on the
11 lower courts and they don't get enough attention.

12 I'm trying to change that they don't
13 get enough attention, but at least having someone
14 at the top saying we're going to recommit to
15 ethics I think would send a message to the rest
16 of the federal courts saying this is something
17 critical to filling out our duties and our job,
18 and we're going to follow the SCOTUS here.

19 COMMISSIONER LEMOS: Thanks.

20 CHAIR BAUER: Thank you very much Mr.
21 Roth.

22 I'd like now to introduce the next

1 Commissioners Michael Waldman, who is the
2 president of the Brennan Center for Justice at
3 the NYU School of Law.

4 The time is yours, Mr. Waldman.

5 COMMISSIONER WALDMAN: Thank you, Bob,
6 and thank you to the members of this panel for
7 bringing your experience, your passion to this
8 critical set of issues.

9 I want to start by following up with
10 Mr. Roth on some of the specific reforms that
11 you've suggested, and then I actually have a
12 broader question for the whole panel to engage
13 on.

14 You've described the importance of
15 recusal rules and of justices having to explain
16 their decisions in your written testimony.

17 Do you mean that justices should
18 explain why they don't recuse as well as why they
19 do recuse, and why is that rather extensive kind
20 of commentary a valuable thing?

21 MR. ROTH: Well, I think I want to
22 start with explaining why they do recuse, right?

1 So, 28 USC 455(b) has several reasons
2 as to why justices recuse, and there's a law that
3 was introduced -- versions of it have been
4 introduced several times, but most recently,
5 called the 21st Century Courts Act, about a year
6 ago that said, you know, if you're a judge or
7 justice and you have a conflict of interest, you
8 say, you know, I Judge Smith took no part in this
9 case because of a reason stemming from 28 USC
10 455(b)(4) which is like a financial conflict.

11 So something just very succinct, and
12 the Supreme Court actually used to do this.

13 When judges were riding circuit, a lot
14 of them would get sick or they wouldn't get back
15 to D.C. in time, so they'd say, you know, Judge
16 Reynolds was recused because he's like lost in a
17 swamp in Alabama.

18 So, I mean, they wouldn't be that
19 specific, but that's, you know, usually the
20 reason.

21 So I think that bringing back that
22 practice would very critically have justices

1 become more cognizant of their potential
2 conflicts of interest.

3 Every year, every few months I find a
4 missed conflict of interest at the Supreme Court.

5 You know, it's on the Fix the Court
6 website, and it's ridiculous.

7 There's no reason that, you know,
8 someone like me should be telling the justices,
9 oh hey, remember you own United Technologies
10 stock and Raytheon is now United Technologies so
11 you need to recuse from the Raytheon case.

12 And they fix it and whatever, but it
13 erodes trust.

14 In terms of, you know, having reasons
15 for saying why you're not recusing, I think that
16 like, that's like three steps removed from what
17 I'm aiming at right now.

18 I think maybe in the future there
19 could be like, you know, the Laird v. Tatum rule
20 or something and if enough people sign a petition
21 saying, you know, tell us, Justice Kagan, why
22 you're not recusing from the ACA case, then maybe

1 she'd be forced to do a response, but I think
2 first, I want the judges and justices to be
3 cognizant of what their conflicts of interest
4 are, tell us briefly why they're -- you know, the
5 justices recuse 250 times a year and, you know, I
6 do the research to try to figure out why, but
7 it's not always clear.

8 And just briefly to add to that, when
9 lower court judges recuse, they don't even know
10 that they're recused. Right?

11 They have a sheet of paper that says
12 these are my conflicts of interest that's fed
13 into software, and then when it's like, you know,
14 Smith v. Jones, if Jones is on my conflict sheet
15 and I'm a judge, it just skips over me, so I
16 never even know that I'm recused.

17 So I think that having, again, a
18 mechanism that says, okay, I am recused from this
19 case and you can put it in PACER. You know, I'll
20 even pay ten cents for that.

21 You know, it says that Judge Smith is
22 recused because of his conflict and not just, you

1 know, glossing over it through the software, but
2 again, judges need to be more cognizant of what
3 they're doing, and having to actually write down
4 I am recused because X, Y, Z even briefly I think
5 would be a step in the right direction in terms
6 of helping the public and then themselves just be
7 more cognizant of their ethical obligations.

8 COMMISSIONER WALDMAN: Thank you very
9 much.

10 I have a question that really is
11 something that I hope can receive some thought
12 from more than one witness.

13 It's been striking for us as members
14 of this commission, both in the previous public
15 testimony and today as well, how widespread the
16 support for or perhaps acquiescence to term
17 limits is across the political spectrum, whether
18 it's supported, or as Mr. Malcolm said, the least
19 objectionable option of the big ideas that have
20 been discussed.

21 One of the questions of course is do
22 you believe that term limits could be done

1 Constitutionally through a statute, or would it
2 require a constitutional amendment?

3 And I ask that question of each of the
4 witnesses.

5 Mr. Roth, you talked about term limits
6 extensively in your testimony, but I'd like
7 others as well to give their views.

8 MR. MALCOLM: Well, if that's a jump
9 ball, I'll jump in quickly. So I read and gave
10 testimony.

11 I've read Akhil Amar's testimony,
12 who's appearing before you later, who thinks that
13 this can be done by statute, and I realized that
14 there are distinguished scholars on both sides.

15 I just think that the good behavior
16 clause means that they serve during good
17 behavior, and I believe that anything that shifts
18 them out of one office into another is not -- you
19 know, we're confirmed to that office, subject to
20 good behavior.

21 There had been suggestions, well,
22 there are judges out there who take senior

1 status.

2 Yes, it's in their rules, it's about
3 when they are eligible for senior status, but
4 they are not required to take senior status, and
5 you have, for instance, Judge Tjoflat, just took
6 senior status.

7 He's well into his 90s.

8 I know judges who are beyond, you
9 know, I'll say the age of 75, who are still
10 serving as active judges, and although there is a
11 debate about whether this can be done by statute,
12 I not only think it has to be done by
13 constitutional amendment, but I think that that
14 would be a good thing because it would again
15 engender that broad, bipartisan acceptance not
16 only within the halls of Congress itself, but
17 also among the population.

18 COMMISSIONER WALDMAN: Do any other
19 members of the panel want to speak on that?

20 MR. C. KANG: I'll just add that I
21 think that it can be done by statute, but I don't
22 think that this Supreme Court is likely to uphold

1 it if it is.

2 I think that the problem right now
3 with so many of these Court reform measures,
4 whether they deal with jurisdiction, or judicial
5 review, or term limits, is that they inevitably
6 will be considered by this partisan Supreme Court
7 that has been the result of a 50 year plan to
8 take over our Court.

9 They're not going to give away that
10 power easily.

11 And so, that is why I think that we
12 need to restore balance to the Court by passing
13 the Judiciary Act of 2021, and then with a
14 balanced Court, maybe some of these Court reform
15 procedures or reforms would have the opportunity
16 to have a legitimate shot at having their
17 constitutionality considered.

18 MS. ARON: I would just add, Michael,
19 that term limits would require probably years of
20 more law review articles, debates in Congress.

21 I agree with Chris. I can't see the
22 Supreme Court upholding it. There are scholars

1 on both sides of the issue.

2 As to whether or not you need a
3 constitutional amendment, some say yes, some say
4 no.

5 And if we did need a Constitutional
6 amendment, it's doubtful that we'd ever achieve
7 term limits. I think this commission has to be
8 bold.

9 I think this commission needs to look
10 at expansion, which is essentially democratizing
11 this Court now and for future generations. I
12 think that ought to be the focus.

13 COMMISSIONER WALDMAN: I'd like to
14 follow up on that question.

15 Ms. Aron, as you've said, you in your
16 career have previously always opposed Court
17 expansion as an option, and as we are learning
18 from the history, even President Roosevelt at the
19 height of his popularity, found public concern
20 about it that he had not necessarily expected.

21 What do you say to Mr. Malcolm's
22 argument that this is just, you know, Democrats

1 do what they'll do, Republicans do what they'll
2 do, but right now the Republicans came out ahead?

3 Or, do you believe something very
4 different and fundamental has happened in recent
5 years that people need to look at with clear
6 vision?

7 MS. ARON: So, I've seen a sea change
8 over the years.

9 In terms of the engagement, it's not
10 just the Democratic party, but it's members, it's
11 constituents, it's progressives who have really
12 been awakened to what Lewis Powell tried, and in
13 fact successfully created, in terms of his
14 progeny.

15 I think Americans realize how
16 politicized the Court is, but when I say that, I
17 think they do see these decisions that make it
18 harder to vote, that make our air dirtier, that
19 make life much more difficult for workers to
20 organize, that allow people with disabilities to
21 be discriminated against.

22 I do believe that there is growing

1 interest, growing engagement.

2 Progressives are galvanized by doing
3 something, taking action about the current state
4 of the Court right now.

5 Interestingly, there was a poll that
6 came out right after the election, and really for
7 the first time I've ever seen, Democrats more
8 than Republicans were interested, were energized
9 by the Supreme Court.

10 Finally, we went through four years of
11 contentious, polarized discussions.

12 I would say Democrats in many of those
13 battles performed admirably, did what they could
14 to raise arguments, to make the case that what
15 was happening to the Court was wrong, that we are
16 at a crisis moment.

17 And I do think the constituents part
18 of the party and beyond the party now realize
19 that something has to be done.

20 CHAIR BAUER: Thank you very much, Mr.
21 Waldman.

22 We actually have time for a second

1 round, so each of the commissioners can ask
2 additional five minutes of questions to take us
3 to the end of panel, so we'll go back to you,
4 Professor Kang.

5 COMMISSIONER KANG: Great. Thanks,
6 Bob. I think I wanted to start off just by
7 following up a little bit with Mr. Malcolm about
8 these disempowering reforms.

9 I think if the power of the Court was
10 reduced, it wouldn't necessarily mean that there
11 wouldn't be judicial review or that no one would
12 decide constitutionality.

13 It might mean that authority, when it
14 comes to constitutionality or interpretation,
15 would shift to other actors, and that might be
16 Congress or state legislatures.

17 It also might mean that lower federal
18 courts, or state courts actually, get the final
19 say, and I wanted to get your view specifically
20 about state courts vis-a-vis the Federal
21 Judiciary.

22 And I guess I'm thinking about

1 federalism arguments for devolving some power to
2 state courts and moving some of that judicial
3 review on constitutional questions, maybe some
4 other questions, you know, closer to the states
5 and not at the federal level, and I'm wondering
6 if that dovetails with some arguments along
7 federalism lines if there was some sort of
8 disempowerment of the Supreme Court, whether that
9 would be beneficial in your view, or worrisome to
10 move power from the Federal Judiciary to the
11 states?

12 MR. MALCOLM: That's a great question.
13 I do have to respond very briefly to something
14 Ms. Aron and Mr. Kang have said repeatedly about
15 how these current justices are hyperpartisans and
16 rogues.

17 You know, 64 percent of the cases that
18 were decided by the Supreme Court this past year
19 were by unanimous or by substantial majorities.

20 This is also the same Supreme Court
21 that upheld Obamacare, unanimously held that
22 President Trump had to turn over his financial

1 records to the Manhattan DA, they said that he
2 couldn't end the DACA program, that he couldn't
3 add a citizenship question to the census, and
4 they did not get involved in the election
5 dispute.

6 Plus, they held that employment anti-
7 discrimination laws apply to people based on
8 their sexual orientation and gender identity, so
9 this is not, you know, Donald Trump, six Donald
10 Trumps in robes.

11 Now, the answer to your question is,
12 look, for a long time there was a sense that you
13 couldn't get fair justice, so that the quality of
14 state Supreme Court justices were just not there,
15 and you would get home cooked.

16 I think that denigrates the lower
17 courts. I know a number of state Supreme Court
18 justices.

19 I think that they are outstanding
20 jurists, and I think that there are some federal
21 statutes that have devolved power down to the
22 state courts, and I think that that is very, very

1 appropriate, and creating a more deferential
2 standard of review by the federal courts.

3 At the end of the day, I think it's
4 important that the Supreme Court, you know, be
5 the ultimate arbiter when it comes to deciding
6 important constitutional questions.

7 You could end up having the same sort
8 of split among state Supreme Courts as you could
9 among the lower federal court, and you talked
10 before about jurisdiction stripping.

11 What if we took jurisdiction away from
12 the Supreme Court, but you let the lower federal
13 courts do this?

14 You know, I agree with the sentiment,
15 and I think that state Supreme Court justices do
16 not get the credit or the respect that they are
17 due.

18 COMMISSIONER KANG: Great, thank you
19 so much. I guess I'll finish by asking a
20 question of Ms. Aron.

21 And I guess basically the question is
22 why have the politics of the federal appointment

1 and confirmation process gotten worse over your
2 career and over my career?

3 Certainly you're right that there's
4 always been partisanship in the appointments
5 process, but I think my sense is -- and it seems
6 like the sense of most -- is that it's gotten
7 worse, and I think at least you and Mr. Kang
8 believe that it sort of inevitably will get worse
9 if nothing changes.

10 Is the mystery why partisanship is so
11 bad in the process right now, or is the mystery
12 why the partisanship wasn't as bad 50 years ago?

13 And I think I could give you a
14 political science story about the growth of
15 partisanship kind of generally in America across
16 all levels of politics that probably explains at
17 least some of this.

18 But I'm wondering if there's something
19 specific about the Federal Judiciary or the
20 politics of the appointment process that helps us
21 understand what's happened at the federal level
22 over the last 40 years or so?

1 MS. ARON: Well, Michael, when I first
2 practiced law in the 1970s, I appeared before
3 Republican-appointed judges, Democratic-appointed
4 judges, and frankly in many instances, I couldn't
5 tell the difference.

6 Judges were open to listening, not
7 just hearing, but listening for the facts and
8 interpreting the law.

9 I often didn't agree with their
10 results, but I thought they were fair.

11 But then came 1984 when the Republican
12 party put language in its platform, party
13 platform, when Reagan was running for a second
14 term, calling for the appointment of judges who
15 would oppose abortion, oppose civil rights, and
16 support prayer in school.

17 And I looked in 1984 as really the
18 beginning of modern day court packing. Packing,
19 not expanding, packing.

20 And Ronald Reagan and the Bush
21 presidents afterwards used very specific litmus
22 tests for the selection of judges.

1 That continued to Trump. Don again
2 was proud to announce that he was looking for
3 judges who would overturn federal regulations,
4 make it harder for plaintiffs to get into Court,
5 prove discrimination, make it more difficult for
6 workers to get fair pay.

7 Republicans have been openly brazen
8 about this, and I think what happened is this
9 plan of theirs exploded during the Trump years, I
10 think culminating in the recognition by
11 Democrats, by progressives, by people around the
12 country, that there is something monumentally
13 wrong with the justices that we are putting on
14 the Supreme Court.

15 And I do think that because of this
16 program instituted in 1984, which is fomented by
17 big business on the one hand, and religious
18 community who is trying to stop abortion, these
19 two social forces continue to fuel money, energy
20 into the Republican party, into candidates to
21 continue to politicize our Court, and I think we
22 are now at a moment where we are seeing Democrats

1 and their constituents realize the dangerous
2 position we as a country are in.

3 COMMISSIONER KANG: Thank you.

4 COMMISSIONER LEMOS: I think it's my
5 turn.

6 Ms. Aron, can I start by asking you
7 the same question that I asked -- or a version of
8 the question that I asked Mr. Kang and Mr. Roth
9 earlier, just to tell us a little bit more about
10 what your vision for ethics reform would look
11 like at the Supreme Court?

12 MS. ARON: It's interesting.

13 A couple years ago, Alliance for
14 Justice produced a film with some leading experts
15 on the topic of Supreme Court ethics to focus in
16 on just that question.

17 And we produced this film because of
18 four phenomenon we saw.

19 One, I remember Justice Scalia loved
20 to attend overtly political events.

21 Justices Alito and Thomas lend their
22 names in prestige to fundraising events organized

1 by the Federalist Society.

2 In the past we've seen some justices
3 fail to turn in their financial disclosure
4 reports.

5 And we've also seen justices in the
6 past receive pretty significant gifts from
7 parties who might someday be arguing before that
8 justice. So there are real problems.

9 If these Supreme Court justices were
10 lower court, on the lower courts, they could not
11 engage in any of these activities, and what we
12 have been pushing for several years is the notion
13 of an ethics system which essentially applies
14 that code for lower court judges to Supreme Court
15 justices.

16 Interestingly, after our film, we did
17 see some of the justices begin to stop attending
18 some of these events, hand in their disclosure
19 forms, but we still see justices routinely
20 attending Federalist Society fundraising events,
21 lending their names and being the primary
22 featured speakers at these events.

1 That should not happen, and if they
2 were lower court judges, they couldn't do that.

3 COMMISSIONER LEMOS: Do you agree with
4 Mr. Roth that impeachment is enough of an
5 enforcement mechanism, or do you think we should
6 have a formal complaint filing system for Supreme
7 Court justices like we do for lower court judges?

8 MS. ARON: I would support an
9 enforcement system.

10 I do think though just ensuring that
11 that code applies to Supreme Court justices would
12 inhibit a lot of the justices from engaging in
13 some of what I view -- well, what the public
14 should view as improper, inappropriate behavior.

15 COMMISSIONER LEMOS: I think I may
16 have one more minute, so let me try to sneak in
17 one more question for you while we're talking.

18 Just to take you back to where you
19 just were with Commissioner Kang, you talked
20 about a shift in 1984 when the Republican party
21 started emphasizing the judiciary in the
22 platform.

1 You know, both you and Mr. Kang have
2 described sort of a transformation in your own
3 views over time, so that you've come to support
4 reforms that you used to oppose.

5 We've heard from other witnesses
6 about, you know, sort of a break the glass
7 moment, such that, you know, one might recognize
8 that there are costs to things like expanding the
9 size of the Supreme Court, but at some point, it
10 becomes necessary or worth it.

11 I'm curious whether if you could go
12 back in time, knowing what you know now, when
13 would you have started advocating for a different
14 approach, and why?

15 MS. ARON: Well, I should say we've
16 certainly thought about it, but advocating it is
17 different.

18 And I think that breaking the glass
19 moment has been a series of Supreme Court
20 decisions that make it much more difficult for
21 people to vote, exercise the franchise.

22 That I think is the moment I think

1 that has -- the fact that a Republican Court has
2 allowed voter purges, has sided with Republican
3 partisan gerrymandering, has gutted the Voting
4 Rights Act, Section 2, Section 5.

5 It's made it more difficult for Native
6 Americans to vote in North Dakota.

7 I think the moment is really upon us,
8 given the incredible importance and the need to
9 democratize our country to ensure that every
10 American has the right to vote.

11 This is a Court that has entrenched
12 its power to do everything and anything it can to
13 ensure that Republicans will continue to win
14 elections at the expense of our democracy.

15 CHAIR BAUER: Thank you, Commissioner
16 Lemos, and Commissioner Waldman, it's on to you
17 now to bring us to a conclusion.

18 COMMISSIONER WALDMAN: Thank you so
19 much. I have a question for Mr. Malcolm.

20 In your testimony, you note for
21 example that between 1991 and 1993, there were
22 eight Republican nominated appointed justices and

1 one Democrat, but at the time, people did not
2 call for expansion of the Court as a remedy.

3 And I want to go into that a little
4 further and ask you whether that is really a fair
5 analogy to the situation today?

6 At that moment, Republicans had won
7 every presidential election but one for the
8 previous 24 years.

9 Currently, as we heard earlier -- and
10 we know that Democrats won the popular vote in
11 seven of the last eight presidential elections --
12 but as we know, Republican presidents nominated
13 six of the nine Supreme Court justices.

14 Isn't there a greater risk now of a
15 loss of legitimacy for the Court, relative to the
16 country, given that kind of mismatch, or do you
17 think that that's not a terribly different
18 situation?

19 MR. MALCOLM: Well, that isn't why the
20 Democrats didn't threaten to pack the court back
21 then.

22 It's because they were very happy

1 having John Paul Stevens and David Souter, and
2 for the most part, happy with Sandra Day O'Connor
3 and Anthony Kennedy on the Court.

4 So, you know, Ms. Aron I remember in
5 her written statement says, well, there's only
6 one Supreme Court justice that was appointed by a
7 Republican president who captured a majority of
8 the popular vote, and that is Clarence Thomas.

9 You know, Bill Clinton won two
10 elections, and because there were third-party
11 nominees, he didn't garner a majority of the
12 popular vote in either of those elections.

13 I do not consider the appointments of
14 Justice Ginsburg and Breyer to have been in any
15 way, shape, or form illegitimate.

16 Look, these people take oaths. They
17 take an oath to administer justice without
18 respect to persons and to do equal right to the
19 poor and to the rich.

20 They may have different approaches.
21 Some may be living constitutionalists, some may
22 be originalists in terms of how they approach

1 their jobs, but, you know, these are honorable
2 people who I think are doing their jobs with
3 fidelity as each one sees that role in order to
4 do justice.

5 And when you start talking about, you
6 know, packing the court here, and what do we do
7 there, I mean, look, you can do it.

8 The Supreme Court of China has 370
9 justices. Is that what we really -- what we
10 want?

11 Do we want a Supreme Court that's, you
12 know, bigger than the Senate or bigger than
13 Congress? This is just a dangerous path to go
14 down.

15 COMMISSIONER WALDMAN: I have a final
16 question for Mr. Roth.

17 You've said that there's a model for
18 the Courts or judges and justices, and the
19 reforms that Congress has imposed on itself.

20 Do you see any lessons of what not to
21 do from the reforms that Congress has imposed on
22 itself?

1 Some critics say there are unintended
2 consequences with some of the reforms in
3 Congress.

4 Do you see anything that the Courts
5 should avoid, or is it in fact something that
6 trends in a positive direction?

7 MR. ROTH: I think it trends in a
8 positive direction.

9 I mean, I hear arguments against
10 cameras in the Court. You know, look what C-SPAN
11 did to Congress. It's an apples and orange
12 comparison.

13 The partisanship of Congress has
14 nothing to do with C-SPAN, and if justices were
15 on camera, you know, there's not enough time to
16 quote, unquote play to the camera or grandstand.

17 Like, those arguments are ridiculous,
18 and lower court judges have cameras, they're
19 fine.

20 A live audio experiment that happened
21 from May of 2020 to May of 2021, that was fine,
22 so any sort of livestreaming issues that people

1 prescribe into Congress would not exist in the
2 judiciary.

3 No, I think, look, you know,
4 Congress.gov is free, PACER should be free. Go
5 to ethics.house.gov and get all these different
6 online reports, and travel reports, and
7 disclosures.

8 The same thing should exist in the
9 Supreme Court and, you know, the challenge is is
10 that, you know, even if Congress passed these
11 laws -- and I want to stress this -- that would
12 bring the justices and lower court judges in line
13 with these modern expectations of transparency
14 and initiatives and exigencies, you know, the
15 judicial conference is going to throw up
16 roadblocks. Right?

17 Right now, you know, the Fourth
18 Circuit just ruled that, you know, a Court filing
19 should become public when it's filed, but to get
20 an online financial disclosure, it's got to be
21 reviewed by a panel of judges and by this whole
22 staff, and it takes -- like, we still don't have

1 the 2019 and the 2020 financial disclosures for
2 anyone except the nine SCOTUS Justices, and it's
3 three years later.

4 So, you know, I think that what you
5 would hear is pushback from the judiciary saying,
6 oh it's too much, we can't do it, you know?

7 No, there are sort of basic tenets of
8 modern democracy which involves the internet and
9 we need to do what we can via laws that are
10 passed by Congress that are very prescriptive and
11 very specific that says, you know, if you are a
12 federal judge, your stock sales got to go online,
13 your disclosures got to go online, you got to be
14 better at listing your conflicts of interests and
15 your recusals, and you got to livestream your
16 proceeding so the public has faith that you're
17 not hiding behind this black box and trying to
18 get something past them.

19 And that's something that exists in
20 nearly every state court and courts of last
21 resort around the world, and really the Federal
22 Judiciary is the outlier in not recognizing that

1 the twenty first century has arrived.

2 CHAIR BAUER: Well thank you very
3 much, and thank you very much to the
4 commissioners who asked the questions, and to the
5 panelists who have given us this time, and very
6 helpful testimony.

7 We are now going to conclude this
8 panel and we will resume after a break at 11:45,
9 so thank you very much.

10 (Whereupon, the above-entitled matter
11 went off the record at 11:33 a.m. and resumed at
12 11:46 a.m.)

13 CHAIR RODRIGUEZ: Welcome back,
14 everyone.

15 This is the start of our third panel
16 of the day, a second one on perspectives on Court
17 reform.

18 At this time I'll ask each of the
19 witnesses to turn on their cameras, please.

20 Each of our four witnesses will have
21 three to five minutes to provide their opening
22 statements, after which we'll turn to a panel of

1 three commissioners for questions.

2 I'll call on the witnesses in
3 alphabetical order.

4 And again, their complete biographies
5 are on the commission website, as is their
6 written testimony.

7 We'll begin with Craig Becker, who's
8 the general counsel to the AFL-CIO and a former
9 member of the National Labor Relations Board.

10 Mr. Becker, the floor is yours.

11 MR. BECKER: Thank you very much, and
12 thank you for inviting me to testify here today.

13 I'd like to make two points in my very
14 brief time, one about the unprecedented form of
15 partisanship on the current Court, and the other
16 about the fairness of access to the Court. A
17 conclusion of proposal for a view of cert
18 petitions.

19 So first, the consequential decision
20 after consequential decision in the last several
21 decades the Court has ruled against the interest
22 of working people and wholly partisan votes.

1 The reports all realness now in the
2 famous phrase, and none of us is naive enough to
3 believe that the justice's political perspectives
4 do not affect their opinions.

5 And most of us still hope that there
6 is some line between judging and advocacy, but
7 that line is now increasingly being crossed.

8 Let me give you just one example.

9 Justice Alito in dicta in a series of
10 cases between 2012 and 2018 actively solicited a
11 case in order to overturn a 40 year old precedent
12 key to collective bargaining in the public
13 sector.

14 No party in the initial case
15 questioned the precedent, but Justice Alito did,
16 labeling it, quote, unusual, and quote,
17 extraordinary.

18 In a concurring opinion in that case,
19 Justice Sotomayor wrote that Justice Alito's
20 opinion, quote, breaks the Court's own rules, and
21 more importantly, disregards principles of
22 judicial restraint.

1 In the subsequent decision, Justice
2 Alito continued, quote, taking potshots at the
3 precedent, in the words of Justice Kagan's
4 descent.

5 The upshot of Justice Alito's unsubtle
6 hints that he wanted to overturn this precedent
7 was a race to the Supreme Court by opponents of
8 unions.

9 In the first case to reach the Court,
10 plaintiffs actually asked the Court of Appeals to
11 rule against them, quote, as quickly as practical
12 so that the appellants may take their claims to
13 the Supreme Court.

14 In 2018, the Court predictably
15 overturned this 40 year old precedent by a 5 to 4
16 vote.

17 In the descent Justice Kagan wrote,
18 quote, today, the Court succeeds in a six year
19 campaign right there in those recent decisions
20 began the assault that culminates today.

21 So this was more than typical
22 partisanship, more than the typical partisanship

1 you've been hearing about.

2 This case would never have even come
3 before the Court if Justice Alito had not
4 actively solicited in his prior opinions.

5 The commission should condemn this
6 form of judicial activism.

7 Second, a growing perception among
8 litigants that they must retain one of a small
9 number of lawyers who are almost exclusively
10 employed by corporate law firms in order to
11 receive a fair hearing in the Court.

12 That perception was reinforced by an
13 excellent piece of investigative reporting
14 published by Reuters in a law review article by
15 Professor Richard Lazarus, the former director of
16 the Georgetown Supreme Court Institute.

17 Reuters found that 66 of 17,000
18 private lawyers who petitioned the Supreme Court
19 in a ten year period succeeded in obtaining cert
20 grants at six times the rate of other lawyers.

21 That is increasingly troubling as the
22 number of cases heard by the Court continues to

1 decline.

2 The argument stage.

3 Reuters' investigation found that
4 eight lawyers, all men, accounted for 20 percent
5 of all the arguments before the Court, a
6 dominance that is increasing over time.

7 So why is this of concern? Three
8 reasons.

9 First, there's a growing perception
10 that the Court and its bar are a closed, elite
11 club, and that personal relationships may
12 influence outcomes.

13 Second, the experience and knowledge
14 of those lawyers and what they bring to the Court
15 is narrow, as is the range of clients they agree
16 to represent.

17 Typically their experience is limited
18 to years in the Solicitor General's Office and in
19 private firms representing corporations.

20 Members of the Supreme Court bar
21 ordinarily will not represent parties with
22 interests adverse to their corporate clients.

1 Reuters quoted one member of the bar
2 acknowledging, quote, we are generally conflicted
3 from representing individuals in litigation
4 against corporations.

5 They are typically suing our clients
6 or perspective clients.

7 This growing dominance of the
8 corporate bar -- Supreme Court bar has played an
9 important role in shifting the Court's
10 jurisprudence against working people and in favor
11 of corporations.

12 Third, the Supreme Court bar lacks
13 other crucial types of diversity.

14 Reuters reported that 66 members of
15 the bar -- of those 66 members of the bar, 63
16 were white and only eight were women.

17 Here I have a possible solution for at
18 least at the cert stage.

19 The submissions should be stripped of
20 any information identifying counsel.

21 Similar to common procedures of blind
22 review of submissions to most academic journals,

1 blind grading of law school exams, and blind
2 auditions for symphony orchestras.

3 Research conclusively demonstrates
4 that a non-blind review of submissions to law
5 reviews, for example, leads to what's called
6 prestige bias.

7 It makes it harder for women to
8 publish and undermines the credibility of those
9 journals.

10 Blind review is fair and less subject
11 to bias, conscious and unconscious.

12 By similarly implementing blind review
13 of petitions for cert, the Supreme Court could
14 reduce the potential for bias and favoritism at
15 that increasingly critical stage.

16 There it would be judged based on the
17 power of the arguments and not the names on the
18 cover.

19 That would help mitigate inequities
20 and access to justice stemming from the position
21 occupied by the Supreme Court law.

22 Thank you, and I look forward to your

1 questions.

2 CHAIR RODRIGUEZ: Thank you, Mr.
3 Becker.

4 Our next witness is Curt Levey, who is
5 the president of the Committee for Justice. Mr.
6 Levey, you have the floor.

7 (No audible response.)

8 CHAIR RODRIGUEZ: You're on mute, Mr.
9 Levey.

10 MR. C. LEVEY: Can you hear me now?

11 CHAIR RODRIGUEZ: Yes.

12 MR. C. LEVEY: Great. Thank you for
13 this opportunity to testify.

14 The non-profit organization that I
15 have, the Committee for Justice, has been
16 involved in each of the last seven Supreme Court
17 confirmation battles, or eight if you count
18 Harriet Miers.

19 We're an advocacy group that promotes
20 constitutionally limited government and promotes
21 judicial nominees who will strictly interpret the
22 Constitution and statutory text.

1 And I've been struck recently by how
2 many progressives -- so, basically on the
3 opposite side of the spectrum from me and my
4 organization -- now describe the Court as
5 undemocratic and too powerful, feeling that it
6 intrudes into issues that are better left to
7 democracy.

8 It wasn't long ago that when one heard
9 such characterizations of the Court, they
10 typically came from conservatives.

11 And, you know, now there seems to be
12 agreement on that, for what it's worth.

13 You know, I realized that people do
14 not agree on, you know, which cases would fall in
15 that category.

16 Progressives will typically point to
17 relatively recent cases like Citizens United or
18 Shelby County or Bush v. Gore, whereas
19 conservatives' concerns about judicial activism
20 go all the way back to at least to the Warren and
21 the Berg reports.

22 For any Supreme Court reform to have

1 a realistic chance of being enacted, it will need
2 to pour it from conservatives, and winning that
3 support I think will require all of those on the
4 commission who aren't conservatives to understand
5 what troubles conservatives about the Court, even
6 now when there are five or six, you know,
7 conservatives on it.

8 And as one of this commission's more
9 conservative witnesses, I hope that I can
10 contribute something by helping to answer that
11 question.

12 I think the answer about why
13 conservatives are unhappy with the Court boils
14 down to the living Constitution.

15 There may be a conservative majority
16 on the Court.

17 I mean, we'll know more after we see,
18 for example, what Justice Barrett does, but
19 American life continues to be governed by a
20 significant number of important Supreme Court
21 precedents pertaining to issues ranging from
22 religious liberty and the death penalty, to

1 abortion and same-sex marriage, that resulted
2 from progressives' living Constitution approach
3 to judicial interpretation.

4 Under that approach, the Constitution
5 is seen as an evolving document rather than a
6 fixed contract between the American people and
7 their government that can be changed only with
8 the Democratic consent of the amendment process.

9 And conservatives don't like that.

10 They believe it leads to unrestrained
11 judicial power, in particular, a one-way ratchet
12 that is used to advance values, reflective of the
13 nation's elite, and in service of a decidedly
14 progressive policy agenda that, you know, often
15 lacks the wide public support necessary for
16 Democratic enactment.

17 Now, my point is not to deny that
18 judges across the ideological spectrum have their
19 biases, both personal and political, all human
20 beings do.

21 There just simply are no constraints
22 when judges use the living Constitution approach.

1 And I think, you know, we've seen that
2 the result is a more polarized society. Probably
3 the most famous example is, you know, Roe and its
4 progeny.

5 You know, they're emblematic of the
6 way in which the living Constitution, you know,
7 leads to overreaching judicial decisions that
8 aren't really grounded in the text, and that in
9 turn begets not just deep dents in the Supreme
10 Court's legacy, but also the sort of societal
11 polarization that has brought us here today.

12 Now, you know, the transformation of
13 the Supreme Court confirmation process into a
14 political circus is something that's now been
15 going on for a long time, at least since Judge
16 Bork was defeated in 1987, but I see it as a
17 symptom rather than a cause.

18 Again, I think the cause is the
19 Court's unwarranted intrusion into political and
20 cultural issues and, you know, we've now had more
21 than three decades, as I say, and things are only
22 getting worse.

1 It's spread to Appeals Court nominees,
2 and, you know, to quote the late Senator John
3 McCain, the surest way to restore fairness to the
4 confirmation process is to restore humility to
5 the Federal Court law.

6 I'm not naive to think that, you know,
7 that's going to be easy.

8 I am sympathetic to anything that
9 might disempower the Court a bit, but I'm also
10 skeptical.

11 I worry that, you know, anything that
12 is seen as political meddling will make the
13 problem worse, not better.

14 The one thing I think I could support
15 would be a constitutional amendment that
16 prohibits court packing.

17 That would fix the number of justices
18 on the Court at nine, for example, and take it
19 out of the realm of politics, and there is such
20 an amendment, the Keep Nine Amendment that has
21 been introduced in the House and Senate, and it
22 has a lot of sponsors.

1 Finally, I should say that I'm not
2 against all reform.

3 I do think there's a number of things
4 that can be done to the Senate confirmation
5 process. It can be shortened.

6 We certainly don't need four day long
7 confirmation hearings like we have now, and the
8 whole process itself I think would be better if
9 it was shorter.

10 I didn't think that before the Barrett
11 nomination, but I think it went, you know, so
12 quickly that there wasn't as much time for
13 mischief, and I'd like to see that be the case
14 with both Democratic and Republican nominees, and
15 I also am certainly sympathetic, you know, if the
16 details are right, to have something that makes
17 it harder for nominees to not get serious
18 consideration.

19 And admittedly, that was done to
20 Justice Garland five years ago now.

21 I don't think any rules or norms were
22 broken because of the fact that it's typical that

1 when there's a vacancy in the final year of a
2 presidential term, and the Senate and president
3 are controlled by the same party, that the person
4 is confirmed, and when they're not, the person
5 typically isn't confirmed.

6 But that doesn't mean that we're stuck
7 with that norm, and I would support something
8 that guaranteed or at least made it highly likely
9 that nominees would get a fair hearing.

10 I think I'll stop there because I'm
11 probably over my five minutes.

12 CHAIR RODRIGUEZ: Thank you, Mr.
13 Levey. Our next witness is Sharon McGowan, who's
14 the chief strategy officer and legal director of
15 Lambda Legal.

16 Ms. McGowan, the floor is yours.

17 MS. MCGOWAN: Thank you, Co-Chair
18 Rodriguez.

19 Throughout our nearly 50 year history,
20 Lambda Legal has litigated in federal and state
21 courts, including multiple times in the U.S.
22 Supreme Court, to realize more fully the

1 Constitution's promises of liberty, equality, and
2 justice for LGBTQ people and everyone living with
3 HIV.

4 My written testimony speaks to the
5 significant damage that has been done to the
6 credibility of the Court in recent years, and
7 offers five recommendations to improve both the
8 public's confidence in our federal judicial
9 system and the system's ability to function
10 effectively.

11 First, institute a binding code of
12 ethics for the Supreme Court.

13 Second, continue the practice of
14 livestreaming oral arguments to the Court.

15 Third, limit the use of the Court's
16 shadow docket to shift legal doctrine without the
17 transparency of full briefing, amicus
18 participation, and oral argument.

19 Fourth, create additional safeguards
20 in capital cases, especially where anti-LGBTQ or
21 other forms of bias may have infected the
22 proceedings below.

1 And fifth, expand and diversify the
2 bench of the lower federal courts.

3 In this statement, I wish to emphasize
4 just a few key points.

5 First, instituting a code of ethics
6 for the Supreme Court is long overdue.

7 There is no reason why the justices
8 should not commit publicly to avoiding not just
9 the fact, but also the appearance of partiality
10 or impropriety, and to limiting their extra
11 judicial activities to only those that are
12 clearly consistent with the obligations of
13 judicial office, which necessarily excludes
14 political activity.

15 The lack of a formal system of
16 accountability for the Court has contributed to
17 increasingly brazen and disturbing behavior, some
18 of which happens in public view, and some behind
19 closed doors.

20 A system of pure self-regulation is
21 plainly inadequate. Reform is needed to restore
22 faith and the fairness of the institution.

1 Second, an ethics code alone will not
2 resolve the grave concerns about how the Court
3 has been commandeered to serve an extreme,
4 reactionary agenda.

5 The commission should not dismiss any
6 proposal, excluding expansion, that could
7 reposition the Court as the trusted top guardian
8 of the rule of law and protector of civil rights.

9 There is nothing sacrosanct about the
10 number nine.

11 We also urge the commission not to buy
12 into the argument that any attempt to reform the
13 Supreme Court will initiate a political arms
14 race.

15 Efforts to ideologically recast the
16 Court began years ago, and there's no reason to
17 believe that those determined to use the Court to
18 roll back rights will relent or forgo options to
19 advance their objectives, particularly as their
20 ability to do so through more Democratic means
21 lacks popular support.

22 Today's imbalance came from repeated

1 flouting of good-faith and checks and balances,
2 and that makes reform important.

3 Finally, I would like to respond to
4 those who say, who is the LGBTQ community to
5 complain about the Court? You all have made out
6 just fine in recent years.

7 Some even point explicitly to the
8 Court's 2015 Obergefell marriage decision as
9 rebutting all claims that fixing is needed.

10 First of all, let's start by putting
11 some of the key constitutional cases in their
12 proper context.

13 Romer, Lawrence, Windsor and
14 Obergefell.

15 Each case dealt with laws that
16 unabashedly targeted LGBTQ people for
17 mistreatment or legal disadvantage.

18 Less than 20 years ago, the existence
19 of criminal sodomy laws not only harmed those of
20 us living in the 13 jurisdictions where those
21 laws were still on the books, but created an
22 environment nationwide in which other

1 discrimination against us was viewed as
2 legitimate and to be expected.

3 As for marriage equality, we are still
4 repairing damage caused by the blatant
5 discrimination against same-sex couples and their
6 children, which existed until only recently in
7 our laws.

8 For example, we are fighting now on
9 behalf of LGBTQ widows and widowers who are still
10 trying to access the safety net of Social
11 Security survivor's benefits because although
12 they paid into the system, they were denied the
13 ability to marry, in some cases for decades and
14 in other cases, altogether.

15 The commission should reject any
16 attempt to recast the narrative of our ongoing
17 struggle for equal citizenship as somehow netting
18 out shocking and devastating recent decisions of
19 this Court that have stripped force and meaning
20 from many of our core guarantees of equality and
21 freedom.

22 Furthermore, we are facing a Supreme

1 Court whose membership has been manipulated for
2 the express, albeit not exclusive, purpose of
3 reading LGBTQ people out of the Constitution once
4 again.

5 A Court packed with jurists who
6 publicly proclaimed their belief that stare
7 decisis means little when it comes to the key
8 case as establishing our rights, and who are
9 willing to upend longstanding constitutional
10 principles to reestablish what they believe to be
11 the proper social and moral order.

12 Current members of the Court currently
13 endorse calls of a well coordinated campaign
14 determined to gut critical protections against
15 discrimination through a weaponization of
16 religious liberty arguments.

17 Meanwhile, transgender children and
18 their families must flee across state lines to
19 escape laws that criminalize their healthcare or
20 exclude them from school athletics.

21 We recognize that on the Court's
22 current course, we may be about to enter a period

1 similar to the years following Bowers v.
2 Hardwick, when for all practical purposes, the
3 constitutional door had been slammed in our face.

4 To be clear, Lambda Legal will never
5 stop demanding full equality and civil rights for
6 our community.

7 The question, however, is whether the
8 Supreme Court, and our federal courts more
9 broadly, will be a place where our laws' promises
10 have any real meaning for LGBTQ people.

11 Thank you so much for inviting me
12 today, and I look forward to your questions.

13 CHAIR RODRIGUEZ: Thank you, Ms.
14 McGowan.

15 Our final witness for this panel is
16 Dennis Parker, who's the director of the National
17 Center for Law and Economic Justice.

18 Mr. Parker, the floor is yours.

19 MR. PARKER: Good afternoon. Thank
20 you for this opportunity to submit testimony.

21 My name is Dennis Parker and I've had
22 the honor of serving as executive director of the

1 NCLEJ for the past two and a half years.

2 When I joined NCLEJ, I became part of
3 an organization, which for nearly 60 years has
4 fought to advance the cause of economic justice
5 and racial justice, particularly for individuals
6 and communities who have historically been denied
7 opportunity and power, especially people of
8 color, low income people with disabilities, and
9 low wage workers.

10 From its founding in 1965, NCLEJ has
11 been in the forefront of legal and legislative
12 efforts to recognize and enforce the rights of
13 those denied the most basic access to the
14 opportunities of American civil life.

15 Participating in landmark cases such
16 as Goldberg v. Kelly, NCLEJ was instrumental in
17 bringing cases that resulted in basic equal
18 protection and due process to public assistance
19 recipients, thereby assuring that access to the
20 safety net upon which these clients' survival
21 depended, could not be arbitrarily denied or
22 interfered with by the state.

1 In the decade since, NCLEJ has
2 advocated for increased access to public benefits
3 while expanding the rights of workers engaged in
4 agriculture, home healthcare, restaurant, and
5 other low-paying industries, pregnant women
6 facing employment discrimination, public housing
7 residents exposed to health hazards resulting
8 from severe mold conditions, and indigent people
9 assessed with unfair and illegal fines and fees.

10 Too often, our clients share a general
11 lack of access through no fault of their own to
12 employment, housing, healthcare, education,
13 public safety, and the opportunity to live a full
14 and productive life, and as a result of a
15 combination of unfair policies and practices.

16 Also shared is the inability to
17 address adequately this inequality through a
18 resort to the justice system.

19 We believe that a significant part of
20 the failure of the Court system to be responsive
21 to the needs and rights of our clients stems from
22 the lack of representation in the courts,

1 including the United States Supreme Court.

2 In our written submission, we
3 highlight the absence of diversity on the current
4 Court.

5 We recognize and believe in the need
6 for many different types of diversity, but focus
7 on two particular types in our submission,
8 professional and racial diversity, because these
9 are two areas in which there has historically
10 been a particularly striking absence of
11 diversity.

12 We do not believe that white justices
13 who have not worked in legal services or non-
14 profit organizations are incapable of being fair,
15 but we do believe that it is important to have
16 people with different experiences on Courts
17 considering matters which will affect everyone.

18 Our submission sets forth specific
19 suggestions to start to address the lack of full
20 and Democratic representation in the Supreme
21 Court and other federal courts, a diversity that
22 reflects the full diversity of the nation as a

1 whole, and can give meaning to the words equal
2 justice under law, which are the words inscribed
3 over the entrance of the Court.

4 A corporate or a government attorney
5 might have very different perspectives on
6 questions of standing or class action
7 certification than would public interest
8 attorneys who have experienced the way that
9 heightened pleading standards and increasingly
10 stringent class action requirements impose
11 extreme burdens on those with the greatest need
12 and the least resources, and may effectively
13 amount to slamming shut the courtroom doors to
14 those people.

15 Judges who are members of groups who
16 experience or represent people who experience
17 discrimination could be expected to bring a
18 different perspective, a perspective painfully
19 absent in Courts filled with justices and judges
20 who deny the continuing existence of
21 discrimination and systems which carry the
22 effects of past discrimination into the present

1 and future.

2 A failure to reflect those differences
3 in experience erode the very legitimacy of the
4 Courts.

5 Also undermining the legitimacy of the
6 Courts is the absence of clear standards and
7 enforcement of disqualification of justices for
8 conflicts of interest.

9 A Supreme Court which lacks diversity
10 of background and disproportionately reflects the
11 interests of the most powerful invites the
12 conclusion of bias when one of its members fails
13 to recuse him or herself in cases where there
14 is the appearance of a conflict regarding a
15 particular group of people.

16 Finally, the extent to which political
17 considerations have replaced sound
18 jurisprudential ones, then the appointment of
19 Supreme Court justice further threatens the
20 legitimacy of the Court and substantially
21 threatens the ability of marginalized groups to
22 protect previously recognized rights and

1 recognize new ones.

2 That threat becomes particularly
3 important when the tax on the ability of the
4 already marginalized to vote continue to be real
5 and growing.

6 For these reasons, we respectfully
7 submit that exploring the consideration of terms
8 for Supreme Court justices would be one way of
9 mitigating the impact of political gamesmanship
10 in the selection of Supreme Court justice.

11 This is an especially important time
12 for consideration of the functioning and purpose
13 of the Supreme Court and the lower federal
14 courts.

15 We're still in the midst of a pandemic
16 which has exacted a much harsher toll on
17 communities and individuals of color.

18 Whether as it relates to healthcare,
19 mortality due to COVID-19, likelihood of facing
20 eviction, loss of employment, BIPOC and
21 low-income people have suffered
22 disproportionately.

1 Rectifying those inequalities which
2 were revealed in the pandemic will fall in large
3 part on the Courts, particularly the Supreme
4 Court.

5 Whether that Court will be up to the
6 task will depend on its success in making it into
7 an institution which is accountable to and caring
8 for all of the people in the country. Thank you.

9 CHAIR RODRIGUEZ: Thank you, Mr.
10 Parker.

11 At this point, I'll ask the
12 commissioners who will be asking questions to
13 turn on their cameras. Okay.

14 So, we will begin with Guy-Uriel
15 Charles, who's the Charles Ogletree, Jr.
16 professor of law at Harvard Law School.

17 Commissioner Charles, it's all yours.

18 COMMISSIONER CHARLES: Thank you.
19 Good afternoon to all and thank you so much for
20 your wonderful written and oral testimony.

21 So I'll begin my initial round of
22 questions by directing it to Mr. Becker and Mr.

1 Levey.

2 First, Mr. Becker.

3 So I was taken by parts of your
4 testimony on the question of access and the
5 relationship between those who argue at the Court
6 and the cert process and the development of law
7 and doctrine.

8 And I wanted to invite you to say a
9 little bit more about that.

10 You didn't get a chance in your oddly
11 short oral testimony to talk about it, so I want
12 to invite you just to expand a little bit more
13 about that, and then to also expand on what you
14 think the solutions could be, particularly what
15 this commission can do.

16 At least as I understood the proposal
17 blind cert review solution, it seemed to be more
18 hortatory to the Court, and so then it's not
19 clear sort of like what structurally can be done,
20 but I wanted to see if you had any more thinking
21 about it?

22 So if you wouldn't mind expanding on

1 both aspects of the question, I'd appreciate it.

2 Thank you.

3 MR. BECKER: I appreciate the
4 opportunity very much to expand.

5 You know, as someone who's teaching
6 law, and I've dabbled in that arena myself, I
7 think we would just unquestionably agree that
8 blind grading is fairer than fully open grading,
9 not knowing the identity of the students whose
10 exam you're grading.

11 And not even intentional blinds but
12 unintentional blinds.

13 The student who was most articulate in
14 class, and then you see the blue book with that
15 student's name on it, you can't avoid thinking
16 that that exam is likely to be a more superior
17 exam.

18 So, in all these areas, I think we
19 would clearly agree that it's fair to have a
20 blind review process, grading.

21 Akin to article submissions to
22 journals, orchestra auditions.

1 And the research confirms that
2 conclusively in all those areas, that blind
3 review is fair in grading, it's fair in
4 acceptance of articles, and even in the rather
5 unusual context of orchestra musicians, not being
6 able to see the musician allows the judges to
7 judge the quality of the sound, and has led to a
8 significant increase in the number of women
9 musicians accepted to major symphonies.

10 So I think, you know, our instincts
11 and the research are all absolutely clear that
12 this would be a fairer system.

13 The solution is not perfect.

14 Of course, you can't hide who argued
15 a case in the Court of Appeals, you obviously
16 can't hide the identity of the parties. Those
17 are important facts.

18 But you can hide the identity of
19 counsel and I think that would be appropriate to
20 allow the power of the argument to speak and not
21 the familiarity of the names on the petitions.

22 As to how it would be implemented, I

1 think first of all it would be important just for
2 this commission to surface the idea, which I
3 think has not been part of the debate, unlike
4 some of the other larger issues that we've been
5 hearing about.

6 But to say, you know, here's a process
7 which we know is fair in all these contexts and
8 which should be used by the Court, and at least
9 urge the Court to adopt it would be an important
10 first step, and you know, the other thing I would
11 say about the *rasa matus* proposal is even
12 individual justices could do it.

13 So perhaps individual justices would
14 say, I want to make sure that I'm not influenced
15 by the name on the cover, and they say and I'm
16 going to review the submissions blind.

17 So I think even surfacing an idea and
18 urging it upon the Court would be important.

19 COMMISSIONER CHARLES: Thank you, I
20 appreciate it.

21 Mr. Levey, I appreciate your
22 perspective and helping us to understand the

1 importance at least of considering multiple
2 perspectives, and understanding that consensus
3 may be important to future reform.

4 So I have also a two part question for
5 you.

6 One is just I want to get a better
7 understanding between the problem as you
8 understand it, and then also to think about what
9 are solutions to the problem?

10 So as I understand your articulation
11 of the problem, it is the substantive rules and
12 the way that the Court has engaged itself
13 substantively in all areas of our lives.

14 Now presumably, now so there's six
15 conservative justices on the Court.

16 Presumably that ought to mean that the
17 method of interpretation ought to make the
18 probabilization less acute.

19 So I'm wondering if you share that, if
20 you think that's true?

21 And then I want to explore a little
22 bit more what the solutions are that you would be

1 willing to entertain because it didn't seem like
2 there were very many that you would be willing to
3 entertain.

4 So for example, what about the code of
5 judicial ethics, turns out Ms. McGowan talked
6 quite a bit about in her testimony?

7 So are there solutions beyond the
8 status quo that you would be willing to
9 entertain?

10 If we're looking for common ground,
11 what would that common ground be?

12 (No audible response.)

13 COMMISSIONER CHARLES: Once again,
14 you're muted, sir.

15 (No audible response.)

16 COMMISSIONER CHARLES: Mr. Levey,
17 you're muted.

18 MR. C. LEVEY: There we go. I was
19 just trying to say that given your affiliation, I
20 wanted to point out that Professor Ogletree was
21 one of my favorite professors in law school.

22 Really cared about his students and

1 just a generally good guy, in addition to being
2 so smart.

3 I'm trying to remember your first
4 question because you asked a few.

5 Oh, I think the first question was now
6 that we have six conservative justices -- I don't
7 know that we have six conservative justices.

8 Certainly conservatives haven't viewed
9 Roberts as a conservative in recent years, and
10 I've seen polls indicating that liberals like him
11 more than conservatives do at this point.

12 Republican presidents don't have a
13 stellar track record of picking conservative
14 justices.

15 I think Democrat presidents have done
16 a very good job of that. It's been more spotty
17 with Republican presidents.

18 It still remains to be seen how
19 conservative Kavanaugh is and how conservative
20 Barrett is, but I would certainly hope that going
21 forward, we'll see less of the living
22 Constitution type approach that conservatives

1 have been complaining about since the Warren
2 Court.

3 But, you know, there are all these
4 precedents that still remain around and I don't
5 expect them to go away.

6 Look, you know, I guess I am skeptical
7 that we're going to be able to rise above the
8 difference in judicial philosophies.

9 I would love it if progressives would
10 give up the idea of the living Constitution, the
11 idea that it's their job to help the Constitution
12 evolve.

13 Like I said, I think it's standardless
14 and just basically functions as a one-way
15 progressive ratchet, which is, you know, one
16 reason that conservatives don't like it.

17 I'm not sure that that's going to
18 happen voluntarily, and, you know, the next bet
19 would be just to take some power away from the
20 Court.

21 I mean, there's a variety of proposals
22 for doing that, jurisdiction stripping,

1 Congressional override, requiring a supermajority
2 of justices in certain types of cases.

3 And again, I am sympathetic to that,
4 especially the requirement for a supermajority.

5 I just worry that if we make any
6 change it could very well make the problem worse,
7 the problem being a perception that the Supreme
8 Court is political and it will function as a
9 camel's nose under the tent where, what might
10 seem like a reasonable reform now will beget a
11 more radical reform, you know, once you set the
12 precedent that Congress can fiddle with the
13 structure of the Court.

14 So, did I answer your questions?

15 COMMISSIONER CHARLES: From the chair.
16 Yeah.

17 MR. C. LEVEY: I hope.

18 CHAIR RODRIGUEZ: Okay, thank you.
19 Thank you, Commissioner Charles.

20 We will next hear from Nancy Gertner,
21 who is a senior lecturer and the former U.S.
22 district judge for the district of Massachusetts.

1 COMMISSIONER GERTNER: Thank you.

2 It's a pleasure to be here,
3 particularly as someone who has gone through the
4 confirmation process as described in previous
5 panels.

6 But let me sort of draw a larger focus
7 on all of the panelists to today.

8 Much of the discussion before has been
9 on the importance of change because of changes
10 distortions in the confirmation process because
11 the Republicans change the rules.

12 Yeah, with respect to the filibuster.

13 Republicans changed the rules with
14 respect to the timing of confirmation with a
15 Garland appointment, or the lack of a Garland
16 appointment.

17 So that just sort of focuses on the
18 ways in which the procedure has been broken.

19 You all are focusing on the ways in
20 which the substance has been broken.

21 You're all talking about anti-labor,
22 three of you are talking about anti-labor, anti-

1 voting rights, anti-LGBTQ, pro-corporate.

2 Tales of this Court, Mr. Levey was
3 talking about that it's insufficient originalist,
4 and that's a problem with the Court.

5 Substantive criticisms of the Court
6 leading then to procedural change, raising more
7 questions than procedural criticisms of the Court
8 leading to procedural change.

9 In other words, the notion that the
10 Court is already broken with respect to the
11 Garland appointment or lack thereof, with respect
12 to the way the three Trump appointees made it
13 through.

14 That's one set of criticisms that said
15 we need change.

16 Your criticisms are -- or do they are
17 more I don't like the outcomes. And that's a
18 very different genre. Let me start with Ms.
19 McGowan.

20 I don't disagree with your criticisms
21 of the Court, the question is whether that should
22 be the trigger for change, or whether that raises

1 exactly the kind of tit for tat problem exactly.

2 There's so many ways people have
3 described it, which is, you know, Constitutional
4 hardball.

5 Just using your criticisms of the
6 substance of opinions to trigger change, isn't
7 that dangerous?

8 MS. MCGOWAN: Thank you so much for
9 the question, Commissioner Gertner, because I
10 actually think it really kind of gets to the
11 heart of the fact that the two are in this case
12 very much sort of intertwined, and one of the
13 things that we talk about is the legitimacy of
14 the Court is a function both of the substantive
15 outcomes in cases, but also a perception about
16 whether or not the system is fair and the people
17 participating in the system can be trusted to be
18 fair and impartial.

19 And I think one of the things that
20 really struck me from earlier testimony was, you
21 know, a conversation about judicial independence,
22 and we absolutely support the notion of an

1 independent judiciary, and we know that in many
2 circumstances, you know, we have seen dangerous
3 attacks on the independence of the judiciary.

4 The Fair Courts Project of Lambda
5 Legal was founded in response to judicial recall
6 of three of the justices of the Iowa Supreme
7 Court, notwithstanding there was a unanimous and
8 bipartisan decision recognizing marriage equality
9 for same-sex couples.

10 But it's important that we not lose
11 the fair when we talk about fair and independent,
12 and that is part of what I think is so disturbing
13 about the way in which the process has been
14 manipulated for a very clearly substantive ends.

15 And so, it is not just sort of a
16 concern about the substantive direction in which
17 the Court is going, although I do think part of
18 what is really troubling about the substance are
19 the ways in which the substantive rulings --
20 particularly in the area of voting right -- but
21 in other areas as well, have really made it much
22 more difficult for other aspects of our

1 Democratic process to work effectively because we
2 know that the Court is not a non-political
3 entity.

4 Obviously the president has the power
5 of appointment, the Senate has the power of
6 confirmation, but the extent of which we have
7 seen a radical sort of overriding, a changing of
8 the rules mid-game to ensure permanent victory.

9 You know, Lambda Legal's not afraid of
10 litigating in front of Republican judges. We
11 need fair judges.

12 We need judges who do not come to the
13 bench already selected and chosen because of
14 their stated commitment to sort of write us out
15 of the rules of the game.

16 And so that is where I would sort of
17 push back a little bit on the fact that this is
18 not just a purely substantive concern, although
19 obviously I'm here today.

20 You know, not normatively, you know,
21 sort of ambivalent about where I believe sort of
22 LGBTQ people should fit in our Constitutional

1 structure, but I do think there are the
2 procedural sort of machinations that have
3 resulted in a lack of credibility that thus then
4 also sort of puts the substantive concerns into
5 greater relief and call for urgent responses in
6 this moment, as well as some longer term
7 planning.

8 COMMISSIONER GERTNER: Again, we've
9 been coming up with metaphors with each of the
10 hearings, and so, there is the break the glass
11 moment.

12 There's tit for tat or break the glass
13 moment. You're a break the glass person it
14 sounds like. We're at a break the glass moment.

15 MS. MCGOWAN: I think that we have
16 seen a number of decisions that dramatically have
17 shifted sort of the ability of our Constitutional
18 democracy would work.

19 You know, and I think that, you know,
20 we can sort of put together a series of decisions
21 --- you know, somebody include Citizens United.

22 I think we would include Hobby Lobby

1 compared with Citizens United in terms of the
2 sort of elevation of corporate rights, you know,
3 in this democracy, plus the elements that have
4 come with the suppression of the votes, and that
5 the capacity to suppress democracy.

6 I do think that we are in a place
7 where to just sort of act as though we are going
8 to sort of stand down and leave the status quo
9 really undermines and downplays the great damage
10 that has been done.

11 COMMISSIONER GERTNER: But you're in
12 favor of expanding the Court to 13.

13 And I believe in your testimony you
14 said one of the reasons was you were trying to
15 come up with a number that would not admit of
16 another number in the next administration.

17 This tit for tat problem -- and so you
18 said the 13 would make sense because there are 13
19 circuits, and each of the justices would
20 presumably be, you know, the circuit judge.

21 Isn't that a little bit of a
22 contrivance? The judges don't really ride

1 circuit anymore.

2 There are relatively minor -- not
3 minor cases, but not very many cases come up
4 through their capacity as the circuit judge, so,
5 is that really a way of keeping, you know, having
6 this from not being this year and next year it'll
7 be -- the next administration will be 20 because
8 it is a little bit of a contrivance.

9 MS. MCGOWAN: So Commissioner Gertner,
10 let me just clarify it, Lambda Legal is not
11 endorsing expansion of the Court to 13 to just
12 sort of offer our perspective on what are the
13 options that are viable.

14 And from our perspective, expansion of
15 the Court is perhaps the most clearly
16 constitutional option on the table, whether or
17 not that in and of itself sort of is either
18 politically reliable, or will resolve the larger
19 issues that were are calling the commission's
20 attention to.

21 That was sort of the purpose of that.

22 To the extent that we've sort of

1 offered 13, you know, having a grounding in the
2 circuits offers a potentially limiting principle
3 but again, as we also say in our testimony, I
4 don't think that a recommendation from this
5 commission that there shouldn't be expansion
6 would prevent expansion down the road from those
7 who believe as though they need to capture the
8 Court to continue to pursue their political
9 agenda.

10 So that was that context in which
11 those comments were made.

12 COMMISSIONER GERTNER: So I want to
13 ask, Mr. Becker, so there are the big reforms?

14 Thirteen term limit reforms, and then
15 your testimony was intriguing because you were
16 also talking about second level reforms.

17 Your comments about the Supreme Court
18 bar were very interesting.

19 Essentially, the broader question is
20 look at all the channels that lead to the cases
21 that the Court considers, and all the channels
22 that lead to who's on the Supreme Court.

1 All the roots and they seem to be one
2 and the same.

3 It was not just a question of concern
4 about the diversity of the stripping Court bar.
5 Implicit in your testimony was the notion that
6 expertise was really only on one side.

7 It's not just the judges know them,
8 it's that this expertise is, for the most part,
9 available to only side of the equation because
10 the disqualification rules would keep a Supreme
11 Court practitioner in a big firm from
12 representing individuals.

13 I'm representing individuals that have
14 challenged corporations.

15 How do you reform Supreme Court
16 diversity? Would you imagine Supreme Court bar
17 diversity?

18 Can you imagine, you know, rules about
19 who can practice? How would you imagine taking
20 care of that?

21 MR. BECKER: I agree with the premise
22 of your question that it's not an easy problem

1 because it's caused by many different factors but
2 I would argue a little bit with the premise of
3 your question, which is that expertise is only on
4 one side.

5 I think it's a very narrow type of
6 expertise, which is not only on one side, and
7 that increasing dominance of lawyers holding that
8 narrow form of expertise I think has
9 been deleterious to the way the Court decides
10 cases.

11 They bring certainly a comfort with
12 the Court because of their experience there, and
13 the facility with a kind of formal legal
14 analysis.

15 But they don't bring a depth of
16 expertise in the substantive areas, or working
17 with the types of clients many of us represent.

18 In the area in which I work, they
19 don't bring substantial expertise, knowing how
20 labor unions function, how they represent working
21 people.

22 What are the challenges facing working

1 people?

2 So I think they bring to the Court
3 precisely the type of expertise the Court doesn't
4 need.

5 The Court knows how to read cases.
6 The Court has very smart clerks who know how to
7 read cases.

8 What the Court needs is a broader
9 perspective and the depth of expertise about what
10 these cases actually mean when they decide them.

11 You know, if you look at the labor
12 cases again, just speaking from my own
13 perspective, they've become increasingly formal
14 and arid documents without a real appreciation
15 for what those decisions mean.

16 So I'd think it's a serious problem,
17 not only because we don't have access to those
18 lawyers, but what the dominance of those lawyers
19 means for the Supreme Court's decision-making.

20 You asked the solutions. Obviously
21 that's complex.

22 I offered a modest solution, but I do

1 think, you know, increasing awareness of what
2 this dominance means.

3 You know, I think one of the central
4 problems that your commission is grappling with
5 is the legitimacy of the Court.

6 So to go to the first question you
7 had, sir, it's not simply that we don't like the
8 outcome.

9 It's that those outcomes are
10 predictably produced by the same divisions over
11 and over. Right?

12 No one can possibly believe what
13 Justice Roberts said, and I'm just calling balls
14 and strikes, when every time the same umpire see
15 it as a strike, and every time the other umpire
16 sees it as a ball.

17 It's causing the Court to lose
18 legitimacy. That's what's important.

19 It's not simply the outcomes, but the
20 predictable part of some nature of the outcomes.

21 I think that's really the challenge
22 that you face, and I think, you know, naming them

1 is important.

2 Surfacing possible solutions, this is
3 important. Even if we can't get to those
4 solutions in the year currently.

5 CHAIR RODRIGUEZ: Thank you,
6 Commissioner Gertner.

7 I will now turn to Caroline
8 Fredrickson, who's the distinguished visiting
9 professor from practice at Georgetown Law, and a
10 senior fellow at the Brennan Center for Justice
11 at the NYU School of Law. Commissioner
12 Fredrickson?

13 COMMISSIONER FREDRICKSON: Thank you
14 so much, Co-Chair Rodriguez, and thank you to
15 all the witnesses for providing me a very
16 illuminating testimony today.

17 It's extraordinarily helpful to our
18 process, and I think as Commissioner Gertner
19 said, you know, it's also a really important
20 iterative process to have the success of panels
21 touching on similar but also distinctive
22 approaches to how to or whether to reform the

1 Court.

2 And I want to direct my question now
3 to Mr. Parker, and I would say, Mr. Parker, thank
4 you so much for your very helpful submitted
5 testimony.

6 I want to ask you a question, so we
7 really haven't talked so much about the ethics
8 and code of conduct.

9 In addition to touching on a number of
10 other issues, which I hope we can get to, you do
11 say in your statement that the ABA code of
12 judicial conduct is not binding on the Supreme
13 Court justices, and that, well, litigants can
14 make a motion requesting that a justice recuse
15 himself or herself.

16 There's no right to appeal the
17 justice's decision and decisions are typically
18 quite brief.

19 If parties ultimately find themselves
20 arguing in front of an obviously biased Supreme
21 Court justice, they have no recourse at all.

22 The result of this lack of clarity,

1 transparency, and accountability is that recusals
2 happen inconsistently.

3 Unclear and unenforceable recusals
4 standards have been a source of controversy
5 throughout the history of this country, but some
6 recent examples are demonstrative of the problem.

7 Can you speak a little bit about this
8 issue and in particular, how it affects the other
9 issues that you have raised about the lack of
10 diversity on the Court and the need for and
11 diversity of all kinds?

12 As you mentioned in your statement,
13 diversity of practice area, as well as diversity
14 of demographic background, and so, do these
15 things go together at all, and if so, how?

16 MR. PARKER: Thank you very much,
17 commissioner, for your questions, and they do
18 very much go together.

19 I recall a client once who losing a
20 case against a large financial institution
21 thanked me for the work that we had done and
22 said, but we never expected to win because of who

1 was on the other side and who was deciding the
2 case that we were in front of the Court on.

3 And that's really at the heart of the
4 issue.

5 The question isn't one of whether or
6 not we're not happy with the outcomes, it's a
7 question of whether the system itself is
8 legitimate and appears to be legitimate.

9 And certainly in an instance where
10 someone is appearing before a justice or an issue
11 is being decided by a justice, of someone who has
12 had, who has benefited personally from receiving
13 money from one of the parties, whose family
14 members are deeply involved in the issue, that
15 invariably leads to a sense that the deck is
16 stacked against people who have historically been
17 excluded from the Courts.

18 And that's one of the reasons for the
19 importance of the diversity.

20 One way of looking at it is to turn
21 the question around and ask, what would be the
22 harm of having a more diverse Court?

1 What would be the harm of having
2 justices subject to what seem like very common
3 sense and basic rules about conflicts, and what
4 would be the benefit?

5 And the benefit would be a Court where
6 it appears and is more open, where the rules are
7 clearer, and where your chances of prevailing are
8 not based on who your lawyer is or who you are,
9 what your past experience has been.

10 The diversity we're talking about, the
11 accountability we're talking about, is
12 particularly important for people who do not see
13 themselves reflected on the Courts, who have not
14 seen instances where people like them are prevail
15 in the cases, and who have a sense that the
16 justice system has not included them
17 historically.

18 And certainly everything we've seen
19 over the last year has highlighted that as a
20 problem.

21 When people look at a criminal justice
22 system that operates very differently against

1 people of color, then they question the
2 legitimacy of the broader system, and that's
3 really where we are historically now in this
4 country.

5 We have to find ways to make sure that
6 the Supreme Court and the federal courts
7 represent or include everyone in the country, not
8 just a relatively small number of privileged
9 people.

10 COMMISSIONER FREDRICKSON: Thank you.
11 Thank you for your very fulsome answer. I'd like
12 to continue on certain issues that you've raised
13 to ask you.

14 I mean, you clearly articulated the
15 benefits of a diverse judiciary, as well as the
16 benefits of ethics rules and transparency and
17 accountability in restoring perhaps.

18 Some might find that a strong word,
19 but certainly shoring up the credibility of the
20 Court, the Supreme Court and the federal courts
21 generally.

22 Do you have ideas or suggestions that

1 the commission might consider about mechanisms
2 that one might adopt or recommend, or certainly
3 at least surface in any report we might put out,
4 that would advance the ability to have a more
5 diverse judiciary?

6 Are there particular proposals that
7 you think could help the process function in a
8 way that didn't seem to eliminate so many highly
9 qualified candidates who don't fit the
10 traditional white male mold?

11 MR. PARKER: I think that the Courts
12 really have to undergo the same kind of self-
13 examination that every other industry and every
14 other part of the country has in an effort to
15 become more diverse, in an effort to reverse the
16 impact of prior discrimination.

17 And that is recognizing that that, the
18 practices that have been used tend to reinforce
19 the pattern of exclusion that has occurred
20 historically in this country.

21 And so, you know, I have certainly
22 heard about the different standards that are

1 perhaps unconsciously applied -- and we've seen
2 this in confirmation hearings -- the fact that
3 someone who has been an ardent civil rights
4 advocate somehow makes them less likely to be
5 fair and less likely to be able to decide on the
6 law.

7 There are so many things that are
8 disadvantages to being appointed a judge,
9 otherwise, how would you explain the absence of
10 people who have the kinds of backgrounds that we
11 are talking about?

12 People who have the experience in
13 legal services, in representing the interests of
14 poor people, who have the experience either
15 themselves or their clients, of experiencing
16 racial discrimination.

17 We have to assure that that never
18 becomes a disadvantage in terms of approval for a
19 position in the Court.

20 So examining both explicit and
21 implicit bias in the process, affirmatively
22 trying to increase the number of people who come

1 from diverse practices.

2 These are things which have been in
3 place, in unemployment and in education, and in
4 other practices, for a very long time. It's time
5 for the Courts to do the same.

6 COMMISSIONER FREDRICKSON: Not to put
7 words in your mouth, but I'm presuming perhaps by
8 your not suggesting the statute, or some kind of
9 more affirmative requirement, that this is
10 something you see as the Courts need to take on
11 voluntarily because of separate of powers issues
12 or simply because there's no other adequate
13 mechanism?

14 Is that what you would suggest?

15 MR. PARKER: I'm certainly not
16 excluding the possibility of a statute, but I am
17 just saying starting at the point of recognizing
18 that what we have now is a system that's not
19 representative, and it's not merely a matter of
20 chance.

21 It's not, you know, 50 dices rows that
22 come up 12.

1 It is policies and practices that have
2 resulted in the exclusion of a significant number
3 of people in this country.

4 COMMISSIONER FREDRICKSON: I
5 appreciate that, thank you, and if I could just
6 add one more thing?

7 And maybe you can comment on this in
8 our few remaining seconds.

9 Which is the clerkship process which
10 obviously funnels into some of what Mr. Becker
11 was talking about in terms of the kind of
12 limiting Supreme Court bar and the kind of
13 expertise that the Court seems to require seems
14 to reinforce, not just at the Supreme Court
15 level, but throughout the course where we had
16 almost no information about the diversity of the
17 law clerk, but the clear outcomes that are
18 available to law clerks of higher pay and greater
19 advancement, and then becoming Supreme Court
20 litigators themselves seems all of a piece with
21 what you were saying.

22 MR. PARKER: That's absolutely

1 correct. I think you can look at the pathways to
2 clerkships, and the subsequent pathways to
3 judicial positions.

4 It is a pathway that is still too
5 limited in terms of the schools people come from,
6 in terms of the backgrounds and the experience
7 that the people have had.

8 And all of that has to be considered.

9 There are great lawyers who would make
10 wonderful justices from many different law
11 schools with many different types of experience,
12 and we're not tapping that now.

13 CHAIR RODRIGUEZ: So we have 15
14 minutes left, which means we can go through a
15 second round of questions, and each of the
16 commissioners will have five minutes if they'd
17 like to use it.

18 I'll return to you, Commissioner
19 Charles, to see if you have any further questions
20 you'd like to pose?

21 COMMISSIONER CHARLES: Sure. If I may
22 start with Ms. McGowan? On the tit for tat

1 problem.

2 You said in your testimony that, look,
3 it's overblown, and we, you know, and shouldn't
4 be a barrier to reform, but of course we're
5 living in a context that is extremely and highly
6 polarized, and then all this panel -- in fact, I
7 think all of you have testified to that effect,
8 and which reforms, no matter what the reform.

9 So what advice might you have for the
10 commission to try to think through the reception
11 of potential reforms or non-reforms?

12 In a world in which everything is
13 polarized and which tit for tat is a realistic
14 possibility, how should this commission think
15 about these sets of questions?

16 MS. MCGOWAN: Thank you so much,
17 Commissioner Charles.

18 I think my comment again about not
19 shying away from considering these proposals
20 merely because it might trigger something else.

21 The goal here is to just be clear that
22 nothing this commission does or does not do is

1 going to take away sort of the political
2 incentives that -- we have seen one side of the
3 ideological spectrum very willing to use and kind
4 of use again and again to ensure sort of a
5 permanent sort of calcification of a view of law
6 in the Courts, and part of what I think is sort
7 of motivating.

8 Some of the calls for expansion of the
9 Court right now is because it is the most
10 immediate thing to potentially sort of stop that
11 in its tracks, and could potentially sort of
12 create conditions in which, you know, voting
13 reform, other things can actually kind of restore
14 some of what has been lost that has actually
15 allowed for the level of polarization to exist.

16 I mean, one question is, you know,
17 thinking about how can we really talk about Court
18 reform without actually having a conversation
19 about what is happening in the Senate, and the
20 undemocratic way in which the Senate currently is
21 sort of operating by design, and is that then in
22 fact sort of, you know, the place where we

1 realized that there are going to continue to be,
2 you know, challenges to this entire sort of
3 enterprise?

4 So I think that there are certainly
5 certain things, and part of why we placed so much
6 emphasis in our testimony on some of these other
7 proposals as well is because Court expansion in
8 and of itself is not sort of a permanent solution
9 because it's always going to depend on who is
10 selecting it, how they're selecting it, and we
11 know that there has been one party who has made
12 very clear that they're comfortable using their
13 power to not confirm justices, and we had a
14 revision in the size of the Court to eight for
15 more than a year.

16 So it is very clear that these are
17 political realities, but again, you know, when we
18 talk about in judicial ethics and the expectation
19 that we need to find new ways to demand a
20 fairness and impartiality, that in some way sort
21 of is the gloss that we would use over sort of
22 this larger conversation, you know, to make sure

1 that, again, nobody is sort of expecting that
2 they are going to win all the time, but when an
3 entire sort of, you know, bench has been stacked
4 with people who are selected precisely because
5 sort of the way in which, you know, that they are
6 going to sort of adopt a philosophy that writes
7 core, you know, elements of our Democratic
8 constituency sort of out of the Constitution.

9 You know, that is why I think we are
10 seeing the level of response right now calling
11 for something that will immediately recalibrate
12 that so that we can then have sort of the larger
13 conversations about other things that might be
14 necessary to change the political context in
15 order to move to perhaps a less highly polarized
16 environment.

17 Again, like I said, this is not about
18 us, you know, only sort of wanting judges that
19 are guaranteed to come out in our favor.

20 We litigate in front of Republican-
21 appointed judges all of the time, and we have
22 success a lot of the time because we apply the

1 law, we build a factual record, we do the work,
2 and we are willing and eager to make the case in
3 front of a judge who hasn't already been selected
4 by guaranteeing the result in the case as a
5 condition of their taking their oath.

6 CHAIR RODRIGUEZ: Commissioner
7 Gertner, do you have any further questions?

8 COMMISSIONER GERTNER: I have
9 questions for Mr. Levey.

10 Do I take your point to be that we
11 don't need major change on my typography of --
12 you know, major change versus little change?

13 We don't need major change if the
14 Supreme Court sort of cabined itself, restricted
15 itself to an originalist philosophy, a textualist
16 philosophy.

17 Then they will stay in their lane.
18 Isn't that in conflict with your view, though?

19 I think you put it that, for most of
20 the past 40 years, the Supreme Court decisions
21 have been in the service of the liberal elite.

22 So of course an originalist won't go

1 out of its lane, except with respect to undoing
2 the precedent that came from that, quote, liberal
3 elite? Isn't that a problem?

4 (No audible response.)

5 COMMISSIONER GERTNER: You're not on.

6 (No audible response.)

7 CHAIR RODRIGUEZ: You are still muted.

8 COMMISSIONER GERTNER: We still can't
9 hear you.

10 (Simultaneous speaking.)

11 MR. C. LEVEY: Yes, I mean, you're
12 right.

13 There's now been, you know, starting
14 with the Warren Court, 60 years of the living
15 Constitution being used to push the law in a
16 progressive direction.

17 And while there are certainly, on the
18 conservative side, you know, there have been, you
19 know, politically influenced decisions, you
20 haven't had this sort of, you know, freewheeling,
21 making things up out of whole cloth that you have
22 had with the living Constitution.

1 So yes, if we go back to a more
2 textualist, originalist approach, it would
3 ultimately undo some of it, although, you know,
4 there's a debate about where a precedent kicks
5 into all of this.

6 But I really do have to push back
7 against the idea that, you know, we're dealing
8 with some sort of right-wing Court here. Look at
9 just this term that ended.

10 I mean, progressives were unhappy with
11 the decisions on the final day of the Court, but
12 before that, everyone was talking about how this
13 has been a surprisingly moderate Court with all
14 kinds of interesting configurations other than
15 the predictable 6-3 or 5-4.

16 In the previous term, conservatives
17 were bitterly disappointed by what we saw in June
18 with the Bostock decisions, the census decision,
19 an abortion decision.

20 I think conservatives were angrier
21 than liberals at what this supposedly
22 conservative Court did in that term, and the term

1 before that.

2 Kavanaugh's first day on the Court,
3 you know, I remember there being more liberal
4 than conservative victories.

5 So, you know, this idea that we're
6 dealing with this far-right Court, or that
7 there's something illegitimate about Republican
8 presidents appointing conservatives, both parties
9 try to skew the Court in their direction.

10 Now, in the case of Democrats, I think
11 it's toward the living Constitution, and in the
12 case of Republicans I think it's towards
13 textualism and originalism, but the idea that one
14 side is trying to manipulate the composition of
15 the Court and the other isn't or that one side is
16 using hardball tactics.

17 I mean, look what was done to Justice
18 Bork, look what was done to Justice Thomas, look
19 what was done to Justice Kavanaugh -- I shouldn't
20 have said Justice Bork because of course he never
21 became a justice.

22 We just haven't seen that being done

1 to Republican nominees.

2 I am sympathetic the situation with
3 Garland, but, you know, I'm not sure which is
4 worse.

5 Not getting a hearing or being treated
6 like, you know, you're an evil Nazi at your
7 hearing, such that you wind up not even being
8 sure that it was all worth it.

9 So again, at the end of the day, I
10 don't think you have to worry about wiping out
11 many of the precedents that certainly --
12 Obergefell, you know, there's not a chance in the
13 world that that would be wiped out.

14 Even with the Court as it is now, I
15 don't think you're going to see -- I'm virtually
16 certainly you wouldn't see Roe overturn.

17 It might be constrained a little bit,
18 but not overturned.

19 I remember when federalism cases were
20 big. Everyone said, oh you know, it's just a
21 matter of time before statutes.

22 Some of the big civil right statutes

1 are, you know, said to be not within the commerce
2 clause. That never happened.

3 Conservative justices tend to be
4 conservative.

5 They tend not to make things up out of
6 whole cloth, they tend not to completely overturn
7 precedent.

8 So I really don't think that you have
9 to worry about that.

10 COMMISSIONER GERTNER: Let me follow
11 up with Mr. Becker's testimony because -- Mr.
12 Becker, you obviously disagree with that because
13 you were describing, I believe it was in your
14 testimony, the way in which an overturning
15 precedent lurked as a theme in many decisions,
16 even decisions this year, so just you wait, we
17 will be able to deal with this in the next case.

18 In fact, we went through the story of
19 was it Abood, in which Justice Alito was
20 essentially inviting people to challenge the
21 precedents, the long 40 year precedent.

22 You want to speak some more about

1 that?

2 Are you a sanguine, as is Mr. Levey?
3 That, you know, an originalist court won't need
4 any more reforms than that because they'll stay
5 in their lane.

6 MR. BECKER: Well, as I said, we're
7 all realists now and I don't think anybody
8 honestly believes that you can read the
9 Constitution.

10 Originalists with, there's only one
11 way to read it. It's just not true, and I think
12 we all know that.

13 In the world in which I live, you can
14 just look at the data.

15 There's a very compelling article by
16 Eric Posner and two colleagues who found
17 empirically that this is the most low-corporate
18 anti-worker Court in history, in modern history,
19 and that two or three of the most pro-corporate
20 anti-worker justices are sitting on this Court.

21 So there has been a sea change, but
22 that's not the question.

1 The question is the increasing
2 predictably partisan nature of the Court.

3 It used to be 40 years ago that you
4 couldn't predict how justices would come out in
5 labor cases, Republican or Democrat. Now you can
6 absolutely.

7 So I don't think, you know, going back
8 to your original question, you can't think about
9 tit for tat here. The Court is losing legitimacy
10 right now.

11 We can't stand still. It's important
12 to the rule of law in this country that the Court
13 not be seen as simply another partisan
14 institution.

15 And while that's a very difficult
16 problem, you have to come up with solutions that
17 are going to speak to the moment and that are
18 going to speak to the problem that we have right
19 now, and that are going to be compelling to the
20 public.

21 Yes, there's a chance that one side
22 does it, then the other side does it.

1 The only way to counter that is the
2 soundness of the proposals which you endorse, and
3 the way they speak through this moment and the
4 preservation of the rule of law before the
5 Supreme Court.

6 CHAIR RODRIGUEZ: Commissioner
7 Fredrickson, I'd like to give you the last two
8 minutes and 20 seconds to pose a question.

9 COMMISSIONER FREDRICKSON: Great.
10 Well thank you.

11 That's very hard because I had so many
12 questions that I would love to pose, but in the
13 short time we have, I want to go back to Mr.
14 Parker because one of the things we didn't talk
15 about is the issue of term limits, that also is a
16 recommendation in your statement.

17 And again, I want to sort of bring it
18 back to some of the broader issues that you
19 raised about the question of the credibility of
20 the Courts and the perception of fairness or
21 bias.

22 How does term limits play into that,

1 if at all, or are there other kind of normative
2 reasons why you believe that term limits might be
3 an important reform to be considered?

4 MR. PARKER: I think term limits need
5 to be considered because the situation that we're
6 in now is actually a very good example of the
7 importance of it, where you have a Court that has
8 been disproportionately filled by one particular
9 administration, the Trump administration, and the
10 effects of the number, the sheer number of judges
11 will continue to be felt long past the time when
12 the administration is over.

13 That, and particularly when you
14 consider the things that we've been talking
15 about, the attempts that have politicized the
16 Court, that really contributes to the lack of
17 legitimacy for the Court where it is not truly a
18 representative Court, and we don't have an exact
19 suggestion.

20 We know that there are a number of
21 ways out there that would consider ways that
22 would make it possible to bring in new members on

1 a more regular basis and to not lock the Court
2 into a particular position for decades, which is
3 what is in essence what is happening now, and
4 making the Court an institution that is
5 completely separated from what is going on in the
6 rest of the country.

7 CHAIR RODRIGUEZ: Thank you so much,
8 Mr. Parker, and thanks to all of the other
9 witnesses.

10 We know how valuable your time is and
11 we really appreciate your insights here, and also
12 your written testimony.

13 We will now take a lunch break, and
14 we'll reconvene at 2:00 for a panel with a group
15 of scholars who will discuss term limits and
16 turnover on the Court, picking up on it at 2:00.

17 We'll see you soon.

18 (Whereupon, the above-entitled matter
19 went off the record at 1:00 p.m. and resumed at
20 2:00 p.m.)

21 CHAIR RODRIGUEZ: Good afternoon. I'm
22 happy to welcome everyone again, Commissioners

1 and the public alike, to our fourth panel of the
2 day where a group of scholars will discuss term
3 limits and turnover on the Court. At this
4 moment, I'd ask the witnesses to please turn on
5 their cameras. Professor Amar, are you there?
6 Wonderful.

7 MR. AMAR: Yes.

8 CHAIR RODRIGUEZ: Welcome, everybody.
9 Each of the four witnesses will have three to
10 five minutes to provide opening statements, after
11 which we'll turn to a panel of three
12 Commissioners for questioning. I will call on
13 the witnesses in alphabetical order, but ask
14 everyone else their complete biographies are on
15 the Commission website as is their written
16 testimony. And so I'll begin with Professor
17 Akhil Amar who's the Sterling Professor of Law
18 and Political Science at Yale University.
19 Professor Amar, you have the floor.

20 MR. AMAR: Distinguished co-chairs,
21 distinguished Commissioners, thank you. Five
22 quick points, here is my proposal. In the

1 future, each Supreme Court appointee should do 18
2 years of active service followed by a lifetime on
3 the Supreme Court itself of relaxed service.

4 Relaxed service justices, also known
5 as emeritus justices, would generally not sit en
6 banc with active service justices but would
7 perform other Supreme Court functions,
8 administrative, educational, ceremonial,
9 advisory, and more, the precise duty roster to be
10 established and occasionally revised by the
11 active service justices. New justices would join
12 the Court every odd year. And the system would
13 be phased in purely prospectively.

14 Two, this is not a partisan political
15 proposal. I first endorsed it in 2002 when a
16 Republican, George W. Bush, was president and
17 Republicans controlled the Senate. I'm a
18 Democrat, and my co-author back then was a
19 Republican, indeed the co-founder and co-chair of
20 The Federalist Society.

21 Versions of this proposal have been
22 endorsed over the last two decades by leading

1 scholars across the spectrum, including the
2 eminent scholars David Shapiro and Paul Mishkin,
3 co-editors of the canonical Hart and Wechsler
4 case book. Three, a general idea of 18 years of
5 active service has many advantages as several
6 other witnesses have acknowledged. I catalogued
7 18 distinct advantages in my written testimony.

8 Four, my proposal is easily and
9 obviously constitutional as a mere statute. It
10 does not require a constitutional amendment. It
11 recognizes a single office, and it simply
12 modifies the duties of that office purely
13 prospectively. It's closely akin to rules of
14 procedure that are universally understood as
15 constitutional and indeed no different in its
16 essence from laws dating back to the first
17 Congress supported by James Madison, signed into
18 law by George Washington, and enforced without
19 objection by every early justice, including John
20 Marshall and Joseph Story.

21 Fifth and finally, my proposal is
22 strictly speaking not a term limit. A justices

1 serves on the Court for life, gets paid for life,
2 holds a formal office, a Supreme Court justice,
3 for life, and does various kinds of Supreme Court
4 work for life. Some casual observers have
5 expressed concern about the idea that relaxed
6 service emeritus justices might ride circuit and
7 thus might need a separate judicial commission
8 creating certain technical constitutional
9 complexities.

10 If this were an issue, the circuit
11 riding feature in the proposal can be eliminated
12 altogether. But in fact, the circuit riding
13 feature is an echo of the Judiciary Act of 1789.
14 The law and custom today plainly permits Supreme
15 Court justices to sit on lower federal courts by
16 designation.

17 Thus, Chief Justice Rehnquist sat by
18 designation in the mid-1990s while also serving
19 as Chief. At least 11 retired justices since
20 1937 have sat by designation and in effect have
21 ridden circuit, to wit, Justices Van Devanter,
22 Reid, Burton, Clark, Stewart, Powell, Brennan,

1 Marshall, White, O'Connor, and Souter. See
2 generally 28 USC Section 294. I welcome your
3 questions. Thank you.

4 CHAIR RODRIGUEZ: Thank you very much,
5 Professor Amar. Next we will hear from Tom
6 Ginsburg who is the Leo Spitz Professor of
7 International Law, and the Ludwig and Hilde Wolf
8 Research Scholar at the University of Chicago
9 School of Law. Professor Ginsburg, please.

10 MR. GINSBURG: Thank you, Chair. And
11 it's an honor to be with everyone at the
12 Commission today. My end goal on this discussion
13 is a comparative one. My academic work is on
14 constitutions and judicial systems around the
15 world, and I've worked with a number of
16 governments and international organizations on
17 constitutional design and judicial reform.

18 And so you might begin by saying,
19 well, why is that relevant? What does the rest
20 of the world have to offer us? American
21 exceptionalism, of course, is a longstanding
22 trope in our national discourse. And it's true

1 that we do have the world's oldest constitution,
2 now 233 years old.

3 But my view is that looking around the
4 rest of the world can tell us something. The
5 issues before the Commission today about the
6 balance between judicial independence and
7 accountability, how to produce a responsive, high
8 quality legal system are important concerns in
9 many countries. And I submit that were we to
10 start drafting the U.S. Constitution anew, there
11 is no way we would have true lifetime tenure for
12 Supreme Court justices.

13 No other country has it. While many
14 other countries do nominally provide for lifetime
15 service or service during good behavior, every
16 one of these has an age limit or a mandatory
17 retirement age. And many other Supreme Courts
18 which do not have lifetime tenure do have term
19 limits. I offer the example of Mexico where
20 justices serve for 15 years.

21 Constitutional courts of the kind that
22 the Commission heard about in its first hearing

1 typically have term limits between 9 and 12 years
2 most commonly. And significantly, many of these
3 institutions are considered to be highly
4 independent. Now as a social scientist, I have
5 to report that measuring judicial independence
6 cross-nationally is a very tricky endeavor, and
7 the U.S. tends to score highly. But other
8 countries like Germany, Australia, Finland, and
9 Japan do so as well with limited terms and
10 rotation on the highest court.

11 Pointedly, I would point out that
12 there are only a handful of officials anywhere in
13 the world with true lifetime tenure: the Pope,
14 the Dalai Lama, 28 monarchs, and 9 justices of
15 the Supreme Court. And while some of those other
16 officials exercise only symbolic power, the
17 Supreme Court justices in our country have very
18 real power. Term limits make sense if you think
19 that there are others whose participation in the
20 job would not have necessarily any cost to the
21 institution.

22 And I believe that we do have many

1 lawyers in the United States of equal or similar
2 qualifications to those who do sit on the Court.
3 And furthermore, as others have talked about, the
4 high stakes of appointments now have been
5 exacerbated by the fact that Supreme Court terms
6 are now longer, 25 years at least for those who
7 have retired since 1970. So just one additional
8 benefit I'd like to point out has to do with end
9 of life issues.

10 I am not a big fan of age limits. I
11 think that they're quite artificial. But it is
12 interesting to note that many of our Supreme
13 Court justices do serve a true lifetime term. Of
14 the 106 persons who have served as justices and
15 left the Court, nearly half have died in office.
16 And while some of those deaths are quite sudden
17 such as Justice Scalia, in many other case, they
18 may be accompanied by a decline in capacity which
19 really does affect the course of American law.

20 How long should the terms be? Well,
21 I'm perfectly happy with Professor Amar's
22 proposal. That seems to be the focal one. But

1 from my point of view, anywhere beyond 10 or 12
2 years would be sufficient to ensure judicial
3 independence. And I think the comparative
4 literature supports that.

5 Many American institutions have been
6 enormously influential around the world: the Bill
7 of Rights, judicial review. And many others have
8 not been borrowed: the Electoral College, the
9 Third Amendment. My view is interpreting good
10 behavior to provide for true lifetime tenure is
11 one of those institutions that have been rejected
12 by other countries that nevertheless have found
13 ways to ensure independent judges. We should
14 follow suit. Thank you very much.

15 CHAIR RODRIGUEZ: Thank you, Professor
16 Ginsburg. And now we will hear from Vicki
17 Jackson, who is the Laurence H. Tribe Professor
18 of Constitutional Law at Harvard Law School.
19 Profession Jackson?

20 MS. JACKSON: Thanks so much for the
21 opportunity to speak on these important topics.
22 Let me leap right in to say why I think it is

1 time to try to reform the Court's tenure
2 provision, three reasons. First, as you just
3 heard, we've learned from the experience of
4 foreign countries and also U.S. states.

5 A hundred years ago, our during good
6 behavior approach drawn from British law was also
7 in effect in Canada and Australia which, like the
8 U.S., are federal countries with written
9 constitutions and judicial review. All three
10 have highly independent national courts, yet
11 Canada and Australia adopted constitutional
12 amendments during the 20th century, establishing
13 mandatory retirement ages of 75 and 70
14 respectively.

15 In Hamilton's Federalist 78, he
16 explained that the most admired state court
17 systems then provided tenure during good behavior
18 no fixed retirement age. But now with judges
19 living much longer, all but one of our states has
20 either term limits or a retirement age. Judicial
21 independence remains vital, but it can be
22 achieved in other ways.

1 Second, there's a troubling gap
2 between public voting and national elections and
3 which parties' presidents have appointed members
4 of the Court. President Carter appointed no
5 Supreme Court justices in his four years.
6 President Trump appointed three. Since 1976,
7 there have been four four-year presidential terms
8 with no appointments. It had been very rare
9 before that.

10 The Court's legitimacy depends, in
11 part, on the indirect democratic input provided
12 by appointments. And very uneven distribution of
13 the opportunities for appointments reduces the
14 legitimacy derived from having political branches
15 involved in appointments to the Court. Finally,
16 constitutions are supposed to provide a framework
17 for peaceful resolution of disputes.

18 Losers of elections, of court cases
19 accepted the results because they trust the
20 overall fairness of the system. But the Court
21 structure now contributes, I fear, to doubts
22 about the overall fairness. So on what reforms

1 should be adopted, the 18-year nonrenewable
2 staggered term idea, a version of which we've
3 heard from Professor Amar, could be quite
4 effective, I think, in addressing serious
5 concerns, including uneven opportunities of
6 appointment.

7 But it could only be effective if the
8 Senate cooperates. And limited terms might call
9 for employment restrictions on those who leave
10 the bench after 18 years to avoid temptations to
11 skew judgment while in office. Moreover, there
12 may be tradeoffs between effectiveness and
13 feasibility.

14 Notwithstanding thoughtful arguments
15 that a statute would be constitutional for the
16 18-year terms, there are counter arguments that
17 it would be unconstitutional, that an amendment
18 would be required given the weight placed on
19 permanency in office at the framing and the
20 decline in power and prestige that the post 18-
21 year justices would experience. So I worry about
22 the feasibility of the proposal. A less

1 effective but perhaps more feasible approach is
2 for the Congress to use its undoubted power over
3 Court size to allow each president to appoint at
4 least one member every four-year term.

5 As several scholars have suggested,
6 this could occur not by limited justices' terms
7 but by allowing the number of seats on the Court
8 to float up or down. Under this approach, if
9 President Biden made one guaranteed appointment
10 this term, the Court's authorized size would go
11 to 10. In the next four-year presidency, a
12 guaranteed appointment could raise the Court size
13 to 11.

14 Now the Court size could be capped at
15 a specific number. You could require reversion
16 towards 9 once presidents make their own
17 appointment and other variations exist. But a
18 fluctuating Court proposal could, I think, be
19 adopted by statute and would improve over the
20 current situation.

21 More briefly, let me mention the
22 possibility of a mandatory or incentivized

1 retirement age. Any mandate to retire would
2 raise constitutional questions. But Congress
3 could try to incentivize retirements by pension
4 boosts, though their effects on wealthier judges
5 are uncertain.

6 On worries that a retirement age would
7 incentivize younger appointments, an alternative
8 to the minimum age idea mentioned in my written
9 statement might be a pension boost conditioned on
10 retiring at the earlier of either the end of a
11 fixed term of years, 18 or 20, or reaching a set
12 age, whichever comes first. This would, I think,
13 avoid creating incentives to appoint very young
14 people. I hope the Commission considers both
15 sets of ideas with a view to effectiveness and
16 feasibility, and I look forward to your
17 questions. Thank you.

18 CHAIR RODRIGUEZ: Thanks so much,
19 Professor Jackson. I'll now invite the
20 Commissioners slated to ask questions to turn on
21 their cameras. Excellent. Thank you. So we'll
22 start with Caleb Nelson, who is the Emerson G.

1 Spies Distinguished Professor of Law and the
2 Caddell and Chapman Professor of Law at the
3 University of Virginia School of Law.
4 Commissioner Nelson?

5 COMMISSIONER NELSON: Thank you, Co-
6 Chair Rodriguez, and thank you to the panelists
7 for taking the time to prepare such thoughtful
8 testimony. Professor Amar, I want to start with
9 one of the issues that Professor Jackson raised
10 in her oral testimony, the constitutionality of
11 the statutory time rules that you're proposing.
12 Just to make sure that we're on the same page, I
13 want to start this with a threshold question
14 about the office that judges who serve on the
15 Supreme Court hold.

16 You referred to the office of Supreme
17 Court justice. And the good behavior clause of
18 Article 3 does arguably refer separately to the
19 judges of the Supreme Court and the judges of
20 lower federal courts. And the Appointments
21 Clause of Article II specifically addresses the
22 appointment of what it calls, quote, judges of

1 the Supreme Court, close quote.

2 Do you agree that Supreme Court
3 justices need to be separately appointed to the
4 Supreme Court in particular so that the office
5 that they shall hold during good behavior is that
6 of being a judge on the Supreme Court? Or could
7 Congress establish a genuine term limit system,
8 not just your time rules but a system under which
9 an appointee as a judge of the Supreme Court only
10 for a set number of years and then becomes a
11 judge on a lower federal court for the rest of
12 the lifetime appointment? You're muted,
13 Professor Amar. I'm sorry.

14 MR. AMAR: Thank you, Commissioner.
15 I prefer the first approach. The second one
16 might be constitutional, but I think it raises
17 some concerns. I'm smiling because I remember
18 way back when, when you were a student of mine,
19 one of my best students ever in Fed Courts.

20 And I'm smiling also because I thought
21 of you uniquely when I modified maybe an earlier,
22 slightly more careless version of the idea that I

1 floated back in 2002 because I've been very
2 powerfully influenced by your idea about
3 liquidation, about paying close attention to the
4 early practices, especially of the first Congress
5 which had a lot of framers and ratifiers, laws
6 signed by none other than George Washington. And
7 I want -- my current version is I've tried to
8 structure it so it's virtually indistinguishable
9 from the first Judiciary Act in which people
10 received, I believe, one Commission as Supreme
11 Court justices.

12 They also rode circuit. That was
13 connected to their Supreme Court function of
14 bringing Supreme Court ideas to everyman's door
15 and in turn reporting back to their fellow
16 justices akin to nisi prius and the assize
17 system. But I think, why push the envelope? Why
18 stretch it if you can bring it into perfect
19 conformity with the early practice established by
20 the likes of James Madison, George Washington,
21 John Marshall, and for that matter, Joseph Story?

22 COMMISSIONER NELSON: Fair enough. So

1 let's assume that the Constitution does
2 contemplate a distinct office of judge of the
3 Supreme Court. And let's assume appointees are
4 entitled to hold that office during good behavior
5 without any fixed term.

6 Under the system that you're
7 proposing, everybody who's appointed to the
8 Supreme Court could stay in office for life. But
9 of course, the duties of that office would change
10 pretty dramatically after 18 years. I'm
11 wondering whether somebody who can no longer
12 participate in any of the Court's decisions,
13 unless perhaps there's a short staff situation,
14 is really still a judge of the Supreme Court in
15 the sense that the Constitution contemplates.

16 How should we think about that
17 question? Is the essence of being a judge of the
18 Supreme Court in the sense that the Constitution
19 contemplates just the title and the salary and
20 the existence of some official functions? Or
21 does it also include the authority to participate
22 in the Court's exercise of judicial power, its

1 decision of actual cases that come before the
2 Supreme Court?

3 MR. AMAR: So once again, I think back
4 to the early practice and the early liquidation.
5 I now understand in a way that I never did
6 before, Commissioner, why the original Supreme
7 Court size was six which is an even number. And
8 if you think it's all about a Supreme Court en
9 banc, that looks weird. Their most important
10 function at the founding was actually writing
11 circuit.

12 There were three circuits and divided
13 actually two justices per circuit. They were
14 spending most of their time actually on circuit,
15 not en banc. And that was an important part of
16 their function.

17 England lost -- Britain lost the
18 loyalty of America because actually the center
19 wasn't paying attention to the periphery. So
20 having justices on your central court out there
21 in circuit is a huge Supreme Court function,
22 central court function. Also, even if you're not

1 actually sitting en banc, you are permitted to if
2 the Court is short staffed.

3 But you're performing other public
4 educational, ceremonial, public service, docket
5 management if you like, advisory functions.
6 Supreme Court justices today do administrative
7 stuff. They testify before Congress. They meet
8 foreign diplomats. They show the flag. They
9 explain the Constitution to Americans and the
10 world.

11 Those are central Supreme Court
12 functions and especially if Congress wants those
13 to be front and center. And if the justices
14 themselves promulgate a sensible duty roster, it
15 seems to me in a real way and not just a formal
16 way, they are Supreme Court justices in every
17 way. And one person who agreed with me about
18 that was named John Marshall because actually he
19 took the position with the Jeffersonian repeal of
20 the judiciary of the Midnight Judges Act.

21 As long as justices got their salary,
22 all sorts of other things -- and their title, all

1 sorts of other things were totally negotiable.
2 That was John Marshall's own position, somewhat
3 formalistic. But I'm going beyond mere formalism
4 and paying attention to what the early practice
5 actually was.

6 COMMISSIONER NELSON: So with respect
7 to the historical liquidation, are there
8 historical examples of Congress passing statutes
9 that prevent justices from hearing any cases that
10 the Supreme Court decides? I mean, the circuit
11 riding practice gives additional duties to the
12 justices so that they sit on lower courts when
13 the Supreme Court isn't in session. But they're
14 also deciding Supreme Court cases. Are there
15 historical examples of Congress enacting statutes
16 that categorically exclude some categories of
17 justices from participating in the Court's merits
18 docket?

19 MR. AMAR: Well, there are recusal
20 rules, both regulatory and statutory, and not
21 just unique to the Supreme Court that do say,
22 you're not supposed to hear certain categories of

1 cases where you have a financial self interest.
2 And in a way, you can think of my idea as a
3 recusal rule of sorts. You could be generally
4 recused after you've had your fair -- your turn
5 at bat, so to speak, and let others do it. So I
6 do think it's akin to a certain kind of recusal
7 idea. So --

8 COMMISSIONER NELSON: To the extent
9 Congress does have the flexibility to do that,
10 could Congress establish other criteria for
11 stripping justices of the authority to
12 participate in the Court's merits docket besides
13 just length of service? I mean, what are the
14 constitutional limits on Congress' ability to
15 this sort of thing in your view?

16 MR. AMAR: Well, I take that word,
17 proper, very serious in the Necessary and Proper
18 Clause. And I think when we're thinking about
19 propriety, we can look at practices of other
20 democratic countries as my colleagues have
21 identified. That's not the only test, but let's
22 look at those things. Let's look at the states

1 and how they've done it.

2 And so here are things that, to me,
3 make it proper. It's not gerrymandered. It's
4 not pegged to someone's party. It's not treating
5 any justice differently than any other justice
6 possibly on the basis of congressional
7 displeasure with a past justice's ruling or a
8 justice's predicted ruling.

9 So there's a generality to it, a
10 prospectivity to it, a nonpartisan feature to it.
11 It's about future presidents, whether Democrat
12 and Republican in their appointment practices.
13 So I think in all of those ways, it passes a
14 Wechslerian neutral-principles idea, it seems to
15 me. And I do think we see versions of this sort
16 of thing in state Supreme Courts as my colleagues
17 have mentioned and in courts around the world.

18 COMMISSIONER NELSON: So Professor
19 Amar, you're a distinguished scholar, and your
20 judgment certainly carries a lot of weight with
21 me and with others. Of course, there are also
22 some distinguished scholars, including people who

1 support term limits as a policy matter who at
2 least have constitutional doubts about such a
3 statute or think it would be definitely
4 unconstitutional. Should Congress worry that a
5 statute adopting your proposal would lead to
6 destabilizing disputes about whether the Supreme
7 Court is properly constituted?

8 I can imagine pretty messy
9 disagreements about which justices should sit on
10 a case that involves the constitutionality of
11 such a statute or that involves whether the one
12 portion of the statute is separable from the
13 portion establishing new appointments. And no
14 matter how the Court answers those questions, I
15 can imagine some citizens and public officials
16 who had the opposite view might think that all
17 subsequent decisions issued by the Court are
18 tainted because the Court isn't properly
19 constituted. Should we worry about that?

20 MR. AMAR: Yes. But under the Rule of
21 Necessity, I think justices have always been
22 allowed to rule on issues, even if they make

1 relates to the jurisdiction of the courts and all
2 the rest. That's a general principle of law.
3 Honestly, many of the objections that have been
4 raised have been raised to earlier versions of
5 the proposals that are different than the one
6 that I'm offering today. It's much more
7 tailored.

8 So if Congress is serious about this,
9 I welcome the opportunity to testify with an
10 individual, another scholar or set of scholars.
11 And they can identify the specific concerns that
12 they have because I don't think actually the
13 current version is as vulnerable to a
14 constitutional criticism as some various other
15 incarnations, in fact, have been. But yes, we
16 should try to do this in a way that maximizes
17 legitimacy.

18 Remember also, I've been trying to
19 invite the existing active justices to be
20 participants in this proposal by giving them an
21 important regulatory voice in identifying what
22 they think are proper functions for relaxed

1 service emeritus justices. And it's very
2 important, I think, to get their buy-in into the
3 regime. That's one of the newer features of the
4 proposal that I put forth today which to repeat
5 is not the same as earlier versions that have
6 been floated, the Cramton-Carrington proposal and
7 others.

8 COMMISSIONER NELSON: Thank you.

9 CHAIR RODRIGUEZ: Thank you very much,
10 Professor Amar. Now we'll turn to Rick Pildes
11 who's the Sudler Family Professor of
12 Constitutional Law at NYU School of Law.
13 Commissioner Pildes, you have the floor.

14 COMMISSIONER PILDES: Thanks very
15 much. And first of all, I want to thank the
16 witnesses for your extremely helpful written
17 testimony as well as your time before the
18 Commission today in these hearings. So thanks
19 for that. Professor Ginsburg, let me start with
20 you. When we drill down into the specifics of
21 how any term limit proposal might be designed,
22 there are at least difficult issues that have to

1 be confronted.

2 A major advantage of these proposals
3 as their proponents put them forward is that they
4 would give each president roughly equal
5 opportunity to appoint the same number of
6 justices. Under the 18-year proposals, each
7 president, for example, would have two
8 appointments. The first difficult issue is one
9 that's been mentioned already, and I want to get
10 your thoughts on this, which is that for this
11 system to work as intended, we have to consider
12 the possibility that during divided government,
13 the Senate might not be willing to confirm any
14 nominee of the president. If that happened, it
15 would significantly undermine one of the purposes
16 for the term limit scheme.

17 I want to discuss the issue with you
18 in the context of a constitutional amendment for
19 term limits, not a statute. So in your written
20 testimony, you say that there are a myriad of
21 ways to design means to deal with the potential
22 impasse of this sort. And I'd like to ask you,

1 what are some of the more promising ways in your
2 mind for addressing that problem?

3 MR. GINSBURG: Thank you very much.
4 It's obviously a critical one. What do you do in
5 the case of obstruction in the process? And you
6 can't just assume that it will go smoothly.

7 Most other countries, especially
8 presidential systems where presidents are
9 appointing, do assume a kind of good faith on the
10 part of the legislative approval of the process.
11 But we do have some examples of institutional
12 design which explicitly contemplate
13 obstructionism. So actually in Mexico which I
14 mentioned, the president sends over three names
15 and the Senate chooses one of them.

16 And if the president -- if they reject
17 them entirely, the president gets to send over
18 more names, three more names. And if the Senate
19 again refuses to act or rejects them, then the
20 president as a default position can pick one of
21 those names. And that person will be placed on
22 the Court.

1 So that's a way of allowing
2 deliberation across the branches but also having
3 a kind of default position where one could get
4 around it if necessary. In Colombia, they have a
5 somewhat similar situation where the president
6 and the Supreme Court and the Council of State
7 each send three names over and the Senate choose
8 among them. So that's a kind of variant of
9 institutional design that one could look to.

10 Now you might imagine in our situation
11 that the Senate would just still refuse to act.
12 And so I think the broader problem to which you
13 are referring, I think we might be able to
14 grapple with even without a constitutional
15 amendment by sort of thinking about the
16 bargaining between the president and the Senate
17 in ways maybe Senate rules could deal with this,
18 for example, where the Senate rules would ensure
19 that the Senate Judiciary Committee could commit
20 to hearing a particular nominee in advance that
21 could be negotiated in advance one might imagine.
22 Or the Senate could give a list of people whom it

1 would presumptively confirm.

2 I mean, that could be done without a
3 major constitutional amendment where political
4 forces so inclined, not that I am saying that
5 they are at the moment. But I think there may be
6 some workarounds even short of constitutional
7 amendment. Once we move to constitutional
8 amendment as you suggest, then I think there are
9 ways of ensure that the process can go forward
10 notwithstanding obstructionism.

11 COMMISSIONER PILDES: One of the
12 proposals that's been made for dealing with this
13 issue is actually in Professor Jackson's
14 testimony. And I'll ask her about it separately.
15 But I want to get your reaction to it because
16 it's an idea I hadn't seen suggested before which
17 is if this impasse occurs, there are concerns
18 about the president having the default power and
19 essentially having unilateral power at that
20 point, or the Senate having the default in which
21 case the Senate can continue to block if that's
22 their policy choice.

1 Professor Jackson suggestion in the
2 case of an impasse giving the chief judges of the
3 Courts of Appeals of the United States the power
4 to appoint a justice if the Senate repeatedly
5 fails to confirm. Since we're talking about a
6 potential constitutional amendment here, that
7 option, of course, is a feasible option in
8 theory. I wonder what your reaction is to that
9 as sort of a bypass of both of the political
10 institutions in the context of a repeated impasse
11 over filling a term.

12 MR. GINSBURG: Yes, one might imagine
13 that it would come to pass quite often, certainly
14 in the current state of our politics. And I
15 don't think there's anything wrong with that. In
16 many, many judiciaries around the world which are
17 considered independent, judges play a really
18 important role in naming justices to the Supreme
19 Court, either through judicial commissions or, as
20 in the case of India which I discussed in my
21 testimony, actually they're designating who's
22 going to actually be a justice of the Supreme

1 Court. The sitting justices have a big role in
2 that.

3 And obviously, there's some risks with
4 that. And countries like Israel, we've seen that
5 debated with self appointing court. But the
6 proposal that Professor Jackson outlines makes
7 that a default, not the normal circumstance and I
8 think is an appropriate thing to do in an
9 instance of political impasse.

10 COMMISSIONER PILDES: Okay, thanks.
11 I'd like to shift to the second obvious difficult
12 issue that has to be confronted in designing a
13 term limit amendment. And again, let's think
14 about this in the context of the constitutional
15 amendment so we have more degrees of freedom
16 perhaps to try to solve these problems. And
17 that's the transition concern.

18 How do we get from a current Court
19 with lifetime tenured justices to a full Court
20 with 18-year term justices? And a couple of
21 suggestions have been offered to handle this
22 transition issue. One is that the most senior

1 justice would be required to leave on the sort of
2 third odd numbered year after the enactment of
3 such an amendment given the president will have
4 the power to appoint one justice in the first and
5 the third year of each term.

6 And that justice would then be
7 replaced by an 18-year term justice. So for
8 example, if this provision were adopted
9 constitutionally in 2022, the most senior justice
10 on the current Court would leave in 2027, the
11 next justice in 2029. That's one option that's
12 been discussed.

13 A second option is that the sitting
14 justices retain their positions and lifetime
15 tenure. When the amendment goes into effect,
16 presidents begin nominating 18-year term justices
17 in years one and three. And so for a time, the
18 Court expands and the number of justices would
19 fluctuate some. And you'd actually have even
20 numbered justices in some years potentially.

21 Those are two of the options that have
22 been put on the table for the transition issue.

1 I would benefit, and I'm sure the Commission
2 would from hearing your thoughts about either of
3 those. Or if you think there's a better approach
4 than one of those two, how you would design the
5 transition process.

6 MR. GINSBURG: Yes, I think one has to
7 distinguish what's constitutionally and
8 politically feasible from what's ideal. From an
9 idea point of view, I see no reason why one would
10 want to keep superannuated justices, right? And
11 my examples of basically religious institutions
12 and monarchies as the only people who have any
13 kind of power who serve for life indicates that's
14 probably not something we want to do.

15 With something like the law which
16 needs to be responsive and independently
17 exercised, finding ways to renew the Court is
18 really important in this particular milieu. So I
19 don't see any idea benefit from having a system
20 where we simply expand. On the other hand -- and
21 Professor Amar, Professor Jackson can speak more
22 to the constitutionality.

1 In terms of what is politically
2 feasible and constitutionally feasible, perhaps
3 that is a better approach or a more practical
4 one. I don't see a big problem with it.
5 Obviously, the Court's size would then be
6 indeterminate.

7 One would imagine that it would expand
8 and contract. And that would give rise to
9 interesting and perhaps unpredictable dynamics
10 within the Court where perhaps there would be
11 disagreements that cross generations or cross
12 eras of appointment. Those are very hard to
13 predict. But certainly as a second best, that
14 seems fine to me.

15 COMMISSIONER PILDES: Okay. And then
16 I think I'll waive the rest of my time because I
17 don't want the hearing to go on for too long. So
18 I'll stop here. And then there'll be a second
19 round of questions, and I'll continue there. So
20 thanks very much.

21 CHAIR RODRIGUEZ: We'll certainly have
22 time for a second round. But now my co-chair,

1 Bob Bauer, Professor of Practice and
2 Distinguished Scholar in Residence at NYU School
3 of Law, has the floor.

4 CHAIR BAUER: Thank you very much.
5 Professor Jackson, let me start with you. I want
6 to talk to you -- pursue again this whole
7 question of how we should be looking at the
8 constitutional versus statutory amendment
9 alternatives here. And I want to refer to your
10 written testimony where you talk about the legal
11 creativity of those who argue that a statutory
12 amendment is constitutional.

13 And you say you are somewhat doubtful.
14 Those are your words, somewhat doubtful that this
15 is possible given that it would be, and I'm
16 quoting you, a significant change from how the
17 tenure of Supreme Court justices has been
18 understood. So I wanted to ask you to respond to
19 Professor Amar on this point.

20 His argument would be -- and I
21 apologize, Professor Amar, I'm going to shorthand
22 this -- that it's been misunderstood and that

1 therefore this current understanding ought to
2 receive only so much weight if we take a close,
3 hard look at the history that he has described
4 and the reasoning that follows from a good grasp
5 of that history. So I wanted to get your
6 response to that and ask you, where do you fall
7 on the somewhat doubtful kind of spectrum here?
8 Are you very doubtful, maybe not so doubtful,
9 open to persuasion? Where do you stand on that?

10 MS. JACKSON: Thank you for the
11 question, Commissioner Bauer. I'm not sure
12 exactly where I stand. I am not arguing that the
13 statute would be clearly unconstitutional.

14 I don't think that. I think Professor
15 Amar and others have made very thoughtful
16 arguments for why it should be considered
17 constitutional. But I think there are, as I
18 tried to indicate, significant counter-arguments.

19 For one thing, current understandings
20 really -- it's not just today in 2021. It's over
21 the course of decades and centuries of
22 understanding of what those words in our

1 constitution have meant. And I get nervous about
2 throwing those things away, absent extremely
3 persuasive reasons.

4 Second, I re-read Hamilton's arguments
5 in Federalist 78 and 79 in preparing my
6 testimony. And I was struck by how powerfully he
7 argued permanency in office as a way of ensuring
8 that judges would not be worrying about what
9 their next job is. The worry about what the next
10 job is, I want to say, I think is not only about
11 salary which Professor Amar's proposal would take
12 care of.

13 It's also, I think, not only about
14 title. But rather I think it's also about power
15 and prestige. And I'm doubtful that judges
16 subject to the 18-year term idea which I think
17 has much to commend it. I should say that, much
18 to comment it as a policy matter. But I am
19 doubtful that judges serving under that regime
20 would feel as powerful and would be regarded as
21 prestigious as those who are in the active 18-
22 year phase of their term.

1 The last thing I'll say is that I also
2 have some generalized apprehension about making
3 changes to the office of Supreme Court justice
4 that would be regarded as adverse to the interest
5 of the holder of the office by statute. It's not
6 easy to enact the statute in the United States.
7 But it's much easier to enact statutes than
8 constitutional amendments.

9 And the world has unfortunately
10 provided us with vivid examples of countries that
11 at one time had really good independent courts
12 and vibrant democracies and then changes were
13 introduced. In Hungary, the retirement age of
14 judges which have been set at 70 was changed to
15 62 to get rid of a bunch of judges who were
16 particularly independent minded. And it took a
17 year -- over a year to sort out the legality of
18 that move during which time other judges were
19 moved into those positions so that the judges who
20 were kicked out eventually got back into some
21 sort of position.

22 But the independence of the court was

1 quite severely damaged. There's no particular --
2 Professor Amar's proposal or many of the others -
3 - that raises those concerns. It's prospective
4 only and so forth. But changing conditions to
5 the detriment of the interest of the holders of
6 the office by statute makes me more concerned
7 than doing it by constitutional amendment which I
8 think is entirely proper as long as it's
9 generalized and so forth.

10 CHAIR BAUER: Well, thank you. That's
11 helpful. Let me follow up on this whole question
12 of the impact of a statutory change. You also
13 say in discussing the risk the statute poses, and
14 I'm going to quote you from your written
15 testimony.

16 Comparative experience suggests that
17 statutory authority you change terms in
18 retirement age is at some risk of being abused
19 should a tyrannical party gain the presidency and
20 the Congress. And I think your larger point
21 being every time we move by statute, there's a
22 danger that you're with a political majority that

1 is taking advantage of the situation and what we
2 perceive, however high minded it believes its
3 objectives to be by its adversaries as operating
4 in its own interest.

5 But you also put forward a proposal
6 for a procedure which you described earlier for
7 giving presidents by statute the opportunity to
8 enlarge the Court by one, at least one in a term.
9 Once that door is open, don't you run exactly the
10 same risks? Wouldn't a proposal like that also
11 be subject to the view that tinkering with the
12 composition of the Court, even in a modified
13 form, presents the risk that you described in
14 your written testimony?

15 MS. JACKSON: It's a really great
16 question. And yes, you properly understood my
17 worries about statutes. But I think that the
18 power of Congress to adjust the size of the Court
19 overall is well established. And I think there
20 is some difference between action that
21 detrimentally affects the life of an individual
22 serving justice which I think the threat of which

1 might cause a reasonable justice to hesitate in
2 rendering a truly independent judgment.

3 There's a difference between those
4 kinds of actions, retirement, term limits with
5 respect to people sitting, and on the other hand,
6 the exercise of a power to expand the Court. I
7 have also written in my testimony against some
8 colleagues who have argued for what I would
9 regard as expansion of the Court to pack it. And
10 that, I think, while it might be well within
11 Congress' powers would be very, very unwise and
12 imprudent right now. But a proposal that would
13 regulatory give every president, whoever gets
14 elected, to a four-year term one appointment I
15 think does not raise those kinds of concerns at
16 nearly to the same degree.

17 CHAIR BAUER: Thank you. Thank you
18 very much. That's very helpful. So I'm going to
19 come back to you, Professor Amar, since I'm on
20 this question. And I'm going to ask you, if you
21 could, to come back because I wasn't sure that
22 you and Commissioner Nelson quite connected on

1 this point.

2 If I understood Commissioner Nelson's
3 question, it was, if we have any constitutional
4 doubt here, and certainly in the public to date,
5 the intensity of that doubt would be -- let's put
6 it this way. That would be intensely expressed
7 in the partisan give and take over the wisdom of
8 a particular proposal. I think he's raising the
9 question of whether proceeding by a statutory
10 amendment would have a destabilizing effect.

11 And in this hyperpolarized
12 environment, if we ever have any doubt about the
13 constitutionality of a proposal like this, then
14 we should go the constitutional route rather than
15 the statutory route. And I didn't fully
16 understand your response because I wasn't sure
17 the two of you were sort of on the same
18 wavelength on the question. So can I ask you to
19 come back to that?

20 Wouldn't -- even those who are very
21 sympathetic to your point of view are still, as
22 far as I can tell, coming away with the thought

1 that there is going to be a big argument about
2 this. You suggest you might bring people
3 together and bring them into a conversation and
4 be happy to testify before the Congress. But
5 there's going to be resistance on the merits of
6 the argument on the part of those who don't agree
7 with you. Is that not game, set, match for how
8 we want to make a change like this, that we want
9 to do it in a constitutionally accepted fashion
10 if there's any doubt about the statutory route?

11 MR. AMAR: It's very relevant. But
12 it's not game, set, and match because their
13 arguments would have to be actually, at the very
14 least, extremely plausible, maybe even extremely
15 good. And I've got to be honest. I haven't
16 heard anything yet.

17 I've heard objections to multiple
18 commissions. But you don't need that at all.
19 And we didn't have that actually with the first
20 Judiciary Act. Okay? We've already decided
21 that.

22 I hear objections to, oh, sitting by

1 designation. Eleven justices have done that
2 since 1937 and that includes retired justices.
3 And that includes also -- that doesn't include
4 Chief Justice Rehnquist sitting on the mid-1990s.
5 Yes, he got reversed by the Fourth Circuit, I
6 believe, when he sat as a trial judge in that
7 capacity.

8 My colleague, Professor Jackson, says
9 she's worried. She's concedes. Okay. You got
10 the title for life. Okay. You got the payment
11 for life. Oh, but your power is going to be less
12 after 18 years.

13 Yes, that's true also if you double
14 the size of the Supreme Court for good government
15 reasons because you add a whole bunch of new
16 circuits. And no one things that that's
17 unconstitutional. So there's not actually a
18 vested constitutional interest in the amount of
19 power that you current have.

20 And John Marshall says all of that
21 when he says, you can take away -- actually for
22 these midnight judges that were lower court

1 judges, you can take away their jurisdiction.
2 You got to pay them and their judges for life.
3 But they're not invested, right, to a certain
4 amount of power when you -- even without any
5 proposal of my sort.

6 When you appoint new justices, the old
7 swing no longer is the new swing with a new
8 composition. And that old person loses power to
9 some extent. That's not actually a valid
10 constitutional objection.

11 So yes, if on a careful analysis by
12 respected scholars of this version there are lots
13 of folks who say, I still have a serious
14 constitutional objection, you should take that
15 into account because I'm trying to suggest that
16 this will actually lower the stakes of a
17 confirmation hearing because it's not for 30
18 years. It's only for 18. I'm trying to suggest
19 we can get bipartisan buy-in.

20 If we don't get that because people
21 think this is actually a constitutional
22 problematic idea, that is relevant. It's not

1 game, set, and match that one person or even
2 three people, even three people that I really
3 respect have doubts. I want to hear specifically
4 what those are because I don't think truthfully
5 there is yet one on the table.

6 I'll tell you what the most serious
7 concern that hasn't been raised that I do think
8 exists which is I'm suggesting -- and you don't
9 have to have this in the proposal, you could get
10 rid of this too, just like you could get rid of
11 circuit riding -- a slightly different way of
12 thinking about the chief justice doesn't affect
13 the senior associate justice. Now in fact,
14 that's true. When the chief justice dies or
15 resigns, we actually treat typically the senior
16 associate justice as the acting chief.

17 I think that actually has some
18 advantages. But I could imagine someone raising
19 a question about that. Oh, you were appointed to
20 be associate. Now you're chief. I think that's
21 all built in to the nature of the office when you
22 were appointed to it. But it is relevant if

1 people aren't persuaded, thoughtful people. It's
2 not game, set, and match unless you, in your
3 independent judgment and you're co-chair and the
4 other Commissioners actually think those
5 constitutional objections are well taken.

6 CHAIR BAUER: Thank you.

7 CHAIR RODRIGUEZ: So we now have time
8 for a second set. And so I'm going to turn to
9 Commissioner Nelson to see if you have any
10 further questions. We have about 25 minutes, so
11 you each have about eight minutes to pose
12 questions to whomever you wish, if you wish.

13 COMMISSIONER NELSON: Perfect, thank
14 you. Professor Ginsburg, I know you're concerned
15 about the authoritarian turn in some countries.
16 If the U.S. is potentially vulnerable to that
17 trend as I assume we agree that it is, could
18 increasing turnover on the Supreme Court and
19 regularizing new appointments have some risks in
20 addition to benefits?

21 If the U.S. keeps its current system
22 of presidential appointments to a nine-member

1 Court but adopts, say, 12-year term limits for
2 service on the Court, a two-term president who
3 serves for eight years would've appointed six of
4 the nine justices by the time that the president
5 is supposed to leave office at the end of the
6 second term. And even with 18-year term limits,
7 a two-term president would've appointed four of
8 the nine justices by then. If a dangerous
9 president gets elected and sets out from the
10 start to appoint justices who will let the
11 president do what the president wants like
12 keeping power past the end of the second term
13 say, should we worry that a single president who
14 had served two terms would've appointed either a
15 majority or a near majority of the justices?

16 MR. GINSBURG: It's a great question.
17 And I think the answer is no more than we ought
18 to in our current system, right? There's some
19 assumptions about the people who get on to the
20 Court that they come from a pool of people who
21 generally believe in the rule of law.

22 And I think that's been upheld and so

1 would not be amenable to spurious arguments to
2 extend a term or something like that as we do see
3 in many other countries. I don't see how more
4 rotation in office actually makes that worse
5 given that I believe there is a very broad pool
6 of people who could serve and actually would
7 improve the performance of the Court. You are
8 correct, though, that tinkering is obviously an
9 issue in many of the backsliding countries,
10 including backsliding democracies.

11 The situation in Poland has gotten a
12 lot of attention in recent years. And it's
13 subject to European Union sort of sanctions at
14 the moment. What's not very well appreciated is
15 that this current cycle actually started with the
16 party before the backsliding party.

17 When they lost power to the Law and
18 Justice Party, they tried to pack the court. The
19 Law and Justice Party came in and said, whoa,
20 we're not going to recognize these justices in
21 much of the -- in exactly the way that you posed
22 the question in the first round to Professor

1 Jackson about the dynamics that might occur. And
2 so you had a situation, which is the real Court,
3 who are the real justices? And then, of course,
4 since then, Law and Justice Party has packed the
5 Court.

6 For this reason, I believe and I think
7 from everything I've heard there's somewhat of a
8 consensus that reforms ought to be undertaken in
9 some kind of bipartisan way. And notwithstanding
10 the current state of the Senate, I think there is
11 a common interest -- a common American interest
12 in ensuring greater rotation in the Court. And
13 there would be certain safeguards perhaps that
14 could be put in to make sure that that sort of
15 bad outcome doesn't come to pass.

16 So in short, I recognize that it is a
17 generic concern when you start tinkering with the
18 Court. And that's all the more reason that one
19 needs a consensus. I should add that one looks
20 at survey data that the American public seems to
21 be behind some kind of limitation of the tenure
22 of Supreme Court justices.

1 avoid, whether we think President Taft was the
2 greatest thing ever or not. It's just too much
3 power over too many important constitutional
4 issues to have a single person making all those
5 appointments. I think, Commissioner Nelson, that
6 if the terms are stretched out, the dangers of
7 which you speak are somewhat diminished. But I
8 do think that worrying about the unintended
9 consequences of a change is a really important
10 thing that you folks will be done.

11 COMMISSIONER NELSON: So one of the
12 points that you made 15 years ago in the
13 Georgetown Law Journal was that the Article III
14 courts aren't the only courts in the United
15 States. Lots of states have state court systems
16 in which judges are elected by the people or at
17 least are subject to periodic retention
18 elections. And in some states, judges serve for
19 relatively short terms before they come up for
20 reelection.

21 Fifteen years ago, you described the
22 life tenure federal judiciary is helping to

1 anchor that system which I took to mean that
2 given the possible pathologies of the elected
3 systems of the state level, maybe there's some
4 advantage in erring in the opposite direction of
5 the federal level. Of course, the system in
6 which Supreme Court justices serve for
7 nonrenewable 18-year terms could still do some
8 anchoring. How should people think about the
9 optimal level of anchoring or how the structure
10 of the federal judiciary intersects with the
11 varying structures of the state judiciaries?

12 MS. JACKSON: Thank you for the
13 question. I acknowledged in my written statement
14 that my views have shifted some, in part for the
15 reasons that I began with in my oral statement to
16 you today. But my awareness of the state court
17 systems and the possibilities for popular
18 passions to play too much of a role in the minds
19 of judges who regularly have to stand for
20 election concerns me.

21 So I know that some people in the
22 current environment have suggested much shorter

1 terms if we're going to go to a term limited
2 Supreme Court. I would be inclined to oppose
3 them, not only because of the authoritarian risks
4 that you asked about but because we will continue
5 to have state court systems that rely on
6 elections. So I would think it might be sensible
7 to think that the term of a Supreme Court justice
8 should be set longer than the term limits you
9 find in the state courts.

10 I'm trying to remember now what they
11 were. It's in my written testimony. But I kind
12 of think in the state courts the terms go, like,
13 8 to 14 or 15 years. So something longer than
14 that I think might make sense because I do think
15 we still need an extra dose of independence in
16 our federal judiciary to counterbalance the very
17 democratically oriented processes -- directly
18 democratically oriented processes that we see in
19 many of the states.

20 COMMISSIONER NELSON: Thank you. I'm
21 in the final seconds of my eight minutes. So I
22 will stop there. Thank you.

1 CHAIR RODRIGUEZ: Thank you,
2 Commissioner Nelson. Commissioner Pildes, would
3 you like to pose more questions?

4 COMMISSIONER PILDES: Yes. Professor
5 Jackson, many people assume a constitutional
6 amendment for term limits would be highly
7 unlikely to be adopted given how rare it is that
8 we've amended the Constitution and how difficult
9 the process is. Yet it seems that there is
10 actually a great deal of support for this idea
11 from across the political and professional
12 spectrum. Indeed three justices on the current
13 Court have been quoted as saying this is an idea
14 worth considering.

15 This morning, we heard testimony from
16 a very distinguished bipartisan group of
17 experienced Supreme Court practitioners who were
18 very resistant to many of the proposals that have
19 been put forward for reforming the Court but who
20 said this was one of the two ideas that they
21 thought was worth considering. And I have not
22 seen a good deal opposition actually to any

1 tenure term, particularly if it's done through
2 constitutional amendment. Obviously, there are
3 debates about whether a statute can do this or
4 not.

5 What's your perception about how much
6 resistance there is among people who write about
7 the Court, who study the Court, practice before
8 the Court to an 18-year term? It doesn't have to
9 be 18. We can debate the particular length. And
10 is it right to think that there -- it would be
11 sort of such an impossible hurdle to enact an
12 actual constitutional amendment on this issue?

13 MS. JACKSON: So I -- thank you for
14 the question, Commissioner Pildes. I do not
15 regard myself as an expert on political
16 feasibility. So is there a great deal of
17 intellectual resistance in scholars who write
18 about the field to the 18-year term if it were
19 done as a constitutional amendment? I don't
20 think so.

21 I would think the weight of views that
22 I've read are that it's basically a good idea

1 given everything. And there's lots of details
2 that would need to get worked out. But my hope -
3 - the history of amendments getting approved in
4 recent decades has not been a strong one. It's a
5 very rigorous process. So I think one needs
6 expertises other than the ones I bring to the
7 table to figure out the political feasibility
8 factor.

9 COMMISSIONER PILDES: Okay. Thank you
10 very much for that. Professor Amar, I want to
11 return to the question that several people have
12 raised, particularly with the comparative
13 expertise on this panel. One of the things that
14 we have become more familiar with unfortunately
15 in recent years among European democracies is
16 what has sometimes been called democratic
17 backsliding.

18 And in particular what has happened,
19 of course, is that electoral majorities that do
20 get elected through the normal electoral process
21 then leverage their power once in office to seize
22 control of the independent institutions that

1 might resist their future efforts to entrench
2 themselves. And that particularly applies to the
3 independent courts. And the political scientists
4 who have looked at this issue across democracies
5 where very similar kinds of forces are at work
6 across a lot of the western democracies have
7 concluded that the systems that are most prone to
8 this electoral authoritarianism, as it's
9 sometimes called, are those in which a simple
10 majority can fairly directly through the
11 political process take control of institutions by
12 doing things like changing retirement ages of
13 justices and the like.

14 And the U.S. is offered as an example
15 the system most resistant to this risk,
16 particularly because we have bicameralism, we
17 have the Article III Supreme Court as it
18 currently exists. Leaving aside whether it's
19 constitutional to do this by statute, but just in
20 terms of whether it's wise policy, do you think
21 the U.S. is largely immune to the same forces
22 that have generated electoral authoritarianism in

1 other democracies in recent years? And as others
2 have asked, how concerned ought we to be that
3 legislation to impose term limits does open the
4 door to future legislative majorities doing what
5 they have done in some of these other democracies
6 to really dramatically undermine the democratic
7 system? You're muted.

8 MR. AMAR: Thank you, Commissioner.
9 We should be very worried, and it can happen
10 here. And I might've given you a different
11 answer six years ago. But Donald Trump's
12 presidency chastened the cockiness that I may
13 have had then about just how great our system is
14 compared to the rest of the world.

15 A few quick points, first on 18 years
16 as the sweet spot. Again, forget, as you invited
17 me to forget, how we get there, I do think -- and
18 in regard to what my colleague, Professor Jackson
19 mentioned, I would want to remind everyone that
20 in 2009, there was an open letter signed by more
21 than 40 distinguished constitutional scholars
22 from across the spectrum in support of an 18-year

1 idea. That was -- I didn't sign the letter. I
2 just generally am not a signer of things.

3 But that was the Cramton-Carrington
4 proposal signed by people including Professors
5 Barbara Babcock, Jack Balkin, Paul Carrington,
6 Roger Cramton, Dan Meador, Frank Michelman, Paul
7 Mishkin, Robert Nagel, L.A. Scot Powe, Jeff
8 Powell, Judith Resnik, Chris Schroeder, David
9 Shapiro, Peter Strauss. So I think that was
10 interesting that there was that sort of range.
11 And it was on 18 years.

12 The other thing I want to tell you --
13 two other things. One, in the long run if the
14 people of the United States want to take us to
15 hell, it's a republic in which they're going to
16 have their will. But we want to structure things
17 so that that's not an easy road.

18 And if you lose three presidential
19 elections in a row, then I do think it's going to
20 just be hard to hold to some crazy type. That's
21 going to be hard. I agree with my colleague that
22 18 years is a good length that's going to require

1 three.

2 I think 18 fits well with 9. But
3 here's my final point because just as I thought a
4 lot about Commissioner Nelson's ideas about
5 liquidation and trying to structure something
6 that reminded me of the Judiciary Act of 1789, I
7 thought a lot about your ideas along with
8 Levinson's about separation of parties and not
9 really of powers.

10 And since you mention the presidential
11 model, here's why. Eighteen years not only
12 equalizes power across presidencies. So Trump
13 doesn't get three compared to Carter's zero and
14 equalizes presidential elections. So we always
15 know that there are going to be two coming up.

16 My specific idea to have these
17 confirmations in years one and three was twofold.
18 It equalizes things within a presidential
19 administration, one pre-midterm, one post-
20 midterm. And you know that that may change the
21 partisan nature of things because presidents
22 often lose seats in the Senate after the first

1 two years. So you might have one unified party
2 appointee and one bipartisan divided government
3 nominee if you have it in years one and three.
4 And so I thought a little bit about that and
5 equalizing that because there are pathologies and
6 possibilities and promises with each kind of
7 configuration.

8 And the second thing that it does, it
9 not only equalizes power within a presidency
10 between pre-midterm and post-midterm which
11 relates to partisan control and divided
12 government. But it also picked, I thought, the
13 least superheated moments to do it, not in
14 election years but in off years, in years one and
15 three and not two and four. And I thought that
16 had a modest advantage.

17 Final thought since it was asked
18 before, what about judges picking someone if the
19 parties are at loggerheads, the president and the
20 Senate? And my colleague, Professor Ginsburg,
21 says, actually, that's how some other societies
22 do it. As a practical matter, we are beginning

1 to do that when lower federal court judges are
2 actually testifying for and vouching on behalf of
3 some of their appellate court colleagues in
4 Supreme Court hearings.

5 At best, that makes it less
6 superheated because you're actually getting
7 distinguished jurists who have impressed other
8 jurists before they even sort of get to a final
9 round of consideration. And if you add to that,
10 having these hearings being held in years one and
11 three rather than two and four and it's only for
12 18 years rather than for 35, those are ways of
13 trying to reduce the temperature, reducing the
14 possibility that toxic politics will destroy the
15 judiciary. But in a democracy, it's always a
16 long-term risk, of course.

17 COMMISSIONER PILDES: Thank you.

18 CHAIR RODRIGUEZ: Commissioner Bauer,
19 would you like to pose any kind of questions?

20 CHAIR BAUER: Yes. How much time do
21 I have?

22 CHAIR RODRIGUEZ: You have eight

1 minutes.

2 CHAIR BAUER: Eight minutes? Okay.
3 I think I'll slip two in and not challenge
4 anyone's schedule. Let me start with Professor
5 Ginsburg. I want to ask a question about the
6 sense in which we need to be mindful in these
7 debates about what we know, don't know, and can
8 never know.

9 So I read your testimony and I saw,
10 for example -- and I believe it is on page 10
11 where you have a paragraph in which you talk
12 about work that you have done on the correlation
13 between constitutional design and observed levels
14 of judicial independence as measured by political
15 scientists. And I turned out to be a complex
16 question. And so as we talk about what would
17 happen if we moved from the life tenure
18 arrangement we currently have to a different one
19 -- and by the way, this reminds me also Professor
20 Jackson's comments about interdependency of
21 various proposals.

22 The question becomes, what can we

1 actually really know? Isn't there sort of
2 necessarily, as we have this debate, a leap a
3 little bit into the void? We would never know
4 for a long period of time what it is that we
5 should've been most worried about or the benefits
6 that accrue that we might've been most delighted
7 to imagine. We'll know when we've given it our
8 best shot.

9 And so my question to you is based on
10 what you know now, what would you think is most
11 at risk? What concern of all the potential
12 adverse consequences would you identify based on
13 what you could imagine now, what you would
14 foresee if suitably designed we move from life
15 tenure to a term limited arrangement like the one
16 we're talking about now? What would be the
17 consequence you'd say in the back of your mind
18 most nags at you?

19 MR. GINSBURG: So first of all, it's
20 a great question. And welcome to the world of
21 constitutional design. You go back to Madison
22 and you realize that he was engaged in the same

1 enterprise of basically kind of guessing how
2 institutions would work out based on his reading
3 of what had happened in other ancient and modern
4 federations just to quote one of his sources and
5 sort of speculating on local conditions and how
6 things might play out.

7 So there's certainly no science here.
8 It is much more of an art of institutional
9 design. And I'm quite careful in the testimony
10 to say that we shouldn't necessarily just draw a
11 conclusion from a general statistical study.

12 The statistical study does remind us
13 that it is complicated and institutions are
14 interdependent. And I guess I would say that we
15 do have many other things which if you don't
16 change, we are going to have -- our judicial
17 independence wouldn't be under threat. But in
18 terms of the risks, what's the biggest risk, I
19 think given our state of politics, you may have
20 to do something along the lines of changing the
21 appointment process because if you just change
22 the term length and didn't change the appointment

1 process, you'd have exactly the kind of issues
2 arising that Professor Pildes' question to me at
3 the outset suggested.

4 There'd be basically, yeah, 18-year
5 terms for anyone who could get appointed to the
6 Court. But no one would ever get appointed to
7 the Court. And eventually, you could have a
8 Court of three or four people or something like
9 that.

10 So that's a major risk. You've got to
11 deal with the appointment process as well as the
12 removal -- or not really removal, but tenure --
13 end of tenure process at the same time because
14 they really do go together. So I think that is
15 something for the Commission's consideration --
16 very careful consideration. You can't just do
17 one without making sure that the other is
18 resolved.

19 CHAIR BAUER: Thank you. That's very
20 helpful. And then my last question is for your,
21 Professor Jackson. You mentioned earlier you're
22 not in the business of assessing political

1 feasibility, and I don't have any PhD in that
2 area either. But I want to ask you a question.
3 It comes at it a little bit differently.

4 When we talk here about the
5 possibility -- and I'm just going to put this to
6 you as a proposition -- a possibility that
7 proceeding by statute would be subject to
8 constitutional objection. And if such a statute
9 were enacted, it would be tested and it might
10 fold to constitutional objection. It might
11 ultimately fail upon final review by the United
12 States Supreme Court.

13 Is that, in fact, in your mind, a
14 dispositive objection? Or could we look at it
15 differently, which is that if there are strong
16 arguments in favor of proceeding by statute and
17 you could develop a bipartisan consensus of sorts
18 -- it's not obviously going to be unanimity, some
19 strong support from elements from civil society.
20 What a statutory route provides is the
21 opportunity for a vigorous national debate on
22 well founded national debate, even as some people

1 would disagree.

2 And if, at the end of the day, the
3 Supreme Court, 7-2, 6-3, 5-4, whatever it does,
4 strikes the statute down, we will have learned
5 something. We'll have the debate and then maybe
6 the basis upon which a constitutional movement
7 begins because it's left to us to decide how much
8 we cared about it. Does that strike you as at
9 least some way of not necessarily catastrophizing
10 a bad constitutional end for a proposal like
11 Professor Amar's?

12 MS. JACKSON: Wonderful question. I
13 don't think my worries, my constitutional doubts
14 are, in my mind, dispositive on what route should
15 be chosen. I identified the feasibility issue as
16 something that needs to be thought about.

17 I do think that there are some risks,
18 but it might work. As you said, it might be the
19 statute is upheld, that Professor Amar's
20 arguments will be persuasive. It might be that
21 the statute is struck down, and we certainly in
22 history have seen statutes get struck down

1 followed by efforts to amend the Constitution
2 that have been successful in varying degrees.

3 And so that would certainly be a
4 possibility that I would not want to rule out.
5 If I might just say a word to add on to what
6 Professor Ginsburg said in response to what are
7 you most worried about, I agreed with his what is
8 the most worrisome thing which is on the front
9 end, the appointment process and the need to have
10 some alternative appointment or backup plan for
11 it. The second worry I have is that 18-year term
12 limited justices may choose not to stay in the
13 Article III judiciary as emeritus judges and that
14 it might be very important to develop a statutory
15 set of restrictions on post-service employment
16 that some other very good court systems that have
17 short terms do have, just part of the
18 interdependent analysis.

19 CHAIR BAUER: Very good. Thank you
20 very much. I really appreciate it. I will use
21 the last 47 seconds so we can stay on time.

22 CHAIR RODRIGUEZ: We're all -- we're

1 almost at the end of the panel. This has been
2 enormously illuminating and very substantive. We
3 can't thank you enough, your testimony and your
4 time. And we look forward to speaking further
5 about this. We will reconvene at 3:30 for a
6 panel on the Court's composition. Thank you.

7 (Whereupon, the above-entitled matter
8 went off the record at 3:14 p.m. and resumed at
9 3:33 p.m.)

10 CHAIR BAUER: Welcome back to the
11 resumption of the public meeting today of the
12 Commission -- Presidential Commission on the
13 Supreme Court of the United States. And we are
14 now going to have a panel that is dedicated to
15 the topic of Court expansion and other changes in
16 the composition of the Court. And so I'm going
17 to ask the witnesses who have kindly testified
18 today to please turn on their cameras. Thank you
19 very much.

20 So let me begin to introduce the
21 witnesses in order here. And we will then have a
22 set of Commissioners -- as we manage these

1 proceedings, a set of Commissioners who will be
2 asking questions. But first we'll have a five-
3 minute testimony from each of our witnesses.

4 So I will begin here by introducing as
5 our first witness Randy Barnett. He is the
6 Patrick Hotung Professor of Constitutional Law at
7 Georgetown University Law Center and Director of
8 the Georgetown Center for the Constitution.
9 Welcome, Professor Barnett. And the floor is
10 yours for five minutes.

11 MR. BARNETT: Thank you so much, and
12 thank the Commission for this opportunity to
13 offer my thoughts on proposals to expand the
14 number of Supreme Court justices. I agree with
15 those who you've already heard from that tell you
16 that any such proposal would end the Court's
17 independence, destroy it as a protector of our
18 rights and liberties, and greatly increase
19 partisan polarization. To their policy
20 arguments, I'll add one more. Partisan court
21 packing is also unconstitutional.

22 To appreciate the constitutional

1 problem, we first need to locate the power that
2 Congress is exercising when it sets the number of
3 justices. It is the Necessary and Proper Clause
4 which empowers Congress to make a law that is
5 necessary and proper for carrying into execution
6 the judicial power that Article III vests in the
7 judicial department. Article III does not
8 specify the size of the Court.

9 And for the past 152 years, a nine-
10 member Supreme Court has become an entrenched
11 constitutional norm. To change the norm of nine,
12 Congress needs to pass a new law. According to
13 the letter of the Constitution, any such law must
14 be both necessary and proper.

15 In his opinion as Treasury Secretary
16 on the constitutionality of a national bank,
17 Alexander Hamilton offered the following test of
18 the law's necessity. Quote, the relation between
19 the measure and the end, between the nature of
20 the mean employed toward the execution of a
21 power, and the object of that power must be the
22 criterion of constitutionality. Today we call

1 this the requirement of means and fit.

2 A law must have an appropriate end or
3 object and the means it adopts must be
4 sufficiently related to that end. In *McCulloch*
5 *v. Maryland*, Chief Justice John Marshall
6 elaborated on this test when he wrote, quote, let
7 the end be legitimate, let it be within the scope
8 of the Constitution, and all means which are
9 appropriate, which are plainly adapted to that
10 end, which are not prohibited, but consist with
11 the letter and spirit of the Constitution are
12 constitutional. Of utmost importance is how
13 Marshall's rule of construction starts, let the
14 end be legitimate.

15 Having set the number of justices,
16 Congress may not then enact a law to change that
17 number of the illegitimate act of affecting how
18 the Court rules. Such an end is illegitimate.
19 That such an end as illegitimate is evidenced by
20 the rationales for Court expansion offered by FDR
21 in the 1930s and by House Democrats today.

22 These rationales are mere pretext for

1 the illegitimate end of changing how the Court
2 rules in particular cases. In McCulloch, John
3 Marshall affirmed that a law based on pretextual
4 reasons was unconstitutional. He wrote, quote,
5 should Congress, under the pretext of executing
6 its powers, pass laws for the accomplishment of
7 objects not entrusted to the government, it would
8 become the painful duty of this tribunal, to say
9 that such a law was not -- such an act was not
10 the law of the land.

11 While Congress has the constitutional
12 duty to staff the Supreme Court with multiple
13 justices, it is improper for Congress to use its
14 power to set the number of justices for the end
15 of affecting the decisions of the Court. Now
16 there is a proper political means to affect or
17 change how justices exercise their power. An
18 elected president may nominate judges based on
19 their judicial philosophy and elected Senate may
20 confirm or reject nominees on that same basis.

21 Once selected, however, these justices
22 are to be independent of the political actors who

1 selected and confirmed them. Partisan court
2 packing is the illegitimate effort to interfere
3 with this independence. All illegitimate is the
4 threat of court packing.

5 Suppose Congress passed a law stating
6 that if the Supreme Court overturns Roe v. Wade
7 in the pending case of Dobbs v. Jackson Women's
8 Health Organization, there shall be created three
9 new Supreme Court justices' positions which can
10 then be filled immediately by President Biden.
11 If your theory of Congress' power to set the
12 number of justices cannot say why such a law is
13 unconstitutional, there's something wrong with
14 your theory. But wait, there's more.

15 In addition to being necessary, the
16 Necessary and Proper Clause requires laws to be
17 proper. In NFIB v. Sebelius, Chief Justice
18 Roberts wrote, quote, laws that undermine the
19 structure of government established by the
20 Constitution are not consistent with the letter
21 and spirit of the Constitution and therefore are
22 not proper means for carrying into execution

1 Congress' enumerated powers. Undermining the
2 structure of government established by the
3 Constitution is exactly what partisan court
4 packing does.

5 For this reason, it is not a proper
6 exercise of Congress' power. To sum up, partisan
7 court packing, court expansion is
8 unconstitutional because it is neither necessary
9 to the accomplishment of legitimate legislative
10 purpose nor proper insofar as it undermines our
11 system of separation of powers and the
12 independence of the judiciary. In 1937, the
13 Democratic-controlled Senate Judiciary Committee
14 issued a report on FDR's court packing scheme.

15 Let me close my remarks with their
16 closing words. Quote, under the form of the
17 Constitution it seeks to do that which is
18 unconstitutional. Its ultimate operation would
19 be to make this government one of men rather than
20 one of law, and its practical operation would be
21 to make the Constitution what the executive or
22 legislative branches of the government choose to

1 say it is -- an interpretation to be changed with
2 each change of administration. It is a measure,
3 which should be so emphatically rejected that its
4 parallel will never again be presented to the
5 free representatives of the free people of
6 America. Thanks.

7 CHAIR BAUER: Thank you very much,
8 Professor Barnett. Our next witness is Professor
9 Daniel Epps. He's the Truman Professor of Law at
10 Washington University in St. Louis. Professor
11 Epps, the floor is yours.

12 MR. EPPS: Thank you, Co-Chair Bauer,
13 for that introduction, and thank you also to the
14 other Commissioners for the opportunity to speak
15 today. So I've been asked to talk about court
16 expansion and other forms of the composition of
17 the Supreme Court. In my remarks today, my goals
18 isn't to argue for any specific reform, although
19 I am someone who thinks that reform is necessary.
20 Instead, I'm going to try to frame the current
21 debate around reform and offer some thoughts
22 aimed at helping the Commission as it thinks

1 through various reform possibilities.

2 So I'm going to have three points.
3 First, I'm going to explain what I see as the
4 problems that are the underlying cause of current
5 calls for reform. Second, I'm going to explain
6 what reforms and what other changes might address
7 the problems I've identified. And third, I'm
8 going to offer a cautionary note regarding what
9 this Commission might accomplish.

10 So first of all, what's the problem?
11 Why do I and a number of others think some kind
12 of reform is needed? And so one response is just
13 to say that this is all politics and people are
14 unhappy with who's on the Court right now.

15 And obviously, there's something to
16 that. But I think that's an imperfect
17 explanation. People's appetite for reform of any
18 system is going to depend heavily on how much
19 status quo arrangements work for them. But that
20 observation doesn't tell you whether the critics
21 of or the defenders of the status quo have it
22 right.

1 Moreover, there have been plenty of
2 periods when one side or the other side wasn't
3 happy with the composition of the Court but
4 didn't produce calls for reform like we're seeing
5 now. Something now is different. The very
6 existence of this Commission I think is evidence
7 of that. What is that?

8 And so in my view, the current
9 situation is the combination of a number of
10 factors. Some are older parts of our system, and
11 some are more recent developments. First is life
12 tenure. Life tenure means that vacancies are the
13 result of unpredictable deaths and strategic
14 retirements.

15 Second, justices tend to serve for
16 lengthy periods which has crept up in recent
17 decades. Third, the Court with nine justices is
18 relatively small such that any one appointment is
19 quite important. Fourth, the Court is very
20 powerful.

21 It regularly declares federal and
22 state statutes unconstitutional, and it wades

1 into some of the most controversial issues in our
2 polity. And then finally, our political and
3 legal cultures are both increasingly polarized.
4 And as a result, nominees by the two political
5 parties tend to vote quite differently from one
6 another, though not always in ways that party
7 affiliation might suggest.

8 But if you add up all these features
9 together, what do you have? You have a system
10 that distributes a huge amount of power in a way
11 that seems unpredictable, undemocratic, and
12 unfair. Appointments are extremely rare, but
13 they're quite consequential given the small size
14 of the Court, the length of tenures, and the
15 growing differences between legal cultures.

16 And yet there's -- opportunities to
17 appoint justices don't have any set affiliation -
18 - set correspondence to a democratic collection.
19 Some presidents get to appoint no serving Court
20 justices, some get to appoint several. And I
21 think the system is very hard to justify from
22 first principles.

1 It's a system where the losers who are
2 currently Democrats are starting to ask good
3 questions about why they should continue living
4 under a system that produces results like this
5 and that they see as undemocratic and unfair. So
6 if that diagnosis of the problem is correct, what
7 might be done about it? Well, one possibility is
8 just to tell losers to get over it.

9 The problem is that they may not.
10 It's not obvious why they should. And to the
11 extent that they don't, I think we're going to
12 continue to see calls for reform.

13 I talk through in my written remarks
14 some of the alternatives for reform. I think one
15 would be regularizing appointments in some way so
16 they correspond to presidential elections more
17 consistently. Another is figuring out some way
18 to share power over the Court so that there's
19 some fixed relationship between the seats and the
20 different political coalitions in our country. A
21 third possibility is disempowering the Court in
22 some ways so that it becomes less important and

1 less consequential. And then a final possibility
2 is trying to rebuild greater consensus in our
3 legal culture.

4 Rather than say which of those is best
5 strategy, I would just urge the Commission to try
6 to take any reform possibilities off the table.
7 There's currently a lively debate happening among
8 elected officials about certain Court reform,
9 some of which would be attempted to be
10 implemented through statute. There's a wide
11 range of views about the different possibilities
12 and their constitutionality.

13 And I think some of the constitutional
14 arguments depend very much on the choice between
15 legal methodologies that is, in part, driving
16 some of the underlying causes for reform. So I'd
17 urge the Commission to tread carefully here.
18 Thank you and I look forward to your questions.

19 CHAIR BAUER: Thank you very much,
20 Professor Epps. Our next witness is Professor
21 Michael Klarman. He's the Charles Warren
22 Professor of Legal History at Harvard Law School.

1 Professor Klarman, the floor is yours.

2 And I understand there may be some
3 mechanics here that we have to address. Let me
4 know how your audio is working. We are
5 experiencing audio issues here. So I understand
6 you might call in. I might move to the next
7 witness and then return to you when you come
8 back. Very good, sir. Thank you. See you
9 shortly.

10 So at this point, I will turn to Marin
11 Levy. She is the Professor of Law at Duke
12 University School of Law. So Professor Levy,
13 five minutes is yours.

14 MS. M. LEVY: Thank you, Co-Chair
15 Bower, very much. So, I want to begin today by
16 framing the discussion. Court expansion impli-
17 cates fundamental questions about the role and
18 operation of our nation's highest Court.

19 So, as I see it, these questions
20 include whether expanding the Court would harm
21 the institutions legitimacy, whether expansion
22 would prompt a series of expansions in the

1 future, whether an expanded Court could function
2 well as a single decision-making body, and
3 whether expansion would contradict existing
4 constitutional norms and conventions.

5 So, I see the role of the Commission
6 as trying to gain purchase on these complex
7 questions, and then a larger background question.
8 Namely, how should these different considerations
9 be weighed against each other.

10 It is no easy task that the Commission
11 has been given, and I hope that the public can
12 recognize this.

13 So, I think in addressing these
14 questions, it can be valuable to take a
15 comparativist approach. So, in June, and then
16 earlier today, the Commission heard testimony
17 about the experiences of judiciaries in other
18 countries.

19 So, my testimony focuses on the
20 experiences of judiciaries in our own country, by
21 noting recent attempts and success in expanding
22 and contracting state supreme courts.

1 Now, it has long been said that when
2 it comes to the United States Supreme Court,
3 there is a robust, constitutional norm against
4 Court packing. So, as some scholars have put it,
5 Court packing simply cannot be done.

6 So, against this backdrop, I think
7 it's particularly noteworthy that there have been
8 numerous attempts to expand and contract courts
9 of last resort at the state level in recent
10 years.

11 So, specifically, in a study that I
12 conducted focusing on the period between 2007 and
13 2019, I found that there had been at least 20
14 different attempts in 11 states to change the
15 size of the court of last resort.

16 So, in the majority of these cases,
17 there was at least a colorable claim that the
18 attempt was made to change the ideological
19 composition of the court. That is, to shift the
20 court further to the left, or, more often as was
21 the case, further to the right, sometimes in
22 direct response to decisions that have been

1 handed down by those courts.

2 Now, of particular import, two of
3 those attempts were successful. So, in 2016 in
4 Arizona, Republican lawmaker introduced House
5 Bill 2537. That was meant to expand the state
6 supreme court from five to seven justices.

7 The Republican-controlled legislature
8 approved the measure, with no support from
9 Democrats. Nor was it supported by any of the
10 court's five justices, with the chief justice
11 writing to the governor saying that additional
12 seats were not required by the court's caseload,
13 and in fact would be unwarranted, given how
14 costly the proposal would be.

15 Critics called the bill an attempt to
16 bring back court packing. And over these
17 objections, the governor signed the bill into law
18 and the two new justices that he appointed took
19 their seats in December of 2016, moving the court
20 further to the right.

21 I would note also, that attempts to
22 expand the supreme court were successful in

1 Georgia. So, in 2016 the Republican-controlled
2 Georgia General Assembly considered a sweeping
3 reform bill which, among other things, sought to
4 expand the court from seven to nine justices.

5 And there was speculation that the
6 Republican governor at the time was interested in
7 expansion for partisan reasons.

8 So, at that time, Georgia had four
9 Democratic, but only three Republican, appointees
10 on the bench.

11 The General Assembly passed the bill,
12 and by 2017 the governor had filled those two new
13 seats, resulting in what was called more
14 conservative meaning court.

15 Now, stepping back, I think the
16 difficult question here is, how should these
17 state court experiences inform the current debate
18 surrounding the United States Supreme Court?

19 So, returning to the questions noted
20 at the outset, I think one observation is that
21 the norm against court packing at the state level
22 is not particularly robust.

1 At least it seems telling that
2 political elites were willing to support Court
3 expansion, and seem to have faced no significant
4 sanctions for doing so.

5 That said, I would stress that we
6 currently lack data that would help us to answer
7 other questions.

8 So, for example, we do not know if
9 public opinion of the courts in Arizona and
10 Georgia shifted pre- to post-expansion. We,
11 likewise, do not yet know if there will be
12 retaliatory attempts to pack or unpack those
13 courts in the future, should party control the
14 state legislature and governorship change.

15 I think even if we did possess this
16 information, there is still a complicated
17 question about the extent to which lessons from
18 the state courts translate to the federal courts.

19 And so, quite plainly, there are
20 differences between the two court systems. And
21 just to pick one example, the most common
22 selection method for state supreme court justices

1 is election, and not appointment.

2 And so, arguably, the norms around
3 judicial independence are weaker for state
4 courts.

5 That said, I would also stress that
6 it's important to not overstate the differences
7 between the two.

8 So, as I'm happy to discuss further,
9 in the states in which expansion did occur, the
10 governor appointed the justices in the first
11 instance. And other differences, I think, become
12 less salient upon closer examination.

13 So, in some, I think it's crucial to
14 consider state courts. They're vital judicial
15 systems in their own rights, and I think that
16 they can serve as helpful laboratories for the
17 federal courts.

18 But I think that the Commission would
19 be wise to note that we do not yet possess all of
20 the data from these experiments, as it were, and
21 there are difficult questions about whether those
22 results could be generalized to the US Supreme

1 Court. Thank you.

2 CHAIR BAUER: Thank you very much,
3 Professor Levy. I'm going to double-check now
4 with Professor Carmen. I'm going to do a sound
5 check with you here.

6 Still having audio issues. So, if you
7 will check, we may be able to just connect you on
8 an audio-only basis if you check with our Federal
9 Designated Officer Dana Fowler, she can walk you
10 through just to be sure that you can connect with
11 us. And I'm just going to go now to the next
12 witness and come back to you, sir.

13 Our next witness is Neil Siegel. He's
14 the David W. Ichel Professor of Law and Professor
15 of Political Science at Duke Law School, where
16 he's also the Director of the DC Summer Institute
17 on Law and Policy. Professor Siegel, the floor
18 is yours.

19 MR. SIEGEL: Thank you, Co-Chair Bower
20 and Commission members. I'm honored to be here.

21 I'm a constitutional law scholar who
22 writes, among other topics, about issues of

1 judicial role, independence and power, including
2 court packing.

3 I also served as special counsel or
4 advisor to Democratic Senators on the Judiciary
5 Committee during the confirmation hearings of
6 Chief Justice Roberts, and Justices Alito,
7 Gorsuch, Kavanaugh and Barrett.

8 In my written statement, I endorse
9 term limits for the justices, and greater
10 diversification of the courts of appeals. But
11 now, I will talk about court packing.

12 Court packing is commonly defined as
13 increasing the Court's size for the purpose of
14 influencing its decision-making going forward.
15 So defined, court packing is an extreme act.

16 It would severely undermine the
17 Court's independence, and almost always risk its
18 legal and public legitimacy.

19 Undermining its legitimacy would, in
20 turn, impair its ability to perform key
21 functions, like ensuring the supremacy of federal
22 law, reducing the danger of authoritarianism,

1 vindicating individual rights, and sustaining the
2 rule of law.

3 The Court isn't the only government
4 institution responsible for achieving these
5 purposes. Nor does the Court perform all its
6 functions well all, or even most, of the time.

7 In the contemporary U.S., however, the
8 Court is the best institution we have for at
9 least partially achieving most of these goals,
10 which is why students learn about them in law
11 school.

12 My point is not that the Court is
13 entirely independent of politics. Rather, it's
14 that the Court is generally more distant from
15 politics than the available alternatives.

16 Court packing should, therefore, be
17 reserved for extreme situations. I've identified
18 three in the framework I outline in my written
19 statement.

20 First, where adding seats would follow
21 a prior instance of court packing, and so be a
22 proportionate response to a norm violation by the

1 other political party.

2 Second, where court packing would
3 restore the Court's legitimacy, after Justices
4 had squandered it by issuing extreme decisions
5 that decimated basic institutions, or tore at the
6 fabric of constitutional law.

7 Or third, where court packing would
8 meet a national crisis, more important than
9 minding the Court's legitimacy in the short term.

10 A crisis involves not just high stakes
11 for fundamental values, but also a situation
12 that's distinguishable from mainstream,
13 substantive disagreements.

14 The strongest argument for current
15 proposals to pack the Court is that they respond
16 proportionately to the stark politicization of
17 the confirmation process by Senate Republicans,
18 that began with their refusal to consider any
19 Supreme Court nominee of President Obama, and
20 that culminated with their confirmation of
21 Justice Barrett.

22 The conduct of Senate Republicans was

1 indeed problematic, for many of the reasons court
2 packing is almost always problematic. It was a
3 norm-violating, significant escalation of prior
4 questionable conduct regarding judicial
5 nominations.

6 And it was followed by a hypocritical
7 refusal to be bound by their own stated reasons
8 for action.

9 I fear it damaged the Court.

10 But it's not clear why such conduct
11 would potentially justify adding four seats, as
12 opposed to two.

13 It's also not clear that adding two
14 seats would be a proportionate response, given
15 the different nature of court packing, and the
16 greater harm it would likely do to the Court's
17 ability to function.

18 Only court packing creates the
19 opportunity to appoint four or six justices all
20 at once, which helps explain why most Americans
21 view court packing as different in nature from,
22 and as more threatening, to the system than

1 playing constitutional hardball with open seats
2 on the Court.

3 Nor do the other potential
4 justifications for packing the Court currently
5 exist.

6 The conduct of Senate Republicans
7 might justify the refusal of Senate Democrats to
8 consider Republican Supreme Court nominees in the
9 years ahead, or to confirm Democratic nominees
10 just before elections, or in the lame duck
11 session after them.

12 But disturbing this ability of the
13 Court's composition for the first time in 150
14 years would risk severely damaging both the
15 progressive court, and would presumably result in
16 future courts. It would likely inject threats or
17 promises of court packing into national election
18 cycles, and unleash additional rounds of packing
19 when the opportunity arose.

20 No one can know now how extreme the
21 current Court will become. Nor can anyone know
22 now that it will be too late to pack the Court if

1 extreme decisions or crises do emerge. Nor can
2 anyone know now that Republicans will pack the
3 Court as soon as they feel the need and have the
4 power.

5 A President and Congress that has seen
6 the very worst about these matters would be
7 engaging in a dangerous form of reasoning, and
8 would be practicing a crude legal realism that
9 could become a self-fulfilling prophecy.

10 The framework I'm offering for
11 approaching court packing is less politically
12 charged than some others, but people can of
13 course still disagree about how to apply it.

14 I offer it not to end this
15 disagreements, but to channel them into
16 potentially constructive conversations about when
17 court packing is justified, and I hope we will
18 have such a discussion in a little bit. Thank
19 you.

20 CHAIR BAUER: Thank you very much,
21 Professor Siegel. I'm going to now check in with
22 Professor Klarman. Are we operational?

1 MR. KLARMAN: Can you hear me now?

2 CHAIR BAUER: We can hear you, sir.
3 Please?

4 MR. KLARMAN: A small miracle.
5 American democracy is under siege today and the
6 assault comes from one of our great political
7 parties. Let me summarize and then explain the
8 connection to the Court.

9 Former President Trump displayed an
10 openly authoritarian bent attacking the press as
11 the enemy of the people, assailing judicial
12 independence, politicizing the DOJ,
13 delegitimizing elections, and praising foreign
14 autocrats.

15 Prior to the 2020 election, he refused
16 to commit to a peaceful transition of power, or
17 to condemn White supremacists.

18 After his defeat, he lied that the
19 election had been stolen, then incited violence
20 against Congress.

21 The GOP proved astonishingly complicit
22 with Trump's authoritarian efforts.

1 Congressional Republicans did not want the 2016
2 Trump campaign's involvement with Russia
3 investigated, were untroubled by Trump's
4 systematic obstruction of that investigation,
5 rejected impeachment, despite Trump's shakedown
6 phone call to the Ukrainian President, and mostly
7 endorsed or tolerated his lies about a stolen
8 election.

9 Immediately after January 6th, GOP
10 leaders condemned Trump. But since opinion polls
11 revealed that 60 to 70 percent of GOP voters
12 believed the election was stolen, they have
13 mainly changed course.

14 Despite video footage showing hundreds
15 of Trump supporters storming the Capitol,
16 chanting hang Mike Pence, and injuring nearly 150
17 police officers, GOP leaders today minimized the
18 violence, blaming it on Antifa, and denied
19 responsibility.

20 They purged Liz Cheney from her
21 leadership position for denouncing Trump's
22 incitement of the riot, and they have killed the

1 independent commission proposed to investigate
2 it.

3 The forces responsible for degrading
4 American democracy described in my written
5 testimony have percolated for decades, but first
6 manifested themselves around 2000 in state-level
7 anti-democratic practices.

8 Republican legislature suppressed
9 votes through restrictive voter ID laws and voter
10 purges. They grotesquely gerrymandered
11 legislative districts, eviscerated the powers of
12 democratic governors, and defied the results of
13 inconvenient voter initiatives.

14 Their most recent and pernicious
15 assault on voting rights features of Georgia law,
16 making it harder to obtain and cast mail ballots,
17 drastically reducing the number of dropboxes
18 around Atlanta, expanding the power of poll
19 watchers to object to voters, and criminalizing
20 offering food or water to voters in line.

21 These recent measures also contain
22 provisions facilitating the outright theft of a

1 future election, by authorizing legislatures
2 counting voting officials essentially at will,
3 and expanding their control over state election
4 boards.

5 Across the country, GOP candidates for
6 office are endorsing Trump's election lies.
7 Sixty-one percent of conservatives believe that
8 GOP officials who deny widespread election fraud
9 are part of a coverup.

10 The idea that an American presidential
11 election could be stolen seemed absurd in 2020,
12 but is no longer so.

13 Democracy depends on peaceful
14 transitions of power and the repudiation of
15 violence. Yet, today the threat of violence
16 pervades our politics.

17 In addition to the brutal Capitol
18 assault by Trump loyalists, Pennsylvania's
19 Republican Senate leader admitted that he feared
20 his home would be bombed if he defied Trump's
21 efforts to overturn the election results.

22 Several Secretaries of State now

1 require bodyguard protection in the face of
2 extensive death threats.

3 Rather than resisting the degradation
4 of democracy, the Supreme Court, under GOP
5 control, has largely facilitated it.

6 First, Republican justices have
7 directly furthered GOP political advantages. In
8 2013, they effectively nullified the pre-
9 clearance provision of the 1965 Voting Rights
10 Act, unleashing a wave of Southern Republican
11 voter suppression.

12 Also, on the proffered basis of the
13 state's interest in reducing voter fraud, which
14 is virtually non-existent, Republican justices
15 have upheld voter purges and strict voter ID laws
16 that disproportionately disfranchised democratic
17 constituencies.

18 They've made it difficult to prove
19 intentional race discrimination in legislative
20 districting, and curtailed the VRA Section 2,
21 thus greenlighting the most concerted assault on
22 voting rights since Jim Crow.

1 In 2019, they declined to limit
2 partisan gerrymandering, which today mostly
3 benefits Republicans.

4 Second, the Court's campaign finance
5 rulings have, based on contrived constitutional
6 rationales, unleashed an enormous flow of money
7 into politics, benefitting wealthy donors and
8 corporations, and leaving working class Americans
9 with little political influence.

10 Large majorities today favor paid
11 parental and sick leave, an increased minimum
12 wage and higher taxes on millionaires, yet such
13 policies are consistently blocked, mainly by
14 Congressional Republicans representing the
15 interests of wealthy donors.

16 Third, today's Republican justices
17 have consistently furthered the GOP's radical
18 libertarian policies, which themselves have
19 helped erode democracy.

20 They've undermined labor unions,
21 protected corporations from class action
22 litigation and punitive damage awards, upheld

1 arbitration agreements protecting corporations
2 from lawsuits, and curbed the reach of federal
3 antitrust and anti-discrimination laws.

4 Today's Republican justices are as
5 pro-Chamber of Commerce as any in history. My
6 written testimony elaborates on arguments for
7 Court expansion to safeguard democracy. Thank
8 you very much.

9 CHAIR BAUER: Thank you, Professor
10 Klarman. And now, I would ask the commissions
11 that will be doing the questioning to turn their
12 cameras on, please.

13 And we will begin with Commissioner
14 Tara Grove. She is a Charles E. Tweedy, Jr.
15 Endowed Chairholder of Law and Director of the
16 Program in Constitutional Studies at the
17 University of Alabama School of Law.
18 Commissioner Grove, the floor is yours.

19 COMMISSIONER GROVE: I would love to
20 take over right now, but I think Co-Chair
21 Rodriguez was going to go first.

22 CHAIR BAUER: We can do that too.

1 independence and legitimacy, and lead to an
2 unnecessarily large Court.

3 So, do you actually believe, and why
4 do you believe, that if the Democrats were to
5 pack the Court, that might actually return us to
6 some kind of equilibrium? Or is there some other
7 motivation for doing that?

8 MR. KLARMAN: So, there are three
9 responses to the argument that Republicans will
10 simply retaliate in kind. The first argument is,
11 as you quoted me saying, is that the Republicans
12 started this. Mitch McConnell stole a seat for
13 the first time in history in 2016. Democrats
14 didn't start this.

15 The second argument is, if you look at
16 Senate Minority Leader McConnell's behavior over
17 the last 15 years, it's quite clear that he will
18 break as many norms as necessary to retain
19 Republican control on power.

20 That's not just true about stealing a
21 Supreme Court seat, it's true about blocking all
22 of Obama's court of appeals appointments in the

1 second half of his second term. It's true about
2 not allowing agency heads to be appointed. It's
3 true about not allowing Republicans to vote for a
4 relief bill during the second worst recession in
5 the last 100 years.

6 So, it's clear that Republicans will
7 do this regardless of what staff Democrats do.
8 And as Professor Levy has shown, the Republicans
9 are already doing this at the state level.

10 So, it can't be a good argument for
11 Democrats not to do this because Republicans will
12 simply do it. It's clear McConnell will do this
13 regardless.

14 The third argument, which I think is
15 mostly responsive to your point, is that it is
16 possible we could move past an epic where the
17 Republican Party is so anti-democratic, so
18 unwilling to disavow violence, so willing to
19 suppress votes throughout the country.

20 If you simply enfranchised everybody
21 and ended the extreme gerrymandering, ended the
22 vote suppression, made it so that African-

1 American didn't have to wait five or ten hours in
2 line in Atlanta to vote, enabled university
3 students to vote, rather than doing what
4 Republicans are doing in Florida, Texas,
5 Wisconsin, New Hampshire, to make it difficult
6 for them to vote, you would actually have a world
7 where the Republican Party needed to respond to
8 voters, rather than relying on a smaller and
9 smaller minority of support.

10 They'd have to change their policies,
11 make them less extreme. That's what we're
12 shooting for. The goal here is not to advantage
13 the Democratic Party. The goal here is to
14 protect democracy.

15 But in a world where one party has
16 essentially given up on its commitment to
17 democracy and the other party is all we have
18 left, it may be necessary in the short term to
19 advantage capital D Democrats in order, in the
20 long term, to protect small D democracy.

21 CHAIR RODRIGUEZ: So, I guess there
22 are two questions that would follow from that.

1 The first is a return to my original question,
2 the motivation for my question, which is that,
3 what would prevent a subsequent Republican
4 President and Senate from expanding the Court
5 with their nominees, such that it's not only
6 unpredictable what the Court would look like if
7 you open this door, but assuming the door is
8 already going to be open, which is what you're
9 suggesting would happen in the future, even if
10 Democrats don't act now, what happens to the
11 Court if that process proceeds and iterates?

12 And the second question, which I think
13 is equally important, you've also said in your
14 testimony that there are a number of structural
15 features that make it so that we live in a
16 context of the military rule, and that relates to
17 the structure and composition of the Senate and
18 the Electoral College.

19 And the kind of mass enfranchisement
20 that you're envisioning can't just depend on the
21 Supreme Court. It has to depend on the state
22 legislatures, as well as on Congress enacting

1 legislation that in fact enables the kind of
2 expansive voting that you envision.

3 And yet, you detail structural
4 obstacles to that. So, how should we think about
5 the actual impediments to what you're describing
6 and using as a justification, or taking a step
7 that might actually have negative consequences
8 for the judiciary itself?

9 MR. KLARMAN: Well, I can start with
10 the second question, and then work back to the
11 first.

12 Just so that people who are observing
13 and are not aware of what we're talking about,
14 the U.S. Senate is the most malapportioned
15 legislative body in the world. There's no good
16 argument today.

17 There actually wasn't a very good
18 argument in 1787 for why Wyoming or Delaware in
19 1787, with a very small percentage of people --
20 Wyoming has 600,000 people, California has
21 40 million -- there's no good argument for why
22 they both have two Senators.

1 The Electoral College system has no
2 good justification today, there's no good reason,
3 why Joe Biden, if he wins by seven million votes,
4 should not securely control the Presidency,
5 rather than getting in by the skin of his teeth.

6 Forty-three thousand votes and three
7 states shifting, and Trump would have been
8 reelected.

9 Those minoritarian features of the
10 system translate into a Supreme Court where even
11 though the country clearly has center-left
12 majority, indicated by the fact that Democrats
13 have won seven of the last eight Presidential
14 elections and the 50 Democratic Senators
15 represent 41 million more voters than the
16 50 Republican Senators, that's translated into a
17 Republican majority on the Court.

18 Of the justices on the Court, five of
19 the six conservatives were nominated by
20 Presidents who did not enter the White House with
21 even a plurality of the popular vote, and four of
22 them were confirmed by Senates that did not

1 represent a majority of the vote.

2 So, since you can't solve the problem
3 of the Senate and the problem of the Electoral
4 College without a constitutional amendment, and
5 it's impossible practically to get an amendment
6 when one of the two political parties benefits
7 from the status quo, we have a problem.

8 You can solve the Supreme Court
9 problem pretty clearly by passing a statute.
10 It's been done many times before. There's no
11 very strong argument that it would be struck down
12 by the Court, and if the Court did strike it
13 down, then something would have to be done in
14 response to that.

15 The Court would invalidate voting
16 rights legislation, or quite plausibly might.
17 You can solve the problem at the state level by
18 enfranchising people and making sure that states
19 don't do what Georgia is doing.

20 Make sure that Georgia and Texas don't
21 get to eliminate mobile voting units, all-night
22 voting, make it more difficult to obtain and cast

1 absentee ballots, so forth and so on.

2 But the Supreme Court might well
3 strike that down. So, if you really want to
4 solve the problem of democracy, you're going to
5 need to make sure that the Supreme Court doesn't
6 simply entrench the Republican control.

7 What happens to the Court -- I mean,
8 everything that I say is premised. I'm not
9 making a bipartisan appeal. Everything I say is
10 premised on the understanding that we are facing
11 an existential crisis in democracy that we have
12 not faced anything like this since the 1850s.

13 The Republican Party is no longer an
14 ordinary democratic system party. It's not
15 willing to repudiate extremists, it's not willing
16 to repudiate violence, and it's willing to
17 suppress votes on a whole scale basis.

18 If we could solve the problem, stop
19 the Republican Party from doing that, enfranchise
20 people, with a couple of election losses, the
21 Republican Party would change its stripes, in the
22 way that many parties have in the past.

1 The Democratic Party used to be the
2 party of open White supremacy and the Republican
3 Party used to be the party of emancipation and
4 Black suffrage.

5 So, political parties will change in
6 response to electoral incentives. The problem
7 today is that the electoral incentives don't work
8 because the Republican Party can maintain control
9 of at least one branch of the national government
10 without responding to the concerns of the median
11 voter.

12 That's the problem. And the
13 reconstituted world that I'm imagining, where we
14 begin to secure our democracy, will go back to
15 normal with the Supreme Court. And hopefully,
16 neither party will be so immune to the
17 constraints of democracy that they'll think it's
18 necessary to retaliate. All Democrats are doing
19 is trying to protect democracy.

20 CHAIR RODRIGUEZ: So, what I'm trying
21 to understand is how we get to that point of
22 restoring the democracy, and what role Court

1 expansion plays in that process.

2 Is your vision one of an expanded
3 Court with new appointments that are progressive
4 in orientation, pushing back on and invalidating
5 state laws that are disenfranchising voters in a
6 number of opinions that ensure this mass
7 enfranchisement that you're seeking?

8 And what would limit that majority to
9 those kinds of laws? What other forms of
10 judicial review are part of this vision?

11 And then, how would that fit into the
12 back-and-forth between the political parties, who
13 are going to be fighting for their lives under
14 your vision?

15 MR. KLARMAN: So, as I made clear in
16 my testimony, if you want a sort of bipartisan
17 solution to an appointment system that I think
18 makes no sense at all -- the system we've
19 inherited from the framers -- 18-year staggered
20 term limits would be a great way to go forward.

21 That would ensure that we don't have
22 the craziness of justices strategically choosing

1 the presidents who choose their replacements,
2 that we don't have randomness -- one President,
3 like Taft, gets five or six appointments, Jimmy
4 Carter gets none -- that would be a long-term
5 solution to that problem.

6 I'm not invested in any particular
7 form of judicial review, as Niko Bowie testified
8 to you. It's not clear to me that we wouldn't
9 have a better system if we just eliminated the
10 Supreme Court striking down statutes.

11 But I'm not advocating for that. What
12 I want right now is a Supreme Court that will not
13 do what the Supreme Court has done in the last 20
14 years, uphold voter suppression, strike down the
15 Voting Rights Act, uphold gerrymandering, make it
16 impossible to take money out of politics, and so
17 forth and so on, and do the handiwork of the
18 Chamber of Commerce's political agenda.

19 That's what I'm shooting for. And a
20 court that was appointed that had four new
21 Democratic appointments, would be a court that in
22 the short-term would guarantee that we have

1 greater protection for democracy in that sense.

2 In the long-term going forward, I
3 think there are all sorts of very difficult
4 questions. But it's not clear to me -- I'm
5 mostly in agreement with Niko Bowie -- judicial
6 review is not a particularly sensible
7 institution.

8 It basically takes nine unelected,
9 elderly people and says, you go and make abortion
10 policy, you make affirmative action policy, you
11 decide on school prayer, you decide on campaign
12 finance reform.

13 That's not a very sensible position
14 and it doesn't have much to do with law.
15 Everybody understands who teaches constitution
16 law, it's almost all about politics, at least on
17 those very deeply contested social issues.

18 We know how the Court's going to vote
19 on an abortion case or a school prayer case, or
20 an affirmative case. And that's a weird way to
21 run a democracy. So, that's a larger point.

22 But right now, we have an existential

1 crisis in democracy, and I think the Commission
2 should pay attention to that. I think every
3 American citizen should pay attention to that.

4 CHAIR RODRIGUEZ: Thank you very much.

5 CHAIR BAUER: Commissioner Rodriguez
6 and the previously introduced Commissioner Grove,
7 the floor is yours.

8 COMMISSIONER GROVE: All right. Well,
9 thank you very much. Thanks to all of you for
10 your written testimony, and also your oral
11 statements today.

12 Professor Barnett, I want to start
13 with you. You argue that what you call partisan
14 court packing is unconstitutional. And one of
15 the things I'm trying to figure out is how we
16 identify the court reforms that are partisan,
17 versus motivated by something else.

18 And just to mention a couple of
19 historical example, as you note, in 1807 and 1837
20 Congress expanded the size of the Supreme Court,
21 in part because more judges were needed for a
22 growing country.

1 But the timing of those court
2 expansions was arguably quite partisan. So, in
3 1807 the democratic Republicans, who controlled
4 Congress, expanded the court when their party
5 leader, President Thomas Jefferson, would make
6 the appointment.

7 In 1837, Jacksonian Democrats, who
8 controlled Congress, expanded the Supreme Court
9 by two members when President Andrew Jackson --
10 their party leader -- would make the
11 appointments.

12 In 1937, as you note, President
13 Franklin Roosevelt initially supported his court
14 expansion proposal, which might have grown the
15 Supreme Court to 15 members. He initially
16 supported that by saying, hey, they need more
17 people to do the job.

18 But soon thereafter, he acknowledged
19 that the real problem, in his view, was the
20 substantive decisions of the United States
21 Supreme Court, and specifically, they're striking
22 down his New Deal program.

1 On March 9, 1937, President Roosevelt
2 gave a radio address to the nation, one of his
3 fireside chats, where he said, quote, we must
4 take action to save the Constitution from the
5 court and the court from itself. Endquote.

6 Now, I'm not asking you to comment on
7 these specific historical examples, or any of the
8 others. I mention these examples just to tee up
9 the question, a lot of court reform, like a lot
10 of legislation, is based on a variety of
11 rationales and motivations, some of which may be
12 partisan, some of which may be other things.

13 So, I'm trying to figure out, do you
14 think it might be hard for either judges or
15 lawmakers to distinguish partisan court packing
16 from other court reform attempts?

17 MR. BARNETT: Thanks for the question.
18 It's not always easy to figure out exactly
19 whether legislation has been motivated by
20 pretextual reasons. But we do look for pretext
21 all the time. We look for laws that may have had
22 an ostensibly public purpose, but actually have a

1 desire to discriminate against particular
2 individuals.

3 And we do so by employing some kind of
4 means-ends fit. So, we ask the government, tell
5 us what you're legitimate end is, and we'll
6 evaluate the means you've chosen to achieve that
7 end, to see if there's a close enough relation
8 that we can be confident that you're actually
9 doing it for the reasons you say.

10 I do think if you look at the history
11 of court expansions that Professor Braver did in
12 the article I cite in my testimony, you see that
13 virtually all of the early examples were ones
14 that were associated with adding new states to
15 the country, and the need to add more circuit
16 court judges, or circuit courts of appeals, which
17 justices staffed in those years.

18 So, you need to expand the number of
19 justices to handle the court of appeals system,
20 the circuit court of appeals as the rode circuit.

21 He does, of course, cite two examples,
22 or three examples, of attempts at partisan court

1 packing. One was associated with the outgoing
2 federalist contracting the number of justices,
3 that was then expanded back to the original
4 number by the Republicans who came in.

5 That he accounts as a failed examples
6 of court packing. And the last one, most
7 recently with President Roosevelt, was a failed
8 one because his own party rejected this for the
9 reasons I quoted in my opening remarks.

10 The one successful example was the
11 Republicans who took seats away from, or
12 constricted the number of seats to prevent
13 President Johnson from obstructing reconstruction
14 by appointing judges, and then that number was
15 restored when President Grant became President.

16 That was the one example in our
17 history where we can be pretty sure that this was
18 motivated only by partisan advantage. But that
19 one example does not make for a norm.

20 And for 150 years, we have not
21 accepted expansion as a legitimate norm. And the
22 only time that norm was really tested was with

1 FDR. And, as you say, he made it quite clear
2 what his real motivations were.

3 And the agedness of the judges and the
4 degree to which they could handle their workload
5 were mere pretext.

6 And it is up to the courts. But at
7 the very minimum, it's up to you, and it's up to
8 this Congress, and it's up to the Senators in the
9 Senate, to decide whether they think that the
10 reasons that are being offered by, in this case,
11 House Democrats, for court expansion, are
12 legitimate, or are they pretextual.

13 COMMISSIONER GROVE: So, to follow up
14 on that, I'm wondering how far your
15 interpretation of the Necessary and Proper clause
16 could take us in the world of court reform.

17 Most court reform depends on the
18 Necessary and Proper clause. That's true, for
19 example, of Congress's power over federal
20 jurisdiction.

21 So, the Supreme Court's appellate
22 jurisdiction under Article 3 is subject to such

1 regulations and such exceptions as the Congress
2 shall make.

3 But Article 3 doesn't confer power on
4 Congress. Instead, it comes from the Necessary
5 and Proper clause, as many scholars, including
6 many prominent originalists, have acknowledged.

7 Article 3 shapes that power, but it
8 comes from the Necessary and Proper clause. I'm
9 wondering, would you say the same thing about
10 what might be called partisan jurisdiction
11 stripping?

12 And I ask this because throughout our
13 history, most jurisdiction-serving measures have
14 split Congress along partisan lines.

15 One political party has predominantly
16 favored the measures, the other political party
17 has predominantly opposed them. Do you think
18 those measures are unconstitutional on that basis
19 alone?

20 MR. BARNETT: They might be. I
21 haven't actually studied jurisdiction stripping
22 enough to form an opinion, or the history of it.

1 I do know there have been Supreme Court opinions
2 that have questioned whether in fact jurisdiction
3 stripping is necessarily constitutional under all
4 circumstances, or whether it might be improperly
5 motivated.

6 I even note that Chief Justice John
7 Marshall expressed a doubt about whether
8 jurisdiction could be stripped from subject
9 matters that the Constitution gives to courts,
10 rather than come from Congress themselves.

11 But I don't have an opinion on that
12 today. I do think that every exercise of the
13 Necessary and Proper clause has to be channeled
14 through an evaluation of whether it's a necessary
15 means to a legitimate end, and whether in fact
16 it's a proper type of law that is otherwise going
17 to be in conflict with either the letter or the
18 spirit of the Constitution.

19 So, it would all be subject to that
20 kind of scrutiny.

21 COMMISSIONER GROVE: Thank you.
22 Professor Levy, thank you so much for all your

1 information about the state courts.

2 One of the questions that I had for
3 you is, what was motivating these efforts to, as
4 you describe it, unpack or pack the state courts?
5 In a couple of cases you mentioned, recent
6 decisions by the state supreme court, was that
7 the primary trigger? Was it something else? Or
8 is that another thing we don't quite know yet.

9 MS. M. LEVY: Thank you. That's a
10 terrific question. So, just going back to your
11 colloquy with Professor Barnett, I think we don't
12 always fully know the motivation. So, going off
13 of what we can tell, certainly it seems like some
14 of these attempts were meant to be in response to
15 opinions handed down by the state supreme court.

16 In other instances, you can see
17 lawmakers saying something to the effect of, this
18 is going to be something of an insurance policy,
19 so if we can swing the state court, a few
20 justices to our particular side, that will just
21 help us in the future.

22 I think Montana is an example, where

1 we have a hearing, and so you can hear a little
2 bit more from the lawmakers who proposed it.

3 So, there was hope that a more
4 conservative court would be more favorable to
5 tort reform. And then also, there was more about
6 redistricting efforts that might be taking place
7 in that state in the future.

8 I would also say, again going back to
9 your earlier exchange, part of what's difficult
10 here is that oftentimes we have statements from
11 the governor or from lawmakers that these
12 measures are necessary in the name of case
13 management.

14 That's a common refrain. This also,
15 of course, goes back to FDR himself. But I think
16 that there's enough evidence in these instances,
17 that there's at least some kind of partisan
18 motivation that really is prompting the
19 particular measure.

20 COMMISSIONER GROVE: And one more
21 question. You have noted that these efforts to
22 either expand or contract the state courts seem

1 to be on the rise. There have been more of
2 these.

3 But most of them have failed. I think
4 you mentioned two out of twenty actually were
5 enacted. I'm wondering, what effect do you think
6 court expansion at the federal level might have
7 on the states?

8 Do you think, for example, that if
9 Congress were to expand the U.S. Supreme Court,
10 that would make it easier for state lawmakers to
11 enact similar measures at the state level?

12 MS. M. LEVY: So, I think that's
13 entirely possible. And so, just to step back
14 with the question, it's certainly true that it
15 seems these efforts are on the rise.

16 So, this is a comment made by Bill
17 Raftery, who's at the National Center for State
18 Courts. He had noted that if we look over the
19 last few years, there's just a significant uptick
20 based on where we had been in the decades
21 previously for these attempts.

22 And so, certainly if we were to see an

1 expansion of the Supreme Court, it's possible
2 that that would be seen as some kind of green
3 light or an encouragement on the state side.

4 That said, we may already be seeing
5 that. So, as I mentioned, we should care very
6 much about potential for retaliatory attempts to
7 expand or contract courts in the future.

8 It's hard to know based on these
9 examples if we will see that. But I would say if
10 we expand our lens a little bit and look to the
11 courts of appeals, there's already some evidence
12 of this.

13 So, in North Carolina, for example,
14 back in 2017 the General Assembly passed
15 legislation to unpack the court of appeals to
16 take away three seats.

17 And part of what was said at the time,
18 in addition to the sort of lip service paid to
19 key management, was that this was really in
20 response to what Democrats had done in 2000, by
21 expanding the court to begin with.

22 So, there are at least some data

1 points out there that there's appetite for
2 retaliation. So, I think we may see that well on
3 the state side anyway. But that may increase if
4 we have expansion on the federal side.

5 COMMISSIONER GROVE: Thank you.

6 CHAIR BAUER: Thank you very much,
7 Commissioner Grove. And our next Professor lined
8 up to ask questions is Adam White. He's a Senior
9 Fellow at the American Enterprise Institute, and
10 he's currently the co-director of the George
11 Mason University Gray Center for the Study of the
12 Administrative State. So, the time is yours,
13 Professor White.

14 COMMISSIONER WHITE: Thanks, Chairman
15 Bauer. And thanks to all of our witnesses for
16 their testimony today.

17 My questions are directed at Professor
18 Epps and Professor Siegel. A lot of the
19 questions that we've heard so far on this panel,
20 much of it goes to just practical questions about
21 the reform proposals, and also the work of the
22 Commission, in evaluating the context surrounding

1 the proposals.

2 First, Professor Epps, you've
3 proposed, among other things, the balanced bench
4 approach of expanding the Court to ten sitting
5 justices, five affiliated with the Republican
6 Party, five affiliated with the Democratic Party.
7 And then, those ten select five more.

8 And I'm just curious about the
9 practicalities of that initial allotment of the
10 ten justices, the process for adding the tenth,
11 and also for affiliating those first ten justices
12 with political parties. Could you elaborate on
13 that a little bit?

14 MR. EPPS: Sure. Although I don't
15 have my co-author with me present, and so I'm
16 going to be limited in how much I commit to, in
17 terms of the proposals.

18 I think in our writing about that, we
19 kept some of those details a little vague in
20 order to suggest a lot of different
21 possibilities.

22 I think one thing to note is there are

1 arrangements like that that can emerge, that are
2 not enshrined into law but are the subject of
3 just political norm.

4 So, there are other countries that
5 follow norms like that. So, one example -- I'm
6 not a comparativist, but I've read a little bit
7 about -- is the German Federal Constitutional
8 Court, where for a long period of time there was
9 an informal agreement, in terms of how the seats
10 would be divvied up among governing political
11 coalitions.

12 So, I think there's a lot of different
13 possibilities for how to do that. In terms of
14 the law, we have independent agencies where there
15 are often rules that specify no more than X
16 number of commissioners can be of the same
17 political party.

18 I think a wide range of ways that
19 could be accomplished. And I think that in terms
20 of what I've written about for this hearing, I
21 think the thing -- I want to put that in the
22 larger context of what I call kind of power

1 sharing arrangements.

2 That's one approach we could have to
3 the court is say, rather than treat this as a
4 prize that one side can capture, treat this as
5 something where this important source of power,
6 we really need to figure out some way to divvy it
7 up among the warring factions in our polity.

8 COMMISSIONER WHITE: Thanks,
9 Professor. The first panel had a couple of
10 witnesses representing the members of the Supreme
11 Court bar, thinking through various aspects of
12 the reform proposals.

13 And in their report, as noted this
14 morning, they were critical of expanding the
15 Court anyway. And in the report they do point to
16 some practical issues. And I don't expect you or
17 any of the witnesses to have read that report
18 closely. I only looked through it last night.

19 But I'd be curious for your reactions.
20 They do say on page 91 of the report, we see no
21 institutional benefit to raising the number of
22 justices above nine. Indeed, based on our

1 experience as practitioners, and some of us as
2 judges, most of us believe that increasing the
3 size of the Court above nine would be
4 counterproductive.

5 For example, it'd make oral argument
6 less orderly. It would likely harm deliberation
7 within the Court, and might lead to more
8 fragmented rulings with multiple rationales and
9 less clarity in the law.

10 And I'm sorry to put you on the spot
11 and I'm sure other witnesses might have thoughts
12 on this if we circle back to it, but I'm just
13 curious your reactions to those sorts of
14 practical concerns about a court of more than
15 nine members.

16 MR. EPPS: Sure. So, I have a lot of
17 thoughts about that. And I think one thing I'd
18 note is, serving Court practitioners are an
19 important source of information and wisdom about
20 the Court but they have a certain perspective
21 that might limit their ability to candidly
22 evaluate the institution.

1 I think that those were a number -- I
2 haven't read that written statement but you
3 identified a number of judicial concerns: oral
4 arguments would be disorderly, deliberations
5 would be hard, and you might have fragmented
6 rulings.

7 I mean, I think that you would need to
8 weigh those costs. First of all, you'd have to
9 figure out the extent to which you agree with
10 them.

11 It's possible. They seem quite
12 speculative to me, and some of them seem pretty
13 inconsequential. So, whether oral arguments are
14 orderly or not strikes me as, I would say, kind
15 of a third order of concern when we're thinking
16 about the kind of basic structure of our
17 government.

18 And also, there's lots of ways you
19 could regulate oral argument. You can have rules
20 about who speaks and seniority and so forth.
21 That would take care of that problem.

22 But I think you'd have to think about

1 what are the other benefits, and why are we doing
2 this. And I think that's one thing I've tried to
3 do in my statement, but also tried to do
4 elsewhere, is really emphasize that we need to be
5 really specific in what we see as the problems,
6 before we figure out what exactly a reform is and
7 what we're trying to accomplish.

8 But I think that if it's true that
9 you'd have more fragmented rulings, if that turns
10 out to be true, that might well be a small cost
11 compared to large benefits, depending on the
12 specifics of the reform proposal that we're
13 talking.

14 COMMISSIONER WHITE: Thanks,
15 Professor. Professor Siegel, throughout this
16 panel and in other conversations, we've heard a
17 lot of conversation about norm violations,
18 reciprocal norm violations.

19 Your written testimony, sort of in a
20 very nuanced way, walks through reciprocal action
21 and what it represents in unfair escalation.

22 For the Commission, or for anybody

1 studying these issues, it's a very practical
2 difficulty in just trying to understand what the
3 conventions are surrounding, say, the
4 appointments process.

5 You write in your written testimony,
6 that in 2016 Senate Republicans, quote, their
7 conduct violated the constitutional convention,
8 requiring good-faith consideration of Supreme
9 Court nominees.

10 And just for the work of the
11 Commission as we go about trying to understand
12 the context surrounding these debates, how would
13 you recommend working through the hard work of
14 identifying what constitutes a convention in this
15 context, and the argument surrounding whether
16 there's just one convention, whether there's a
17 different convention for election years, and so
18 on?

19 MR. SIEGEL: Thank you for that
20 question. Part of the difficulty is that when
21 you're dealing with norms, or what I call
22 constitutional conventions in the British

1 tradition, is that you often don't notice them
2 until they're violated.

3 This is a general problem of customary
4 norms, customary law. And so, it could have been
5 going a certain way for a long time. It could
6 have gone without saying. And then there's a
7 violation, and then you look at the response.

8 And so, I think the predominant way in
9 which to know a norm exists, is empirical, which
10 is, how do members of the relevant community, how
11 have they understood themselves? How have they
12 behaved? Has there been stability in the
13 practice.

14 I think there's a different way to try
15 and go about this, which I think is more of a
16 minority position, which is that you take more of
17 a normative perspective and you say that certain
18 kinds of behavior, certain kinds of actions, are
19 so destructive of important values, that
20 regardless of what people believe, say in the
21 Senate, is a norm violation if people believe it.

22 I tend to be more of an empirical

1 bent. And I ask myself such questions as, how
2 long has the practice existed? Has it been
3 stable? Has there been bipartisan buy-in? Has
4 there been some kind of self-understanding along
5 the way that this is how we should conduct
6 ourselves? Or, is it one of the things that
7 simply went without saying?

8 And so, when I see holding a seat open
9 for almost a year based upon the stated reason
10 that the American people should have a say in who
11 decides who the next President is, and then you
12 see a few years later that stated principle being
13 thrown overboard, and now the principle becomes,
14 well, it's whoever has the political power,
15 whoever controls the Senate, both the inclination
16 initially to come up with a better reason than
17 partisanship, as well as the past practice,
18 suggests to me that we're not just talking about
19 politics as usual. We're talking about something
20 more significant and institutional, a
21 constitutional norm.

22 COMMISSIONER WHITE: Thanks,

1 Professor. Maybe with just a minute-and-a-half
2 left, I'll post to you the same question I posed
3 at the start to Professor Epps. Just a practical
4 question of adding justices to the Court.

5 Now, obviously, your written testimony
6 emphasizes that you don't think this is the
7 moment for that but you leave the door open for
8 the possibility of it. Do you have any advice on
9 how, if there were to be an expansion or a
10 packing of the Court, how Congress ought to go
11 about the process of actually adding justices?

12 Would it be all at once? Would it be
13 seriatim in a very short period of time? Should
14 it be in a series over a longer period of time?

15 MR. SIEGEL: I would need to know more
16 about the context and the reasons that the action
17 was being taken. If it was being taken for good
18 government non-partisan reasons, then it seems to
19 me a natural thing to do would be to put
20 ourselves behind the veil of ignorance and to
21 spread the number of seats out over time before
22 we know who's in control of the Presidency and

1 the Senate.

2 If it's what I think we're talking
3 about now, which is an attempt to influence the
4 Court's decision-making going forward, then it
5 seems to me the obvious way in which one would go
6 about that is the way FDR attempted, which is
7 trying to add a certain number of seats all at
8 once with a guarantee of who the President is and
9 who constitutes the Senate.

10 But I should say, this kind of
11 question, I think, is secondary or tertiary to
12 the fundamental question of, what are the
13 circumstances in which fundamental reform of the
14 most important legal institution in the country
15 are justified. That, to me, is the question.
16 Logistics can be worked out later.

17 COMMISSIONER WHITE: Thanks,
18 Professor. Thanks again, Professor Epps.

19 CHAIR BAUER: Well, we have a few more
20 minutes for very -- I call it lightning round at
21 this point, because we can go to 4:45. So, we'll
22 go back around for maybe one more question apiece

1 for a quick question-and-answer. And begin with
2 Commissioner Rodriguez.

3 CHAIR RODRIGUEZ: So, I'd like to ask
4 Professor Siegel a question that picks up where
5 you just left off, so maybe your train of thought
6 is already moving in this direction.

7 And I found very helpful in your
8 testimony that you, as you suggested, laid out
9 criteria for thinking about under what
10 circumstances, steps that would affect this
11 important institution should be taken, let alone
12 change it fundamentally.

13 So, my question is, how would you
14 assess the democracy crisis that Professor
15 Klarman identified and calls existential? Why is
16 that not reason enough to seriously consider
17 court expansion under your extreme circumstances
18 criterion? And if not, what would look like an
19 extreme circumstance?

20 MR. SIEGEL: All right, so I lay down
21 several criteria. One is proportionality.
22 Another is restoring the Court's legitimacy after

1 it tore the fabric of constitutional law, and
2 then a genuine national crisis.

3 And I think it has to be something
4 separate and apart from mainstream, ordinary
5 ideological, partisan disagreements, because if
6 it's not, then it's always an opportunity to pack
7 the court.

8 What one side views as a crisis, the
9 other side's going to view something else as a
10 crisis, and we're going to get into this back-
11 and-forth in which the Court, and therefore the
12 country, is going to be severely damaged.

13 And so, I share Professor Klarman's
14 concerns about democratic backsliding, about a
15 risk of authoritarianism.

16 I think if democracy dies in this
17 country, it's not going to be primarily because
18 of the Supreme Court -- the Supreme Court can
19 facilitate it to different extents -- it's going
20 to be because not nearly enough Americans stood
21 up and pushed back. I don't think it's because
22 the Court has been leading the way.

1 And so, I don't think it's a crisis
2 now, because if it's a crisis now, then it was a
3 crisis in 2010 with Citizens United, there was a
4 crisis in 2013 with Shelby County.

5 When did the crisis begin and why
6 shouldn't the other side say, well, abortion is
7 also a crisis and that justifies packing the
8 Court?

9 What it would take? What would be
10 sufficiently extreme? I gave some examples in my
11 testimony: a court that aided and abetted a
12 presidential candidate to try and steal a
13 presidential election; perhaps controlling seats
14 on the Court in the wake of an epic civil war in
15 which we're trying to decide how savagely racist
16 we're going to continue to be; what are the terms
17 of reunion and reconstruction?

18 I think certain kinds of Court
19 decisions -- invalidating paper money on
20 originalist plans, could cause a genuine national
21 crisis. But I think it has to be something
22 beyond profound, passionate disagreements, about

1 the issues of the day.

2 And at this point at least, that's
3 where I but debates about democracy and voting.
4 I think Professor Klarman speaks ably about his
5 point of view.

6 There are many, many other Americans
7 who believe passionately that he is wrong, and
8 there are many in between. And I worry that if
9 there's a crisis now, then there's always a
10 crisis. And that will degrade the Supreme Court.

11 CHAIR BAUER: Commissioner Grove.

12 COMMISSIONER GROVE: Thank you.
13 Professor Barnett, one more question. I was
14 struck by your argument that the spirit of the
15 Constitution and, in this case, preserving the
16 Supreme Court's role, should inform the way
17 lawmakers do their jobs.

18 Now, you're focused on legislation.
19 But I wonder if the same ideas could influence
20 the way lawmakers, or should influence the way
21 lawmakers, interact with the courts in lots of
22 other ways.

1 And specifically, I'm thinking of the
2 nomination and confirmation process. So, let's
3 say sometime in the future, we have a President
4 and a Senate from different political parties and
5 there's a Supreme Court vacancy, and the Senate
6 refuses to confirm any nominee. And so, the
7 Supreme Court size goes from nine to eight.

8 And then there's another vacancy and
9 the Senate, once again, refuses to confirm a
10 nominee, and the size of the Supreme Court goes
11 from eight to seven. And one could imagine this
12 going on.

13 I know that you say that Senators are
14 fully within their discretion to consider
15 judicial nominations and judicial ideology, and
16 to reject nominees. And I know that that can
17 sometimes split on party lines.

18 What I'm wondering is, if at some
19 point the partisanship in the nomination and
20 confirmation process becomes so detrimental to
21 the Supreme Court's role that it actually
22 violates the spirit of the Constitution.

1 MR. BARNETT: I think the answer to
2 that is yes. I think that all discretionary
3 power can be abused.

4 That's one of the reasons why we have
5 a due process clause, to protect police against
6 federal and state abuse of otherwise
7 discretionary -- in this case, the state's --
8 police powers. There's limits on how they can
9 exercise their discretion.

10 I would say the same thing is true in
11 Congress. I do think that with respect to people
12 who think the Republicans or the Democrats have
13 misbehaved in the Senate, reforming the rules of
14 the Senate would be a step forward.

15 For example, there's no reason why the
16 rules of the Senate couldn't guarantee a
17 committee hearing and a vote, under the rules of
18 the Senate.

19 That would be a way, in this case, for
20 the Democrats who now control the Senate, to
21 change the rules of the Senate to prevent what
22 happened before from happening again.

1 On the other hand, Democrats did
2 withhold hearings from many Republican nominees.
3 To the court of appeals, in particular.

4 And so, there was a precedent for
5 withholding hearings from people for a very long
6 time. But that could violate -- I agree with
7 you, Professor Grove -- that could violate the
8 spirit of the Constitution.

9 And so, we always have to look at the
10 letter. And then we have to enforce the letter
11 according to its spirit. That doesn't mean the
12 spirit of the Constitution overrides the letter.
13 But it means that as you're pursuing the
14 letter -- and in this case it's the letter of the
15 Necessary and Proper clause -- the functions and
16 purposes, and ends and objects, for which we have
17 a written Constitution, need to be taken into
18 account when discretion is being exercised.

19 COMMISSIONER GROVE: Thank you.

20 CHAIR BAUER: And Commissioner White.

21 COMMISSIONER WHITE: Thank you.

22 Reading some of the testimony here and the

1 testimony around this Commission as a whole, I
2 wonder if they try to brush off all the post-
3 World War II gang theory memos from RANDS and the
4 Wohlstetters and everybody, on gang theory.

5 But in recent history, things haven't
6 been always so dark. I look at just 15 years ago
7 we saw a robust debate surrounding the nuclear
8 option of ending filibusters of judicial
9 nominations in the Senate.

10 There was a debate about that in the
11 early 2000s, and then a bipartisan compromise was
12 struck.

13 Around the same time, there was a
14 debate in favor of filibustering Supreme Court
15 nominees, but no filibuster succeeded and the
16 Republicans and Democrats went forward to a final
17 vote on those nominations.

18 I'm just curious, Professor Klarman,
19 shouldn't we at least look for opportunities for
20 bipartisan reform in the short-term, given that
21 it's happened in recent future? Or are those
22 recent examples really exceptions to a broader

1 trend of unilateral escalation?

2 CHAIR BAUER: We're not able to hear
3 you, Professor Klarman, I'm afraid. I think
4 you're just muted.

5 MR. KLARMAN: The extent of partisan
6 polarization is much greater today than it was
7 even 15 years ago. If you look at factors that
8 political scientists look at in evaluating the
9 extent of partisan polarization, it's greater
10 than it's been at any time in the United States
11 since the civil war.

12 And I think it's very, very difficult
13 to achieve bipartisan achievement when you
14 believe that one of the two political parties is
15 no longer committed to democracy.

16 I don't think you're going to get
17 bipartisan agreement about whether the Republican
18 Party has essentially become an authoritarian
19 party which no longer is committed to excluding
20 extremists from its rank, repudiating violence
21 under any circumstances, and resisting efforts to
22 suppress votes for political advantage.

1 Obviously, you're not going to get a
2 consensus. Mitch McConnell thinks the Democrats
3 trying to pass voting rights legislation is the
4 most partisan thing he's ever seen. I think it's
5 entrenching democracy.

6 So, I'd certainly like to believe that
7 it's possible that we can recover the good old
8 days when we didn't have this extent of partisan
9 disagreement, and I'm aiming for that in the
10 future. But I don't think it's possible right
11 now. No.

12 COMMISSIONER WHITE: Thanks,
13 Professor.

14 CHAIR BAUER: Well, thank you very
15 much to the panelists and to the questioners.
16 That concludes this panel. We're going to take a
17 break now and we'll return at 5:00 p.m. for
18 closing reflections on this topic of the Supreme
19 Court and Constitutional Governance. Thank you
20 very much.

21 (Whereupon the above-entitled matter
22 went off the record at 4:46 p.m. and

1 resumed at 5:00 p.m.)

2 CHAIR BAUER: Welcome back to this
3 public meeting of the Presidential Commission on
4 the Supreme Court of the United States.

5 We now have a panel which is devoted
6 here at the conclusion of the day to closing
7 reflections on the Supreme Court and
8 constitutional governance.

9 And so, at this time, I would like to
10 ask all of our panelists to please turn on their
11 cameras.

12 MR. KRAMER: Okay. Mine is not coming
13 on for some reason.

14 CHAIR BAUER: I think yours is on.

15 MR. KRAMER: Here we go.

16 CHAIR BAUER: You're in good shape.
17 Very good. Thank you very much.

18 So, as you know, we'll recognize the
19 witnesses in turn for five-minute statements, and
20 then, we'll proceed to have the Commissioners
21 also do the questioning.

22 I would like to begin with Justice

1 Rosalie Abella of the Supreme Court of Canada.
2 And we're very delighted to have you here. Thank
3 you for joining us. And please take your five
4 minutes to testify to the Commission on the topic
5 at hand.

6 MS. ABELLA: Thank you so much, and
7 thank you for the honor of inviting me to appear
8 before the Commission to offer a perspective on
9 the evolving role of the Canadian Supreme Court
10 after Canada adopted the Canadian Charter of
11 Rights and Freedoms in 1982.

12 In my five minutes, I can offer only
13 a general sketch of the developmental arc of the
14 Supreme Court's approach to the constitutional
15 protection of rights, but I do look forward to
16 answering any questions about the more granular
17 aspects of how we function.

18 The addition of the Charter to our
19 preexisting federalism-based constitutional
20 architecture led to a Copernican revolution for
21 the Supreme Court of Canada. It approached its
22 new mandate in the eighties robustly. It was

1 innovative, it was bold, and it was
2 transformative. It adopted a theory of living
3 constitutionalism that saw the Charter's role as
4 growing and expanding over time to meet new
5 social, political, and historic realities.

6 This was to be a broad and generous
7 approach, guided by the values and principles the
8 Court designated as essential to a free and
9 democratic society, including a commitment to
10 social justice and equality, accommodation of a
11 wide variety of beliefs, and respect for cultural
12 and group identity. It made the Court hugely
13 popular.

14 But it also generated some controversy
15 in the nineties when we saw a brief backlash to
16 constitutional supremacy and to the role of the
17 Court as the guardian of the Constitution,
18 assisted, I should say, by some supply-side
19 rhetoric trickling up from south of the border.
20 The critics called women and minorities seeking
21 the right to be free from discrimination special
22 interest groups seeking to jump the queue. They

1 called efforts to reverse discrimination "reverse
2 discrimination."

3 They said courts should only
4 interpret, not make law; thereby, ignoring the
5 entire history of common law. They replaced
6 ideas with ideology and substituted analysis with
7 meaningless labels like "activist" or "anti-
8 democratic" -- labels designed to presumptively
9 dismiss the legitimacy of a decision they didn't
10 agree with and labels they applied only to
11 decisions that expanded rights, never to those
12 that restricted them.

13 But the criticisms proved to be
14 evanescent in Canada. It turned out that a
15 majority of the Canadian public had confidence in
16 the Court and understood that, by guaranteeing
17 its values and constituent rights of freedoms, we
18 were strengthening, not undermining, our
19 democratic legitimacy.

20 So, we confidently endorsed a new
21 justice consensus based on our constitutionalized
22 human rights, which made compassion and respect

1 for human dignity, a tenacious belief in the
2 transcendent importance of rights, and a
3 commitment to their democratic centrality, the
4 motivating core of our national values. And that
5 is the national trajectory we've been on for most
6 of the last 40 years.

7 But Canada and its judiciary are part
8 of a global ecosystem. If democracy and human
9 rights are at risk anywhere, they are at risk
10 everywhere, and all over the world democracy and
11 human rights are at risk -- a world where too
12 many governments have interfered with the
13 independence of their judges and media, where the
14 vulnerable have become more vulnerable, where
15 hate kills, truth is homeless, and lives don't
16 matter.

17 We're in the midst of an
18 intellectually sclerotic, rhetorically
19 tempestuous, and ideologically polarized global
20 discourse. That discourse includes an intense
21 and distractive verbal whirlpool about judges and
22 constitutions and democracy and rights -- a

1 conversation in which loaded phrases are
2 perpetually spun and important concepts are
3 conveniently disregarded.

4 The most basic of the central concepts
5 we need back in the conversation is that
6 democracy is not, and never was, just about the
7 wishes of the majority. What pumps oxygen no
8 less forcefully through its democratic veins is
9 the protection of rights through courts,
10 notwithstanding the wishes of the majority.

11 And that is why independent supreme
12 courts in a democracy are indispensable national
13 institutions. There can be no democracy without
14 respect for rights, no respect for rights without
15 respect for courts, and no respect for courts
16 without respect for their demonstrably
17 independent, impartial, nonpartisan, and fearless
18 defense of democracy and rights. Independent
19 judges who rigorously scrutinize state action for
20 constitutional compliance are not anti-
21 democratic; they are democracy at work.

22 A concluding thought: My life started

1 in a country where there had been no democracy,
2 no rights, no justice. It created an
3 unquenchable thirst in me for all three. I was
4 born in a displaced persons camp in Stuttgart in
5 1946 to parents who survived the Holocaust.

6 My father was a lawyer. He taught
7 himself English and was hired by the Americans as
8 a legal counsel for southwest Germany. Those
9 Americans restored his belief that justice was
10 possible. My father died a month before I
11 finished law school, but not before he taught me
12 that democracies represent the best possibility
13 of justice, and that those of us in the justice
14 system have a particular duty to make that
15 justice happen. That, I know, is the goal of
16 this Commission, and that is why I feel so
17 honored to be asked to participate.

18 Thank you.

19 CHAIR BAUER: Thank you very much,
20 Justice.

21 Our next witness is Chief Justice
22 Margaret Marshall, who served for 11 years as

1 Chief Justice of the Supreme Judicial Court of
2 Massachusetts and is now a member of the firm
3 Choate, Hall & Stewart.

4 Chief Justice Marshall, the floor is
5 yours.

6 MS. MARSHALL: Thank you, Commissioner
7 Bauer and the other Commissioners. It is a great
8 honor for me to testify before you and, in
9 particular, a great honor to follow in the
10 footsteps of Justice Rosie Abella.

11 My testimony is focused narrowly, but
12 the experience of state court judges, which you
13 heard in the last panel on a wide range of issues
14 from encounters in the courtroom to judicial
15 ethics for judges, to appointment and
16 reappointment processes, may be helpful to you.
17 And, of course, I would be pleased to answer
18 questions on any subjects.

19 Much of what I will say in some
20 respects repeats that of others. What I can add
21 is my own experience as State Chief Justice under
22 one of the proposals, the constitutional revision

1 to set judicial tenure terms under consideration
2 by this Commission.

3 At its adoption in 1780, the
4 Massachusetts Constitution provided that judges
5 would serve during good behavior, essentially,
6 life tenures, we've come to understand it. And
7 in 1972, Massachusetts changed its Constitution,
8 and all judges must now retire at age 70.

9 The provision for a single, but
10 limited tenure for judges has worked well in
11 Massachusetts and has, in fact, worked
12 extraordinarily well for almost 50 years. I
13 stress, of course, that mandatory retirement at
14 age 70, or 75, or older, or limited terms, have
15 nothing whatsoever to do with mental acuity or
16 physical disability of those serving. There are
17 other mechanisms to deal with those cases.

18 But, in my experience, the benefits of
19 limited judicial terms I have experienced are
20 several, and here are just some:

21 We are living, as almost every witness
22 has noted, for longer and longer and longer, and

1 a limited term for judges makes sure that we,
2 quote, "make room for new generations of judges,"
3 as Judge David Tatel said in his recent letter of
4 resignation to President Biden.

5 Several witnesses have noted -- and I
6 agree -- that the Founders certainly did not
7 anticipate judges serving for 30 or 40 or 50
8 years, and there's absolutely nothing
9 inconsistent between limited terms for judges and
10 the form of the government the Founders sought to
11 establish. Indeed, I view limited terms as being
12 entirely consistent with the founding vision for
13 our democracy.

14 Next -- and I think this is
15 important -- the known departure date of judges
16 allows everyone engaged in the process to plan
17 appropriately. Judges, Governors, Presidents,
18 loyalists, citizens, all can anticipate and plan,
19 and if a Governor or President knows that during
20 his term in office there will be two or three
21 departures of Supreme Court Judges, she can plan
22 accordingly. Predictability removes the kind of

1 hurtful and, frankly, institutionally damaging
2 comments that can surface when the continued
3 tenure of a particular Justice is under scrutiny.

4 And third, in my view, limited terms
5 will help undercut some of the strong reactions,
6 very strong reactions, today when federal judges,
7 in particular, are appointed at relatively young
8 ages. Of course, there is now an expectation
9 that, without limited terms, the judge will serve
10 for 40 or even 50 years. The reaction to any one
11 appointment is often extreme. This is not good
12 for the judge; it is not good for the court, or
13 for our nation.

14 It appears to me that the Supreme
15 Court, and more globally, the judiciary in all
16 forms, is losing its credibility as fair and
17 impartial, independent branches of our
18 government. And that is deeply troubling to me,
19 as I know it is to many who have appeared before
20 you. And I share Justice Abella's comments in
21 saying that, because I came from a country where
22 the rule of law was the rule of the powerful

1 against the powerless, this means a great deal to
2 me.

3 There may, indeed, be statutory or
4 other ways to achieve limited terms for Justices
5 of the Supreme Court and other federal judges.
6 Regardless, I am affirmatively in favor of a
7 Constitutional Amendment to provide such tenure,
8 whether it be by age or number of years.

9 Any change as fundamental as this to
10 our democracy at this time should have the
11 support of the widest spectrum of people of our
12 nation, and Constitutional Amendments I know are
13 difficult to achieve. But the process invites
14 the public to learn anew the fundamentals of, the
15 value of a constitutional democracy and the
16 important role that independent judges play in
17 that democracy.

18 The Constitution is not written in
19 stone. Difficult to change, yes, but not
20 impossible. And I have seen more impossible
21 changes in my life than I care to mention.
22 Changes to our Constitution can be made. The

1 people can and will understand why change is
2 warranted, if it is.

3 Last -- and this is more in the nature
4 of a plea to this Commission -- this is an
5 opportunity for this Commission to make
6 observations about the necessary, the absolute
7 minimum necessary requirements for a fair,
8 impartial, and independent judiciary, state or
9 federal, in our nation. I hope you will do so,
10 even as you make recommendations for any changes
11 to the federal courts.

12 My main concern the past 25 years has
13 focused on a subject not directly under review by
14 this Commission, but worthy of note. It is this:
15 To maintain the independence of judges in our
16 form of constitutional democracy, the linchpin is
17 not the length of tenure, but that judges serve a
18 single tenure. In other words, that once
19 appointed to a particular court, judges not be
20 dependent for the continuance of their tenure on
21 any review process, whether by reappointment or
22 any other form of review.

1 Today, 47 states do have such a review
2 process, and the politicization of those state
3 courts, where almost all of the judicial business
4 in the United States takes place, makes the
5 politicization of the Supreme Court of the United
6 States seem pale in comparison. Those states are
7 facing crises that are fundamentally at odds with
8 the Framers' intentions. It is all but
9 destroying independent and impartial state
10 judiciaries. And whatever recommendations this
11 Commission makes to the President, that point
12 should not be lost.

13 Thank you for this opportunity to
14 testify, and I would be pleased to answer any
15 questions.

16 CHAIR BAUER: Thank you very much,
17 Justice Marshall.

18 Our next witness is Professor Jamal
19 Greene. He's the Dwight Professor of Law at
20 Columbia Law School.

21 Go ahead, sir.

22 MR. GREENE: Good afternoon, and thank

1 you for giving me the opportunity to share my
2 views with the Commission.

3 I am the Dwight Professor of Law at
4 Columbia Law School, and my scholarship has
5 focused on U.S. and comparative constitutional
6 rights adjudication, theories of constitutional
7 interpretation, and the structure of
8 constitutional argumentation.

9 As my written statement elaborates,
10 among the many potential drivers of the need for
11 reform of the Supreme Court, one stands out as
12 nonpartisan, as undeniable, and as incompatible
13 with constitutional democracy -- the
14 disproportionate amount of power that each
15 individual Justice wields. The Justices of the
16 U.S. Supreme Court are too few; they hold office
17 for too long; they are too easy to seek, and they
18 exercise too much discretion over the cases they
19 hear and the political identity of their
20 replacements.

21 The most recent push for court reform
22 has a genesis in a perceived political imbalance

1 on the Court, but my remarks don't focus directly
2 on responses to that imbalance. Democrats and
3 Republicans, progressives and conservatives can
4 and do disagree about the degree to which the
5 ideological makeup of the Court is a genuine
6 problem. But the amount of power that individual
7 Justices wield over American life should concern
8 policymakers, lawyers, and citizens of all
9 political and ideological perspectives.

10 The Supreme Court is one of the most
11 powerful institutions in American public life.
12 In just the last 11 years, the shift of a single
13 vote would have led to radically different and
14 enormously consequential outcomes over a wide
15 range of areas. A shift of one vote would have
16 meant the preservation of Section 5 of the Voting
17 Rights Act. One vote would have meant the end of
18 the Affordable Care Act's individual mandate.
19 One vote would have meant state bans on same-sex
20 marriage, the effective end of race-based
21 affirmative action, and bans on corporate
22 election year-end expenditures.

1 Americans hold disparate views on
2 these questions, but whatever those views, a
3 starkly different political and legal landscape
4 in a nation of 330 million people should not
5 consistently turn on the views of a single
6 unelected person, one who is only one of nine,
7 who can be confirmed by a bare and strictly
8 partisan majority of the U.S. Senate, who plays a
9 major role in deciding what cases they hear, who
10 can potentially remain in office for 40 years or
11 even 50 years, and who can, in effect, choose the
12 ideology of their replacement, who may, in turn,
13 hold office for another 40 or even 50 years under
14 similar conditions.

15 No democracy of any character should
16 tolerate a single person exercising this degree
17 of power, discretion, longevity, and complete
18 lack of accountability, and no other democracy
19 does.

20 Four aspects of the Court's design, in
21 particular, combine to personalize the Court's
22 power in the way I've just described, to make it,

1 in effect, the Justices, rather than the Court.

2 One is life tenure.

3 Two is a small, absolute number of
4 Justices.

5 Three, a partisan confirmation
6 process.

7 And four, a nearly entirely
8 discretionary docket.

9 Life tenure and a small number of
10 Justices, in particular, combine to create an
11 almost monarchical body that is quite unlike
12 other courts in the world. Nearly all of the
13 world's high courts have term limits or mandatory
14 retirement, and all of the high courts of
15 countries of at least 50 million people have more
16 than nine judges.

17 A larger size and a shorter term
18 diffuses power. So that, even if the Court
19 itself can still make the momentous decisions
20 that we have come to expect of it, its individual
21 members are denied the ability to shape the law
22 in their personal image.

1 In my statement, I offer a proposal
2 for a statutory change to a Court with 16
3 Justices serving 16-year terms. I will not get
4 deep into the weeds of that proposal in my oral
5 statement, and the particular details are less
6 important than the structure.

7 In brief, the proposal leverages
8 Congress' ability to increase the size of the
9 Court, along with its ability to shift the
10 functions and jurisdiction of judges, to provide
11 a framework through which both term limits and
12 other reforms can be implemented without the need
13 for a Constitutional Amendment.

14 The proposal is not for Court packing,
15 which is partisan and which I do not support, for
16 many of the reasons others have given. The
17 proposal is for a bipartisan assessment of the
18 costs and benefits of the Court at its current
19 size. I believe the ubiquity of larger courts
20 with shorter judicial tenures, among all remotely
21 comparable countries in the world, reflects an
22 American exceptionalism that we should not

1 celebrate.

2 I look forward to the Committee's
3 questions.

4 CHAIR BAUER: Thank you very much,
5 Professor Greene.

6 Our next witness is Larry Kramer, who
7 is the President of the William and Flora Hewlett
8 Foundation. Before joining the Foundation, he
9 served from 2004 to 2012 as the Richard E. Lang
10 Professor of Law and Dean of Stanford Law School.

11 Mr. Kramer, the floor is yours.

12 MR. KRAMER: Thank you. Can you hear
13 me?

14 CHAIR BAUER: Yes.

15 MR. KRAMER: I'm grateful for the
16 opportunity to speak today, and I know it's been
17 a long day for everyone. So, I'll just touch on
18 a couple of points from my written statement.

19 The question I think about on which we
20 want to be clear is, what exactly is the problem
21 that we're addressing? Why are we considering
22 whether something needs to be done about a

1 Supreme Court that has operated in pretty much
2 its current form since at least 1925?

3 So, the problem is not with the
4 Supreme Court's rulings, though some of us may
5 dislike some or a lot, or even all of them. Nor
6 is it that the last several appointments were
7 made in controversial circumstances that involved
8 hypocrisy and political gamesmanship.

9 Standing alone, those things would not
10 justify taking extraordinary action. But they
11 can't be taken alone because they're just the
12 latest in what has been a long process in decline
13 in how Justices are chosen and confirmed. And
14 that, in my view, justifies taking a moment to
15 talk about whether something should be done and,
16 if so, what?

17 This decline in the appointments
18 process is an unanticipated product of two
19 features of the modern Supreme Court. First, the
20 spectacular growth in the Court's power since the
21 1950s, and second, the interaction of that
22 newfound power and importance with life tenure.

1 The first feature, the growth in the
2 Court's power, is the product of the widespread
3 acceptance of judicial supremacy, a power the
4 Court had never successfully asserted until
5 Cooper v. Aaron, and one that achieved acceptance
6 in the broader political culture only gradually
7 in the years after Cooper.

8 As perceptions in the broader
9 political culture settled that the Court is
10 supreme in the interpretation of the
11 Constitution, the power of the Court to extend
12 and exercise authority expanded in what has been
13 a steady and quite spectacular growth, touched on
14 by some of the other speakers, for the past 50
15 years.

16 With supremacy settled, any
17 appointment to the Court now entails giving
18 someone enormous power they can exercise
19 unchecked by any other branch or part of
20 government for as long as they choose to remain
21 on the Court. And that, in turn, has corrupted
22 and debased the appointments process, encouraging

1 Presidents to engage in much more rigorous
2 ideological vetting, looking to appoint people
3 dedicated to the President's politics who are
4 also young, and turning each new appointment into
5 a moment of high political drama that contributes
6 to further degrading American democracy broadly.

7 Who needs elections when you can pack
8 the bench with ideologues to perpetuate your
9 world view long after you've left office. And
10 it's no wonder that Donald Trump and Mitch
11 McConnell put remaking the federal bench, and
12 especially the Supreme Court, at the top of their
13 political agenda and consider it to have been
14 their preeminent achievement.

15 What, then, can we do to restore the
16 incentives of Presidents and Congresses to think
17 more responsibly about appointments?
18 Historically, what kept this under control was
19 that the Supreme Court's power could be checked
20 by action from Congress and the Executive. If
21 the Court veered too far from the nation's
22 political consensus, it could be reined in using

1 devices clearly and explicitly conferred in the
2 Constitution. Presidents could ignore its
3 mandates. Congress could change its composition
4 or rules of proceeding or its jurisdiction or its
5 budget, and so on.

6 And all of these devices were deployed
7 at different times across American history. They
8 were not easy to deploy. It took both a strong
9 political consensus in the nation and the Court
10 acting decisively to upset that consensus, but
11 when that happened, the political branches could
12 and did push back. And the mere existence of
13 that possibility that this might happen sufficed
14 to produce a workable equilibrium between the
15 Court and the political branches.

16 In practical terms, the successful bid
17 for supremacy entailed the delegitimation of
18 exactly those control devices as a political
19 matter, rendering them off-limits; shifted the
20 equilibrium strongly in favor of judicial
21 authority by limiting control to the appointments
22 process.

1 Now one solution to that could be
2 simply to recognize and acknowledge again that
3 the devices historically used to rein in a
4 runaway Court are, in fact, legitimate. The
5 Administration and Congress might well want to
6 consider deploying something like enlarging the
7 size of the Court, if only to make clear that the
8 kinds of games that dominated the last two
9 appointments will not succeed. Tit for tat, it
10 turns out, really is one way to drive a system
11 back towards cooperation.

12 But the present political
13 circumstances makes succeeding in that kind of
14 effort a long shot. Still, I should say a report
15 from this Commission acknowledging the
16 constitutionality and legitimacy of the various
17 control devices that have been deployed
18 historically could go far toward restoring a
19 better balance among the branches, especially if
20 and when the circumstances arise again where
21 there is a big gap, as could well happen.

22 In the meantime, there is, as I noted

1 in my written statement, a simpler, more direct,
2 and more effective solution to the appointments
3 problem. This is the proposal first developed by
4 Deans Cramton and Carrington in 2005, and
5 recently introduced into Congress as H.R. 8424.
6 The bill would, in a nutshell, add a new Justice
7 each Congress, with the nine most recent
8 appointees deciding the merits cases on the
9 Court's regular docket. The other Justices would
10 remain on the bench with their full salaries and
11 tenure, performing all the other duties of
12 Article III judges, including deciding cases in
13 the other courts.

14 This would -- and it could be adopted
15 by statute since Constitutional Amendment is
16 virtually impossible -- it would, in my view,
17 address the problem in its entirety. By
18 requiring regular appointments on a frequent
19 basis, it reduces the stakes of any single
20 appointment and ensures both parties regular
21 opportunities to nominate. By having merits
22 cases decided by the nine most recent appointees,

1 it assures that the cases are not being decided
2 by Justices appointed decades earlier, when the
3 issues facing the nation were different. And it
4 eliminates the incentive to make age, that is,
5 relative youth, a critical factor.

6 And lastly, it protects judicial
7 independence fully, while the constant, steady
8 renewal of members reduces the likelihood of a
9 Court that's ideologically extreme or out of
10 synch with the rest of society.

11 Thank you.

12 CHAIR BAUER: Thank you very much, Mr.
13 Kramer.

14 Our next witness is Stephen Sachs. He
15 is the Antonin Scalia Professor of Law at Harvard
16 Law School.

17 Professor Sachs, you have the floor.

18 MR. SACHS: Thank you very much. I am
19 honored to testify before the Commission today.
20 I appreciate your work, as you now enter hour
21 nine of testimony today, and I'm honored to be
22 able to offer my reflections on the Supreme Court

1 and constitutional governance.

2 In considering potential reforms, the
3 Commission should take care to do the following:

4 First, it should preserve judicial
5 independence. The Court's fundamental job is to
6 apply the law to the cases before them. We rely
7 on courts not only to reach individual judgments
8 of guilt or liability, but to enforce the limited
9 powers of our different governments and different
10 branches. Correcting for judges' errors, even
11 serious errors, by shifting these powers to
12 another department would not make their
13 enforcement more reliable, but it would harm the
14 Court's ability to act as neutral tribunals in
15 particular cases. That is a crucial element of
16 the rule of law, and for that reason, it's also a
17 frequent target of autocracies the world over.
18 America has a nearly unbroken tradition of
19 judicial independence at the federal level, and
20 your Commission should not break it today.

21 Second, put politics in its place. If
22 you want a less political judiciary, you need a

1 more political amendment process. You need to
2 move political fights out of judicial conference
3 rooms and into statehouses and the Halls of
4 Congress. A Court reform that ignores Article V
5 will be reform only in name, because a Court that
6 can get away with Constitutional Amendment on the
7 cheap, one that evades the Constitution in the
8 guise of interpreting it, is always going to be a
9 target for partisan capture.

10 Third, beware unforeseen consequences.
11 It is much harder to build than to destroy.
12 Traditions of judicial independence that we've
13 built up over time can be demolished much more
14 quickly than one might expect. Many of the
15 reforms you've heard proposed today would have
16 extensive unforeseen consequences.

17 These might include measures that are
18 likely unconstitutional, absent amendment, such
19 as supermajority requirements or 18-year terms;
20 measures that would be constitutional, but
21 dangerous and irresponsible, such as Court
22 packing or jurisdiction stripping, or measures

1 that would be entirely lawful, but would likely
2 prove unwise, such as requiring cameras in the
3 Court during oral argument.

4 The greatest contribution that this
5 Commission could make would be to raise the
6 profile of smaller-bore reforms that right now
7 are easy for Congress to ignore, but that have
8 consequences that could be better assessed and,
9 if necessary, more easily reversed.

10 Finally, in considering potential
11 reforms, the members of the Commission have to be
12 honest with each other and with the public. In
13 this process, euphemism is not your friend. The
14 public is going to see through efforts to recast
15 Court packing as Court expansion, jurisdiction
16 stripping as jurisdiction channeling, and so on.
17 It will see through efforts to pursue short-term,
18 partisan payback under the guise of long-term
19 reform. And because legitimacy is a two-way
20 street, reforms that are not received by both
21 sides as enhancing the Court's legitimacy are not
22 going to work at doing so.

1 Whatever else might be wrong with
2 today's Court -- and there is much to say on that
3 score -- it has not shown itself overly resistant
4 to public opinion. The Court is not getting in
5 Congress' way. The main barrier to major
6 legislation, whether on voting rights or climate
7 or health care, or anything else, is cobbling
8 together 50 votes in the Senate and not five
9 votes in the Supreme Court.

10 The most controversial topic that
11 might come up in the next term is whether to
12 revisit Roe v. Wade. And whatever one's views on
13 that topic, revisiting Roe would allow democratic
14 majorities to make their own decisions, not
15 prevent them.

16 The public's approval of the Supreme
17 Court, at least as of last year's Gallup Poll,
18 was higher than it has been for most of the last
19 decade. So, the case that there is a major
20 crisis requiring major reform seems to me rather
21 weak.

22 To be clear, there is an awful lot

1 that could be fixed about the Supreme Court.
2 Over the last century, in my view, the Justices
3 have too often mistaken their own rulings for the
4 law that they are charged to enforce. But these
5 problems are not yet matters of universal
6 agreement, and that means they can only be solved
7 by the slow work of persuading others and not by
8 some simple policy fix. There are no drastic
9 policy changes that would avoid the need for that
10 work, and no sudden crisis that calls out for
11 attempting them.

12 If there were a single policy that
13 could improve the Court's fidelity to law, I
14 would happily recommend it, but many of the
15 reforms proposed thus far would subject the Court
16 to political pressure instead. Under these
17 circumstances, the best that the Commission can
18 do is to do no harm.

19 Thank you.

20 CHAIR BAUER: Thank you very much,
21 Professor Sachs.

22 So now, we're going to turn to the

1 Commissioners who will be directing the questions
2 to the witnesses. So, the Commissioners, please
3 turn their cameras on. Very good. Thank you
4 very much.

5 So, the questioning will begin with
6 Judge Thomas Griffith. He's a former member of
7 the U.S. Court of Appeals for the D.C. Circuit
8 and now a Special Counsel to the firm of Hunton
9 Andrews & Kurth and a lecturer on law at Harvard
10 Law School.

11 Judge Griffith?

12 COMMISSIONER GRIFFITH: Thank you very
13 much, Co-Chair Bauer.

14 And let me give a special thanks to
15 all of the witnesses on this panel, not only for
16 the substance of what you offer us, but may I
17 also congratulate you on the tone of it. To
18 participate in these discussions with civility
19 and respect for the opposing points of view, as
20 you have each demonstrated, I think is marvelous,
21 and it is an example to all of us.

22 If I might, Justice Abella, may I

1 start with you? We are honored to have you with
2 us and we congratulate you on your extraordinary
3 life of service to the rule of law.

4 Having recently reached Canada's
5 mandatory retirement age for Supreme Court
6 Justices, what are your thoughts on this age
7 limit and its impact on the work of the judiciary
8 and how it's perceived by the public?

9 Justice Abella, you're on mute.

10 MS. ABELLA: That's the expression of
11 the year, isn't it?

12 COMMISSIONER GRIFFITH: That's right.

13 MS. ABELLA: Well, it's a very timely
14 question for somebody who retired at the age of
15 75 on July the 1st. I have always been a fan of
16 mandatory retirement. I think it's important to
17 have a "sell by date" when you embark on a
18 judicial career; very difficult for judges to
19 decide for themselves when they are no longer
20 indispensable. And the idea that there is a
21 moment when you are expected to depart and make
22 room for someone else, so that there is renewal

1 of ideas, of institutional objectives, is a very
2 healthy one for me and to me.

3 Now, most of my colleagues, I should
4 tell you, in the 17 years I've been on the
5 Supreme Court, even though 75 is the mandatory
6 retirement age, most of them have left before the
7 75 years was up. But what there has never been
8 is the perception that departures are based on
9 anything partisan, so that one party or the other
10 has an opportunity to replace you. That
11 nonpartisan tradition in the appointment process
12 I think helps as well.

13 I've been a judge since 1976 to
14 various courts and have been appointed, as have
15 most of my colleagues, by both major political
16 parties. So, the fact that you leave when one
17 party or the other is in power really doesn't
18 project any possibility of a guaranteed judicial
19 outcome.

20 So, to me, since most countries in the
21 world, I think almost all countries in the world
22 except the United States, have a term limit, it's

1 something I've always grown up thinking is a very
2 healthy way to ensure that, when the time comes,
3 we will be replaced by another qualified
4 candidate.

5 COMMISSIONER GRIFFITH: Thank you.

6 If I might take advantage of your
7 international perspective, as you know, the
8 Commission has been tasked with hearing arguments
9 about the role of the Supreme Court of the United
10 States. From your international perspective,
11 what is it about the Supreme Court of the United
12 States internationally that you value most, and
13 then, I'll invite you to say if there's need for
14 change to the U.S. Supreme Court to enhance its
15 role internationally, what might that be?

16 MS. ABELLA: I think it's fair to tell
17 you that, when I was in law school from 1967 to
18 '70, the court that we looked to as the beacon of
19 how constitutionalism works in a vibrant way was
20 the American Supreme Court. Our Constitution,
21 the BNA Act, until we got the Charter rights and
22 freedoms, was a federalism-based document, a

1 division of powers, which doesn't engender the
2 same passion for the protection of rights,
3 obviously, that your Bill of Rights did.

4 What happened once Canada got its own
5 Bill of Rights was that it started to look not
6 just to the United States, but all over the world
7 for comparative and international guidance. We
8 weren't bound by what we saw, but we found that
9 most legal problems really are universal, and
10 it's always interesting to see how other courts
11 have addressed exactly the same problems.

12 In fact, our very first constitutional
13 provision in the Charter says: All rights are
14 guaranteed, subject only to those reasonable
15 limits in a free and democratic society. So,
16 essentially, a constitutional exhortation to look
17 outside.

18 So, we learn from everyone. We learn
19 from the things that we like about other
20 jurisdictions. We learn from the things that we
21 aren't particularly fond of.

22 Isaiah Berlin had a wonderful

1 expression, "There's no pearl without some
2 irritation in the oyster." So, sometimes when
3 you read something from another jurisdiction --
4 and we look at all of the democratic
5 jurisdictions -- we find something that rankles a
6 bit, and it helps us formulate something that we
7 think works best for our own jurisdiction.

8 The limits on the American appeal, I
9 think, is because, unlike most jurisdictions in
10 the Western World, you do not have, obviously, a
11 new Constitution. The rest of us have a post-
12 World War II constitution which protects both
13 individual and group rights, has a
14 proportionality clause. So, we aren't restricted
15 to absolutism in the interpretation of rights.

16 And so, the judicial international
17 conversation tends to play out more, I think,
18 among those countries that have similar
19 philosophical bases to their constitutions rather
20 than the United States, which is not to say we
21 aren't guided by much of what we read in the
22 United States, not just in constitutional law;

1 copyright law, criminal law. I mean, we get much
2 from what the American Supreme Court does, but we
3 have, I think, shifted focus mostly into a more
4 international sphere to see what other modern
5 constitutions are doing in their protection of
6 rights.

7 COMMISSIONER GRIFFITH: Thank you.
8 Thank you very much.

9 Chief Justice Marshall, can I start by
10 thanking you for the reference in your written
11 testimony to Robert F. Kennedy's 1966 Day of
12 Affirmation speech in Cape Town? Unlike you, I
13 wasn't there that day, but I lived in South
14 Africa for several years not long thereafter, and
15 Senator Kennedy's speech is, in my view, one of
16 the most inspiring political speeches given by
17 someone not named Lincoln or King. So, thank you
18 for that. I urge the public to read your written
19 testimony for many reasons, but for that.

20 If you could, could you describe a
21 little bit more, then, for the public that's
22 listening what you think the problem is in the

1 U.S. Supreme Court that would be solved by term
2 limits?

3 MS. MARSHALL: I think the problem is
4 the following, and Justice Abella sort of
5 commented on it: All of us know at some point we
6 have to give up power. And Justices on the
7 United States Supreme Court exercise enormous
8 power. Judges in our constitutional systems
9 exercise enormous power.

10 It seems to me that I agree with so
11 many people who've testified today that be
12 careful of the consequences of when you make
13 changes. I am very, very cautious about
14 suggesting changes to our great constitutional
15 system. Because, as I said in my written
16 testimony, for me, my great discovery was of the
17 merits of a constitutional democracy founded on a
18 charter of rights, enforced by independent
19 judges.

20 As I look to what has happened in the
21 federal courts with the taking of senior status,
22 I know that is not what we're contemplating here,

1 but, essentially, it's an extremely effective
2 option for judges when they get to a certain age
3 to begin to move off. We have seen how that
4 revitalizes the federal courts and the circuit
5 courts.

6 I have seen what happens in countries
7 around the world, including South Africa. I take
8 issue with, for example, Professor Dixon who
9 suggested that we serve for too long. I don't
10 think we serve for too long. I am less worried
11 about length of tenure than, to use Justice
12 Abella's term, a "sell by date."

13 I think that there is no other piece
14 of our government where, as Professor Greene
15 suggested, you can serve for 50 years, and then,
16 make sure that you're appointing the next person
17 for 50 years who's like you. We really don't
18 like that in the United States.

19 I think the American people are open
20 to a conversation about changes to its
21 Constitution. I think they are more open to that
22 than they are to legislative changes. I have no

1 basis, other than the fact that I talk all over
2 the country all of the time. One of my great
3 joys has been to explain to Americans how
4 fabulous this Constitution is. And so, I think
5 that people would understand. I don't think it
6 is a revolutionary move at all. I think it is
7 entirely consistent with courts around the globe
8 who now newer than us.

9 I mean, I always say to people, you
10 know, the poor Canadians were suffering under
11 what Justice Abella mentioned, the federalist
12 system, a kind of parliamentary system, no
13 charter of rights. She couldn't protect anybody,
14 if she tried, in the old days.

15 I mean, we have a fantastic
16 Constitution, but there is a problem which has
17 been solved for federal judges in your court, you
18 know, when you sat. It's been largely solved in
19 the state courts.

20 I emphasize what I said in my
21 testimony. For me, the linchpin is always a
22 single lengthy tenure. So that when a judge

1 issues a decision, they don't find themselves out
2 of a job the next go-round. That's the linchpin
3 for independence.

4 And as long as this Commission keeps
5 that sense right at the center of its
6 deliberations, I don't think that limiting terms
7 is going to be as dramatically over some of the
8 other suggestions, even though I understand the
9 motivations for it.

10 COMMISSIONER GRIFFITH: Thank you very
11 much.

12 CHAIR BAUER: Thank you very much,
13 Judge Griffith.

14 The next Commissioner who will be
15 questioning is Michelle Adams, who is Professor
16 of Law at the Benjamin N. Cardozo School of Law.

17 Commissioner Adams?

18 COMMISSIONER ADAMS: Thank you, Co-
19 Chair Bauer. I very much appreciate it.

20 And I thank everyone for their
21 testimony, particularly at this late hour. And
22 it's a delight to be here and to hear everyone's

1 views.

2 Let me start with Professor Greene.
3 Thank you for your written testimony and your
4 oral testimony. I want to focus in on something
5 that you mentioned in both, which is the idea --
6 you said in your statement that the Supreme Court
7 is structured as a monarchy. Others would argue,
8 I think, that Congress and President, because
9 they have political control over the Supreme
10 Court through the appointments process, through
11 the advice and consent process, that, in fact,
12 the Supreme Court does not function as a
13 monarchy. If there is political control, or that
14 level of political control, over the Court, can
15 you say more about how the Court could be viewed
16 as a monarchy, as you have suggested?

17 MR. GREENE: Thank you for the
18 question. Just to start, of course, I didn't
19 mean a literal monarchy, right? So, yes, of
20 course, there is political control over the
21 Court. I think the features that concern me are
22 life tenure and this very small number of

1 Justices, right? So, if there's political
2 control at time A, and time B is A plus 40 years,
3 that's highly diffused political control. Of
4 course, that's a feature to some degree, and not
5 just a bug, of the Court. But there's a limit to
6 how much that's a feature, and as many countries
7 around the world have demonstrated, a tenure of
8 that length is not necessary for judicial
9 independence and has lots of costs associated
10 with it.

11 But the other aspect of this -- and
12 this was touched on as well by Chief Justice
13 Marshall -- is the fact that members of the Court
14 time their own replacement strategically. Now
15 that's not always possible; life catches up with
16 people sometimes. But, often -- and we've come
17 to expect them to do this -- they can choose the
18 ideology of their replacement. And the nature of
19 political polarization in the United States today
20 is such that that can be done fairly reliably.

21 So that even if there is a degree of
22 political control, one can reliably choose one's

1 political allies to choose one's replacement.
2 That's not a system that we should want in a
3 democracy. We've come to expect it, but there
4 are alternatives around the world, and I think we
5 should take a look at them.

6 COMMISSIONER ADAMS: Thank you,
7 Professor Greene.

8 Let me ask as a followup something
9 that I think you mentioned both in your written
10 statement as well as in your oral testimony just
11 now. And that is the emphasis on the idea that
12 individual Justices have too much power. I think
13 that's a big theme in your written statement, if
14 I'm reading it correctly.

15 But, after you discussed the fact or
16 your assertion that they had too much individual
17 power, you gave a list of cases having to do with
18 the ACA or the Voting Rights Act, which sound, of
19 course, in partisan terms. And so, I wonder if
20 you can say more about whether the problem is
21 individual Justices having too much power or
22 whether the issue really is one of partisanship

1 about how the Judges actually decide, once
2 they're on the Court.

3 MR. GREENE: So, the problem that I
4 identify in the statement is not strictly about
5 partisanship. One can imagine -- and the
6 examples I chose are examples in which the sides
7 that won, so to speak, are different partisan
8 sides -- the concern is, you know, I think about,
9 as someone who teaches, you know, when I teach
10 constitutional law, you think about who are the
11 swing Justices on the Court. And that's a
12 question that we tend to ask ourselves a lot, and
13 we talk about the Court in those terms.

14 And you can identify Justice Kennedy
15 for many years and Justice O'Connor for many
16 years and Justice Powell for many years. That's
17 three people going back about 50 years of tenure
18 on the Court, where their own particular views of
19 the law, whatever you think of them, are
20 dominating the Court's decisionmaking.

21 And whatever you think the proper role
22 for the Court should be within our system, the

1 idea that that role should be dominated by a
2 small number of swing Justices, which is the
3 result you get when you have a small number of
4 judges sitting en banc for decades at a time, is,
5 again, profoundly undemocratic. And this is not
6 a statement about their performance, and it's not
7 a statement about the Court's power, which we all
8 have different views about. But it's hard to see
9 how one could defend a system in which a small
10 number of individuals have that much power for
11 that long.

12 COMMISSIONER ADAMS: Let me ask you
13 one more question, Professor Greene, before I
14 shift over to Professor Sachs. In your written
15 statement, you argue that fixed and non-renewal
16 terms for Supreme Court Justices are consistent
17 with, rather than a violation of, Article III's
18 "hold their offices during good behavior"
19 language. Can you say more about why that might
20 be the case?

21 MR. GREENE: So, I don't think this is
22 an obvious constitutional question. I think

1 there are good arguments on both sides. I think
2 the expectations of the Framers were fairly
3 straightforward that good behavior was the same
4 thing as life tenure. So, it then becomes a
5 question of constitutional interpretation. And I
6 think that the purposes behind the good behavior
7 provision are entirely consistent with non-
8 renewable terms over a length of years. And as I
9 mention in my statement, there are other
10 instances in which we allow Article III judges to
11 serve a term of years and consider that to be
12 consistent with Article III, and that's in recess
13 appointments. So, there are other constitutional
14 ways in which we -- again, there are
15 complications; there are good arguments on both
16 sides, but, again, it's more of a purpose of
17 argument on one side versus the specific
18 intentions of the Framers on the other.

19 COMMISSIONER ADAMS: Thank you,
20 Professor Greene.

21 Let me shift over to Professor Sachs
22 for a few minutes now and ask you some questions.

1 And thank you, again, for both your written and
2 oral testimony.

3 The gist, as I understand it, of your
4 written testimony is that no major reform should
5 be made to the Supreme Court. I think that sort
6 of what you're pressing is the idea that, first,
7 do no harm. And you state in your written
8 testimony, "Weakening one branch of government
9 usually means empowering another branch;
10 typically, reducing the power of courts by
11 increasing that of Congress."

12 But I wonder if you could address the
13 ways in which, under the Constitution, Congress
14 has significant control over the Supreme Court,
15 both the Exceptions Clause in Article III, as
16 well as what came up in one of the earlier
17 discussions, I think in connection with Professor
18 Barnett's testimony, the Necessary and Proper
19 Clause which gives Congress a tremendous amount
20 of authority in terms of creating rules for the
21 function of our government.

22 MR. SACHS: Yes, under the

1 Constitution, Congress has a great deal of power
2 over the Supreme Court's appellate jurisdiction
3 and, also, over the structure of the Court. If
4 it wanted to add 800 Justices tomorrow, it could
5 do so. That doesn't mean that doing so would be
6 consistent with our traditions of constitutional
7 government or would be good for the separation of
8 powers.

9 What I say there with respect to Court
10 packing, in particular, is not that Congress sort
11 of lacks this power, but, rather, that it would
12 clearly weaken the Court in a substantive way for
13 every President and Congress to be able to add
14 enough Justices to do whatever they hope to do
15 without it being struck down by the Court; and
16 that that kind of weakening would empower other
17 branches, not necessarily in terms of their legal
18 powers -- you know, Congress would still be
19 limited by all the limits of the Constitution.
20 It's just that, substantively, they would be able
21 to get away with whatever they wanted, the
22 Constitution notwithstanding. So, my concern

1 there is less that Congress lacks tools
2 altogether, but more that the misuse of those
3 tools could undermine the constitutional
4 structures that we have.

5 COMMISSIONER ADAMS: Thank you.

6 Let me follow up by asking a question
7 in connection with individual rights. In your
8 written testimony, you discuss individual rights,
9 and you suggest that Congress might not do as
10 well as the Court at protecting individual
11 rights. So, I've got two questions on this.

12 No. 1, can you say more about why you
13 think that's the case? And No. 2, if you could
14 talk a little bit about the ability to be able to
15 reverse decisions. If Congress gets it wrong, is
16 it easier for the people to be able to correct
17 Congress versus the Supreme Court in terms of
18 underprotection of individual rights? And so,
19 I'd like you to sort of speak to that issue.

20 MR. SACHS: Sure. So, under our
21 system, if someone's life, liberty, or property
22 is going to be taken away, you need Congress to

1 enact a statute; you need the President to
2 enforce that statute, and you need the Court to
3 uphold the statute. So, you've got sort of three
4 checks, each of which can say: You know what?
5 This statute's unconstitutional. We're not going
6 to enact it; we're not going to enforce, or we're
7 not going to uphold it.

8 The danger, if you have a system where
9 Congress sort of always has the last word on the
10 question of individual rights, is that you have
11 reduced the number of steps from three to two.
12 And so, it's a lot easier for individual rights
13 violations to go forward. Congress decides that,
14 you know, this particular type of expression of
15 speech or press is not as worthwhile, and so,
16 we're fine getting rid of it. Or this other
17 particular right is inconvenient to the
18 achievement of our particular policy goals.
19 Then, it may very well vote that way.

20 On the other hand, if Congress thinks
21 this particular individual right is not being
22 enforced by the Court as much as we would like,

1 at least within the scope of federal law -- and
2 sort of setting aside issues involving the Bernie
3 case -- at least with respect to federal law,
4 Congress can always say, look, we're not going to
5 try infringing this right, even if we think the
6 Court is not protecting it.

7 Indeed, that's what happened in the
8 Religious Freedom Restoration Act. The Congress
9 said, not only do we think the Court got the
10 scope of the First Amendment wrong, but, even if
11 they're right, we're not going to push the
12 envelope; we're not going to go right up to the
13 line. And so, if the Court is underprotecting
14 rights, Congress can choose to protect them
15 instead.

16 COMMISSIONER ADAMS: I believe my time
17 is up.

18 CHAIR BAUER: Thank you very much,
19 Commissioner Adams.

20 And we now turn to the Commission Co-
21 Chair, the Leighton Homer Surbeck Professor of
22 Law at Yale, Cristina Rodriguez.

1 CHAIR RODRIGUEZ: Thank you,
2 Commissioner Bauer.

3 So, Professor Kramer, I'm going to
4 come to you. You say in your testimony, after
5 noting that the judiciary is absent from
6 Madison's Federalist 51, that the judiciary was
7 necessary, of course, but you don't elaborate.
8 And so, I would like to invite you to say why it
9 was necessary, not just in historical
10 perspective. In fact, I'm more interested in
11 what you think the contemporary role of the Court
12 should be.

13 Because we've heard a lot today and in
14 our previous day of testimony about reform
15 proposals and the potential consequences, and why
16 they might be constitutional or not. And also
17 heard a lot about the problems that might be
18 driving this push for reform. But from that has
19 not yet emerged a conception of what it is
20 precisely that the courts are supposed to do.
21 And both Justice Abella and Chief Justice
22 Marshall gave us their conceptions of that, but

1 I'm really interested in what that role should
2 be, because I think we need to have some
3 conception in order to decide about how these
4 reform proposals should be put in perspective.

5 MR. KRAMER: Thanks for the question.
6 Of course, I wish I had about a week to think
7 about how exactly to answer that because that's a
8 big question.

9 But what I would say is the following:
10 So, just to touch briefly on the founding, and
11 the difference between the founding and today
12 really undergirds the answer I want to give. At
13 the time of the founding, the courts were
14 obviously deemed necessary. They created a third
15 branch. It was part of the standard talk in
16 broad terms around separation of powers. And the
17 conception, though, was they needed independent
18 courts to enforce justice in individual cases.
19 They were not thinking about the court as having
20 the kind of broad policymaking role that has
21 emerged with constitutional adjudication.

22 So, law and politics are often

1 separate, but when you get to constitutional law,
2 they're inseparable and there's an inherently
3 political dimension, and that wasn't really part
4 of the thinking. But, of course, it has emerged.

5 And so, my thinking about the role of
6 the court is there's no inherent or abstract
7 right answer to that. It is actually different
8 in different countries and at different times.
9 It's different in Massachusetts than it is at the
10 federal level. It's certainly different in
11 Canada than it is in the United States and in
12 most of the other countries of the world.

13 In our country, the court's role has
14 evolved over time, but one thing that's clear is
15 it clearly has a role in constitutional politics.
16 We are not, and shouldn't want, to get rid of
17 judicial review. It's really important for all
18 the reasons that people have talked about.

19 As I say, my focus has been on, the
20 way I'm thinking about it is, taking up from
21 where we are now in which the Court has this
22 role, but in which some things have gone wrong

1 that are damaging both its ability to play that
2 role well and the rest of American politics,
3 because the way in which these judicial
4 appointments are playing out has implications
5 beyond the Supreme Court. We're still living
6 with the Bork hearings. Decades later, you know,
7 it's still a sore spot that continues to pay out.

8 So, it's more, how do we adjust the
9 process to sustain the role of the Court, as a
10 constitutional interpreter with independent
11 authority, but in a way that reduces the
12 likelihood for these sort of bad consequences
13 that are happening? And so, that's at least the
14 way I've thought about it.

15 In other words, it's the pragmatist
16 approach, looking at what's gone wrong. That's
17 why I think it's so important to start by
18 identifying what the actual problem is. Looking
19 at what's gone wrong, how can we adjust that
20 without wrenching the system into some
21 potentially -- because, in fact, as others have
22 noted, the consequences are hard to judge --

1 potentially bad space?

2 CHAIR RODRIGUEZ: So, that feeds into
3 the next question I wanted to ask you. And also
4 in your testimony, you say that the "risk of
5 wounding the Court is far smaller than the
6 alternative danger." And so, that's a really
7 interesting risk assessment that you've offered,
8 and it suggests that the Court is resilient and,
9 also, savvy in knowing when to back off and
10 preserve what autonomy and independence that it
11 has.

12 And so, the question is, how do we
13 know to judge when we're in danger of wounding
14 the Court or undermining its role as an
15 independent interpreter of the law in our system?

16 MR. KRAMER: Yes, thank you. That's
17 also a good question. So, what I would say is
18 there's, again, no scientific assessment there.
19 You could look at any of the past instances where
20 there was some kind of serious pushback on the
21 Court, and people might disagree about whether,
22 in fact, there was some long-term harm done to

1 its role or not. My own assessment, looking
2 across American history, is where that comes
3 from.

4 So, it's really hard to look at any of
5 the major controversies and not see the Court as
6 having actually sustained itself quite well and
7 resumed roughly the same kind of role it had,
8 although with some adjustments, typically,
9 because of what happened, you know, in a fairly
10 robust way. But it's not a scientific
11 assessment.

12 What I find interesting, though, is
13 what has definitely changed. It is now -- and
14 you've heard it; I've seen some of the statements
15 -- this hypersensitivity that, no, actually, we
16 must do nothing. Even things that have been done
17 over and over in American history have to all be
18 off bounds because the Court is so delicate that,
19 if we do any of those things, it's going to be
20 the end of judicial independence.

21 So, all I would say is, you know, you
22 can't tell within a limited range there will

1 clearly be changes, but there is zero basis --
2 zero basis, from lots of experience -- to think
3 that any of the kind of significant claims that
4 are made about what will happen will happen.
5 There's just nothing in experience to support
6 that, and lots of experience to the contrary.

7 CHAIR RODRIGUEZ: Yes, so it's helpful
8 for you to refer to these checking devices and to
9 make the point that they've been used frequently
10 throughout our history in probably different
11 combinations and to different extents. And in
12 your testimony, you say, you posit that, even if
13 using them could lead to a tit for tat, it won't
14 be endless, that the parties will learn to
15 cooperate. And you also make the point that
16 others have made in their testimony, too, that
17 having and using checking devices can reduce
18 conflict because it can lead the Court to adjust
19 its behaviors as just suggested.

20 But, in your oral statement, you seem
21 to express a little bit more reservation about
22 that in our current political moment. An idea

1 that the tit for tat will eventually resolve into
2 cooperation seems discordant with our current
3 political motivation. And so, how do we think
4 about the way that politics around nominations in
5 the Court have played out, as we've tried to
6 think through what risks are worth considering
7 and what risks are too great and threaten the
8 Court?

9 MR. KRAMER: Yes, I'm sorry, I didn't
10 mean to suggest the way you interpreted it. What
11 I was suggesting is that the likelihood of
12 actually getting that kind of political action
13 seems nearly impossible to me. And that's part
14 of, it kind of takes me back to your first
15 question, which is to say, even in the era in
16 which these kinds of tools, which are clearly
17 constitutional, were being used, two things
18 happened. One is they almost never need to be
19 used because you get the kind of political
20 equilibrium. And part of that is they're so hard
21 to use because, in fact, as others have noted,
22 the American public, generally, really can and

1 does appreciate the importance of an independent
2 judiciary. So, it takes a lot.

3 Typically, if you look, the Presidents
4 who have done this -- Jefferson, Jackson,
5 Lincoln, the Reconstruction Congress, Franklin
6 Roosevelt; Teddy Roosevelt came close, you know,
7 hardly a rogues' gallery, I think as I noted in
8 my statement -- they all did it at times when
9 they had huge popularity, both Houses of Congress
10 firmly in control, and a strong national
11 consensus around an agenda that the Court was
12 working really hard to undermine. And it takes
13 that kind of thing. So, we're not there.

14 But the mere possibility of it in all
15 those periods between has been something that has
16 prevented the need to use it in the first place.
17 And so, I think what I'm saying is, although I
18 don't recommend doing that now, partly because
19 it's not politically feasible, partly because I
20 think there's simpler solutions, the simple
21 relegitimation of the possibilities will actually
22 have a positive corrective.

1 So, I think a report by the Commission
2 that acknowledged that the last 50 years of
3 scholarship, which for reasons I've never
4 understood other than I think I suggested in my
5 testimony kind of a political flip on the left,
6 devices that are both clearly constitutional were
7 used, and we've said, "No, no, you can never use
8 them." Just restoring the sense of, actually,
9 they're not illegitimate itself would be helpful,
10 but it's not an action that I would recommend at
11 this time, both because it's not necessary and
12 it's not realistic.

13 CHAIR RODRIGUEZ: Thank you. I
14 appreciate that perspective a lot.

15 If I may, in the last minute, this is
16 a big question to ask in one minute, but I wanted
17 to pose a question to Justice Abella. We've
18 heard a lot, both today and in prior testimony,
19 about the legitimacy of the Court, and either
20 that it's threatened today or that it's important
21 to preserve it by maintaining its independence
22 and other features of it.

1 And I'm wondering how in the Canadian
2 context you conceptualize legitimacy, and is that
3 something that weighs on you and other judges
4 when you're making decisions on what you think
5 constitutes your legitimacy as a court within a
6 democratic system?

7 MS. ABELLA: That's an excellent
8 question, and, of course, we think about it all
9 the time. But that's a very different question
10 from, to what extent do we take public opinion
11 into account? And the answer is, of course,
12 we're aware of what public opinion may or may not
13 be, as expressed in different newspapers. I
14 think most of us are not on social media. But
15 public opinion isn't evidence and we don't cross-
16 examine as the basis of its belief. And I think
17 our job as independent judges is to make
18 decisions, notwithstanding what public opinion is
19 or what the majority thinks, especially when
20 you're talking about the constitutional
21 protection of rights, which tend to be
22 protections of minority interests, which are the

1 opposite of what the majority wants.

2 But I think one of the interesting
3 components of what the Canadians have been
4 worried about over the years is we have
5 understood that it is not just what we do that
6 affects our legitimacy, although that is the most
7 important thing. It's the public perception of
8 who we are and what we're supposed to do.

9 And when you have a culture where
10 there's a consensus about what the role of the
11 Supreme Court is, then it's easier for that
12 public to accept a decision they may not agree
13 with as part of the natural flow of things. We
14 don't, for example, have swing judges, on the
15 theory that, if you're open-minded, you don't
16 come into a case with a cerebral basket that
17 dictates the outcome. You have to be open to the
18 arguments, even if you have views, and, of
19 course, everybody over 10 has views. But are you
20 prepared to listen to the evidence with an open
21 mind, notwithstanding what your views are?

22 So, I always find it amazing that I

1 will walk into court on a given morning and not
2 always know what the result is going to be. It's
3 not going to be this group and that group in most
4 cases. And that's one of the things that keeps
5 us legitimate, as is the appointment process,
6 which is non-partisan, but, of course, small "p"
7 political, as is the removal process, as is the
8 fact that we're very visible -- our hearings are
9 televised -- as is the fact that we tend to be,
10 we practice enormous judicial humility.

11 People in Canada tend not to know who
12 the judges on the Supreme Court are. I'll bet
13 you anything they could name all nine judges on
14 your Supreme Court, but none of the nine on ours.
15 So, it's a polycentric attempt to preserve public
16 confidence, not by going along with what they
17 want, but by doing everything we can to help them
18 understand what it is we do, so that we are
19 transparent to them.

20 But our media helps. We have a good
21 relationship with the media. They tend not to be
22 polarized, although they have different

1 perspectives.

2 But every judge understands that in
3 100 percent of the cases 50 percent of the
4 people, those who lost, think you got it wrong.
5 So, we don't strive to avoid controversy. We
6 strive for the legitimacy of the analysis and the
7 opinion that we give.

8 And I think, again, that's because of
9 who the Canadian public thinks we are as an
10 institution and the efforts we've made to try to
11 keep confidence, public confidence, in that
12 institution strong.

13 CHAIR RODRIGUEZ: Thank you very much.

14 CHAIR BAUER: Approximately I'm going
15 to invite the Commissioners in the same order
16 they began the questioning in what we will
17 consider a lightning round here with very quick
18 questions and very quick answers. So, we'll
19 close at 6:15.

20 So, Commissioner Griffith?

21 COMMISSIONER GRIFFITH: Yes, Dean
22 Kramer, just quickly, some critics of the

1 Commission, of this Commission, argue that calls
2 for change from progressives wouldn't exist at
3 all, or certainly wouldn't be as loud, if Mrs.
4 Clinton had won in 2016, and that she had been
5 able to appoint as many as three Justices to the
6 Supreme Court. What do you make of that
7 criticism?

8 MR. KRAMER: Yes, they probably
9 wouldn't. Instead, we'd be hearing them from
10 people on the right. I mean, the bizarrest thing
11 is some notion that people are not going to be
12 acting from their political interests. That's
13 not even a question. The question is, okay,
14 taking that as a given, do they have a legitimate
15 claim or not? Is there a real problem? So,
16 maybe they wouldn't have raised this problem
17 unless something, this or that were true in terms
18 of their political interests, but here it is.

19 And so, from my perspective, as I say,
20 what I look at is a system that has been steadily
21 in decline. We're looking at not something that
22 just happened in the last three years, but that's

1 been happening since the early 1970s or early
2 1980s, growing progressively worse. And this is
3 an opportunity to address it, and we should think
4 about it, with a solution, though, that is --
5 that's one of the issues with a Court packing
6 solution. I think it could work, but it also is,
7 in fact, straight-up partisan; whereas, something
8 like my proposal or Professor Greene's proposal
9 actually avoid that. They work equally for both
10 parties, while addressing the systemic problem.

11 COMMISSIONER GRIFFITH: Just a quick
12 followup. What do you make of -- Justice Breyer
13 has been quite emphatic of late that judges are
14 not partisans. It seems to me that much of the
15 proposals for packing expansion assumes that they
16 are in some degree. But what do you make of
17 Justice Breyer's insistence that they're not?

18 MR. KRAMER: So, many judges aren't.
19 I wouldn't want to speak for all judges, either
20 as me or as him. What I would say is it doesn't
21 actually matter. So, first, whether they're
22 partisan or not, they are certainly ideological.

1 Some of them are ideological in a strong sense,
2 some in a weaker sense, but that's just inherent
3 to who we are as individuals, which is why it can
4 be problematic to have cases being decided by
5 people who were appointed 30-35 years earlier, as
6 opposed to a system like almost every other
7 country in the world has where you've assured the
8 kind of regular turnover.

9 So that, whatever you're getting on
10 the Court that you can't help because people are
11 people is itself still likely to be within the
12 general consensus of the time. And I think
13 that's really important for a court whose
14 decisions are unavoidably political, whether they
15 see them that way or not, certainly in terms of
16 their consequences.

17 COMMISSIONER GRIFFITH: Okay. Thank
18 you.

19 CHAIR BAUER: Commissioner Adams?

20 COMMISSIONER ADAMS: Thank you.

21 This is for Chief Justice Marshall.
22 You have called for a Constitutional Amendment to

1 provide the Justices serve for a limited time.
2 As you know, many of the reform proposals that
3 the Commission has heard about are statutory
4 rather than constitutional in nature. We had a
5 discussion about that earlier today. Professor
6 Akhil Amar presented one, for instance.

7 As you recognize, it's very difficult
8 to amend the Constitution. I wonder if you could
9 say more about going the Article V route versus
10 using a statutory mechanism to effect the change
11 that you are putting forward.

12 MS. MARSHALL: Thank you for the
13 question.

14 I would say this: I have agreed with
15 many of the -- let me start this again. I do not
16 disagree with many of the proposals that can be
17 accomplished by statute. So, I listened to
18 Professor Kramer, and I think that there are lots
19 of ways that we've sort of pushed the Court when
20 it's out in the extreme end.

21 My sense is that there is in one
22 respect where we, as the United States, and only

1 one Court in the United States named the Supreme
2 Court, are a little bit out of whack. And to the
3 extent that people are looking at solutions,
4 that's one solution to look at.

5 I also feel very strongly that -- I
6 think somebody on this panel said, you know,
7 people are very informed about the United States;
8 they know who the United States Justices are. I
9 think it may have been Justice Abella. They
10 don't. I mean, I spend a great deal of time
11 talking to non-lawyers, and I mean educated
12 people, the League of Women Voters, the Chambers.
13 They have very little idea of how our government
14 works.

15 And so, one of the other pleas that I
16 would make to this Commission, if it has the
17 opportunity to do so, is bring back civic
18 education. I sound a little bit like Justice
19 O'Connor.

20 That doesn't answer your question, but
21 there's plenty that we can do to make sure that
22 people understand what is at risk here. I know

1 you haven't asked me this question.
2 Massachusetts has a pretty extreme form -- a
3 pretty extreme form -- of judicial independence.
4 I think that I would disagree with Professor
5 Kramer; we're very close to the federal
6 Constitution.

7 We have a very tough system of
8 judicial ethics. Judges in Massachusetts can't
9 go to fundraisers for the Federalist Society or
10 for the American Constitutional Society. You
11 would be hauled before the Commission on Judicial
12 Conduct and there would be discipline imposed,
13 because we think it is essential that people know
14 that, when the people know and perceive that when
15 we come to issue a decision, it has not been
16 influenced by people who are trying to, you know,
17 we're on one side of the other.

18 Naive? Possibly. But we've had some
19 pretty controversial decisions in Massachusetts.
20 And when you talk about what's legitimacy, I
21 would say the very first way I would judge that
22 is, are people going to obey your orders? Do not

1 take that for granted in the United States.

2 If I meet with judges from all over
3 the world, the first question I get asked, how do
4 you get people to follow your orders? That's
5 where your legitimacy is. And when people think
6 that you're just getting the biased individual
7 opinion of individual judges, that is not good
8 for our system.

9 It's not an answer to your question,
10 Professor, but at least it gives me an
11 opportunity to say a little bit more about what
12 is at risk here. And as I repeat, I'm pretty
13 conservative when I want to do fundamental
14 changes.

15 I suppose, when the chips are down, I
16 would say I would agree with Professor Kramer's
17 far more sweeping and nuanced and subtle look at
18 American history. There are ways that each
19 branch pushes back. They don't all have to
20 occur. My view is the one piece that is really
21 getting in the way, and is inconsistent with what
22 the Framers had in mind, was life tenure, because

1 the age was 48 or something, and not what it is
2 now, which is 75-80, 85-90, 95-100.

3 COMMISSIONER ADAMS: Thank you, Chief
4 Justice. I have another question, but I just
5 will yield to --

6 MS. MARSHALL: I took all your time.

7 COMMISSIONER ADAMS: No. I will yield
8 to Co-Chair Rodriguez.

9 CHAIR RODRIGUEZ: Just one final
10 question. It actually follows from that. And if
11 you could say final words, both Professor Sachs
12 and Professor Greene, on this exchange that Chief
13 Justice Marshall is having. It relates to what I
14 asked Professor Kramer before, which is, how
15 resilient do you think the Court is, such that we
16 can contemplate even semi-radical forms of
17 checking or restructuring of power?

18 Professor Sachs, I think you're much
19 more cautious. And, Professor Greene, I'm
20 curious how you think we should think about this
21 particular question. So, maybe, Professor Sachs,
22 you could address it first, and then, Professor

1 Greene. And we'll go a minute over. I think
2 that's fine.

3 MR. SACHS: Sure thing. Thank you
4 very much.

5 I would say that a lot of the dangers
6 are reduced by getting broader buy-in at the
7 start. So, if the proposal is for an 18-year
8 term limit done by Constitutional Amendment, it
9 might not be my favorite, but I'm not really
10 worried about it. Because I think that if you
11 have two-thirds of each House and three-fourths
12 of the states, you're going to be okay.

13 I am much more worried about the
14 statutory changes, both because some of them I
15 think would be unconstitutional, absent
16 amendment, and even the ones that are
17 constitutional might be dangerous to the Court,
18 because I think that the support for democratic
19 norms is a lot more fragile than we thought it
20 was perhaps seven months ago.

21 And I think that there is a real
22 danger, if Congress is seen as sort of making big

1 changes to the only institution capable of
2 resisting it, of people just not following
3 Supreme Court orders. I think there's a real
4 danger, if a supermajority rule, for instance,
5 were put in and someone had a majority of the
6 Court behind them, but lost anyway, of a Governor
7 or other official saying no. And I think that we
8 don't want to risk that.

9 Moreover, we don't want to risk the
10 Supreme Court striking down a statutory change,
11 and then, having, essentially, a constitutional
12 crisis of who are the actual judges, and where
13 does the Supreme Court believe its loyalties lie?

14 I think that it is much better for the
15 country to proceed with longer-term changes
16 through broader-based means, and to proceed
17 through smaller changes through statutory means.

18 CHAIR RODRIGUEZ: Thank you, Professor
19 Sachs.

20 Professor Greene?

21 MR. GREENE: So, I entirely agree with
22 Professor Sachs that, in process terms, if I'm

1 getting buy-in on the front end in bipartisan
2 ways, it is extremely important to sustaining
3 Court reform. And I think that can happen in
4 statutory ways in addition to Constitutional
5 Amendment ways. I think, ideally, a
6 Constitutional Amendment is better, as I say in
7 my written statement as well. But I think
8 bipartisan statutory changes can actually effect
9 what you might call the constitutional common
10 sense.

11 I think the constitutional questions
12 around a lot of the proposed Court reforms are
13 unsettled. And part of the way they get settled
14 is through bipartisanship and through careful
15 reflection in ways that don't reflect a partisan
16 agenda. And so, I think that can happen
17 statutorily.

18 And just substantively, I'll just go
19 back to saying we can look abroad in thinking
20 about whether the Court falls apart. I think we
21 too often confuse judicial review with this
22 Supreme Court and the way it's particularly

1 structured, when things like term limits and much
2 larger courts and different selection processes
3 happen everywhere else in the world, and have
4 done so without judicial independence or
5 integrity falling apart.

6 CHAIR BAUER: Thank you very much.
7 Thank you very much, Commissioner Rodriguez.

8 And that does conclude the panel. I
9 want to thank all of the panelists. It was an
10 excellent panel and a very strong conversation,
11 and it definitely will inform our deliberation on
12 these issues.

13 So, that concludes it for today. I'm
14 just going to make a few concluding remarks here
15 on behalf of myself and the Co-Chair about the
16 coming schedule.

17 First of all, once again, we want to
18 thank all of the witnesses for today and all of
19 those who have submitted written statements, and
20 members of the public who have submitted
21 comments, and experts who have responded to our
22 requests for their expert support. We're very

1 grateful for that.

2 Please keep in mind that the written
3 testimony, as well as the public comments, are
4 posted to the Commission website at
5 whitehouse.gov/pcscotus.

6 We have made some adjustments to the
7 tentative meeting schedule that we announced at
8 our June 30 public meeting. We now expect to
9 have our next public meeting on October 15th from
10 1:00 p.m. to 5:00 p.m. Eastern Time. And we'll
11 confirm all of the relevant details in an
12 appropriate Federal Register notice and on our
13 website. The material before the Commission for
14 deliberation at that meeting will be posted, of
15 course, prior to the meeting deliberations.

16 We also now expect that a second and
17 last public meeting will be on November 10th from
18 3:30 to 5:00 p.m., when we will conclude our
19 deliberations.

20 We will submit our report to the
21 President on November 14th, at which time it will
22 also be made public.

1 Once again, keep in mind that further
2 information on these meetings and the
3 Commission's work, such as written testimony and
4 public comments, and the draft materials that the
5 Commission will deliberate on, will be posted
6 regularly, as it becomes available, on the
7 Commission's website.

8 The Commission will continue to accept
9 public comment until November 10th. However, as
10 Commissioner Rodriguez, Co-Chair Rodriguez said
11 earlier today, this comment is most helpful to
12 the Commission if it is submitted before the
13 deliberative meetings scheduled for October and
14 November. And so, preferably, we'd like to see
15 those comments on or before November 1st.

16 So, with that, thank you very much for
17 joining us. We look forward to having you at our
18 next public meeting.

19 And have a good evening.

20 (Whereupon, the above-entitled matter
21 went off the record at 6:20 p.m.)
22

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In the matter of: 3rd Public Meeting

Before: President's Commission on SCOTUS

Date: 07-20-21

Place: teleconference

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

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