

**Meeting Minutes**  
**Presidential Commission of the Supreme Court of the United States**  
**Public Meeting #3 (Virtual)**  
**July 20, 2021**

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## **Call to Order**

### **Dana Fowler, Commission Designated Federal Officer**

The third public meeting of the Presidential Commission on the Supreme Court of the United States was called to order by Dana Fowler, the Commission's Designated Federal Officer (DFO). The DFO advised participants and the public that this meeting was recorded and streamed live on the Commission's website at <https://www.whitehouse.gov/pcscotus/>. The DFO established that a quorum of Commissioners was present (see Appendix A for a list of Commissioners that joined throughout the meeting), and provided brief remarks on her role and the Commission's status as a Federal Advisory Committee under the Federal Advisory Committee Act (FACA).

## **Welcome and Opening Remarks**

### **Commissioner Cristina M. Rodriguez, Co-Chair**

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

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

The Commission's report, due November 14th, 2021, will draw from a broad range of views and consider a broad spectrum of ideas. The Commission's report will not make specific recommendations, but rather provide a rigorous appraisal of the arguments and proposals that animate Supreme Court reform debates today. Public engagement has been encouraged throughout the process, resulting in hundreds of unique comments from Congress and other public officials, advocacy organizations, subject matter experts, and members of the general public. These comments support a variety of reform proposals, as well as retaining the status quo. Comments are reviewed by Commissioners and serve as valued input into the Commission's deliberations. Comments can be viewed and submitted at <https://www.regulations.gov/document/PCSCOTUS-2021-0001-0003>. The public is advised that while comments will be accepted until November 10th, 2021, they are most valuable if provided before the October 15th deliberative meeting.

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

*Commissioners: Bob Bauer, Caroline Fredrickson, David A. Strauss*

*Panel Witnesses: Kenneth Geller, Wade Henderson, Maureen Mahoney, Jeff Peck, Ilya Shapiro, Benjamin Wittes*

## **Witness Testimony**

[Kenneth Geller](#)

[Maureen Mahoney](#)

[Written Testimony](#)

[Opening Remarks:](#)

Mr. Geller and Ms. Mahoney co-chaired a 16 member committee of experienced Supreme Court practitioners from a diverse group of Supreme Court and appellate lawyers from across the political spectrum. This committee was formed to consider the wisdom and practicality of a number of reform proposals from the perspective of lawyers with extensive experience appearing before the Supreme Court. Mr. Geller noted that despite its broad political makeup, members reached consensus agreement on most issues, with disagreements primarily limited to issues of degree and emphasis. The committee unanimously opposed all but two of the reforms that were considered, as members determined that many of the proposed reforms would cause serious harm to the Supreme Court and practitioners' abilities to seek redress for constitutional violations. The committee concluded that the Supreme Court is in the best position to determine how and when to change internal processes and that Congress should continue its historic practice of respecting the Supreme Court's authority to control its own proceedings. The committee did ultimately recommend some proposals for the Supreme Court's consideration, in addition to supporting serious consideration for two proposals for Congressional action.

The committee examined three general categories of proposals:

### **Changes to Composition**

1 - The committee unanimously opposed proposals to enlarge the Supreme Court. While acknowledging that there are legitimate concerns around the political polarization of the nomination and confirmation process, the committee came to the conclusion that increasing the number of Supreme Court justices would represent an escalation of that problem, not a solution. The committee cautioned that a larger bench could make arguments less productive, deliberations more difficult, and yield more opinions with less clarity in the law.

2 - The committee unanimously opposed proposals to impose statutory term limits on Supreme Court justices, which the committee cautioned would create unacceptable instability as the length of terms could be manipulated by subsequent Congress'. However, a majority of the committee did support further consideration of a constitutional amendment imposing 18-year term limits on Supreme Court justices, with each president having the ability to fill two seats per term.

### **Changes to Jurisdiction**

1 - The committee unanimously opposed statutes that would strip the Supreme Court of its jurisdiction to strike down unconstitutional legislation, authorize Congress to supersede the Supreme Court's holdings, or require a supermajority vote to strike down legislation. The committee cautioned that such changes would fundamentally subvert the Supreme Court's power of judicial review, emphasized by the committee as an essential function of the Court.

2 - The committee unanimously opposed proposals to regulate the Supreme Court's certiorari jurisdiction. The committee argued that time and experience have led Congress to give the Supreme Court discretion over its own docket, as the Court is in the best position to identify and resolve the legal questions that are most important to the U.S.

3 - The committee unanimously opposed proposals to give the Supreme Court mandatory appellate jurisdiction over capital punishment appeals, as they would overwhelm its docket with fact intensive issues best resolved in the lower courts. However, a majority of the committee suggested that Congress give serious consideration to heightening the standard of review for evaluating stays of execution due to the profound consequences of error.

### **Changes to Internal Procedures**

1 - The committee unanimously opposed the adoption of legislative rules governing the Supreme Court's internal procedures (e.g., mandating oral arguments, written proposals, etc.), as the Court has developed its own rules since 1789 and any intervention would be constitutionally suspect. The committee did, however, recommend that the Supreme Court consider adopting some changes in practice, such as more frequent telephonic oral argument and more frequent issuance of opinions when feasible, particularly when entering injunctions.

2 - The committee unanimously opposed legislative changes to the Supreme Court's recusal and ethics policies. The committee has found no evidence of a problem with the Supreme Court's current practices in addressing these issues.

3 - The committee unanimously opposed congressional mandates to televise oral arguments, as the Supreme Court is in the best position to

determine whether or not cameras would impair its deliberative processes. However, the committee supports the continuation of live audio for oral argument and possibly an expansion to live audio of opinion announcements.

4 - The committee unanimously opposed proposals for public standards that govern amicus appointments, as well as proposals for the creation of an Office of the Defender General. However, the committee encouraged the Supreme Court to continue to expand the pool from which it draws appointed amici, and encouraged an increase in federal funding for the development of Supreme Court expertise in public defenders' offices as a means of reducing the disparities in resources between defenders and prosecutors in criminal cases.

### Wade Henderson

### Written Testimony

### Opening Remarks:

Mr. Henderson started his testimony by quoting the late Congressman John Lewis' words on protecting democracy; "each generation must do its part to help build what we called the Beloved Community." Mr. Henderson continued by noting that the Supreme Court has, at times, used its power to recognize civil and human rights in decisions like *Brown v. Board of Education*; however, Mr. Henderson cautioned that the Supreme Court has also acted in ways that had devastating consequences for civil and human rights in cases such as *Plessy v. Ferguson* and *Korematsu v. United States*, which served to subjugate minority groups, and, more recently, in *Shelby County v. Holder* and *Brnovich v. Democratic National Committee*, which eliminated or sharply narrowed key provisions of the Voting Rights Act. Mr. Henderson argued that Senate Republicans have worked to manipulate the confirmation process as part of a strategy to undermine democratic methods of change and entrench their influence in the judiciary, as evidenced by a series of norm violations committed by Republicans from 2016-2020. Specifically, Mr. Henderson noted 3 events where he viewed this as happening: In 2016 Republicans refused to consider President Barack Obama's nomination of Merrick Garland because it was made during an election year, in 2017 they altered the filibuster in order to confirm justice Neil Gorsuch, and in 2020 they pushed justice Amy Coney Barrett through the confirmation process despite the fact that voting on a presidential election had begun. Mr. Henderson urged the Commission to consider all options for reform that would serve to strengthen democracy and protect historically marginalized people, and cautioned that the manipulated composition of the Supreme Court has concerning implications for how the law and individual rights will be shaped for generations to come. Mr. Henderson put forth two priorities:

- 1 - It is vital that the federal judiciary be made up of fair-minded judges and Justices who are committed to civil and human rights and who possess diverse backgrounds and experiences that will inform their role on the bench.
- 2 - It is essential for Congress to pass legislation that modernizes the federal judiciary by shoring up ethics standards and transparency, as well as making structural changes, such as the expansion of the lower courts.

[Jeff Peck](#)

[Written Testimony](#)

[Opening Remarks:](#)

Mr. Peck's testimony centered on his extensive research into the process of nominating and confirming Supreme Court Justices. Mr. Peck interviewed a bipartisan group of 25 individuals that participated in nominations made between 1981 and 2020, made up of current and former Senate Judiciary Committee staff, Senate leadership staff, and former Senators. While Senate Judiciary Committee rules provide a general framework for the confirmation process, Mr. Peck noted that in reality, norms of behavior strongly guide the Senate through the process. Mr. Peck argued that these unwritten norms, described by Steven Levitsky and Daniel Ziblatt as ones of "mutual tolerance and forbearance," have broken down in the Senate, with mutual tolerance and forbearance now being the exception. In an effort to address this breakdown and reduce partisan tribalism, Mr. Peck proposed a detailed series of flexible rules and standards intended to promote regularity, clarity, and accountability:

- Senate rules should explicitly require that all nominees receive a Judiciary Committee hearing, a Committee vote, and an up or down vote on the merits by the Senate.
- The Senate majority leader should not be able to decide whether or not to consider a nomination.
- Hearings should start no sooner than 30 days and no later than 50 days after the Senate receives a presidential nomination.
  - Nominations made during a Senate recess longer than 3 days should extend the minimum and maximum periods by the length of the recess.
- Nominees' complete written records should be delivered no later than 10 days before Senate hearings begin.
  - Delays in the delivery of written records should extend the minimum and maximum periods by the length of the delay.
- The Senate Judiciary Committee should vote on nominees no sooner than 10 days and no later than 21 days after Senate hearings conclude.
- Senate consideration should begin no sooner than 10 days and no later than 21 days after the Senate Judiciary Committee files its report.

- The above timeframes should apply under all circumstances, including for nominations made up until August 1st of presidential election years. Nominations made after August 1st of a presidential election year cannot be heard fairly, so should not be considered.
  - The above timeframes could be adjusted for cause by joint agreement by the chair and ranking member of the Senate Judiciary Committee.
- These rules should only be altered through unanimous consent to eliminate partisan manipulation.
- A memorandum of understanding should clarify the Federal Bureau of Investigation's (FBI's) role in the confirmation process by:
  - 1 - Memorializing the FBI's independence.
  - 2 - Implementing communication protocols governing the FBI's dialogue with the White House and Senate Judiciary Committee.
  - 3 - Setting clear parameters for the FBI's investigation, with a more thorough investigation at the outset.

Mr. Peck acknowledged that his proposed rules may need to be honed in an iterative manner, and noted that his initial proposal seeks to set a baseline for moving nominations onto a principled process and timeline. Regarding the proper scope of questioning of Supreme Court nominees, Mr. Peck did not find it feasible to impose written rules, and instead favored norms guiding expectations of responsiveness.

[Ilya Shapiro](#)

[Written Testimony](#)

[Opening Remarks:](#)

Mr. Shapiro put forth seven lessons derived from his analysis of Supreme Court confirmations:

**1 - Politics has always been part of the confirmation process.** Mr. Shapiro has found that even from the early republic, presidents have sought to nominate Justices that align with them politically. Mr. Shapiro argued that Senate control of confirmations is nothing new and that the failed confirmation of Merrick Garland was not unprecedented, as historically only 20% of nominees presented during a presidential election year have been confirmed under a divided government, while 90% have been confirmed under a united government. Mr. Shapiro continued that even outside of election years less than 60% of nominations are confirmed by a divided government.

**2 - More recently, fighting over confirmations has become driven by judicial philosophy.** Mr. Shapiro argued that parties have started adopting incompatible judicial philosophies, making it impossible for modern presidents to nominate Justices that are not controversial to opposing parties.

**3 - Modern confirmations are different because the political culture is different.** Mr. Shapiro argued that 1968 was the turning point of the modern confirmation process, prior to which most Justices were confirmed more smoothly.

**4 - Hearings have become “Kabuki Theater.”** Mr. Shapiro argued that in recent years, public hearings have been used by opposing parties to make accusations against nominees or to pressure nominees to take positions on controversial cases.

**5 - Every nomination can have a big impact.** Mr. Shapiro suggested that every Supreme Court vacancy is seen as a chance to “flip” the Court, causing parties to fight over seats.

**6 - The most difficult confirmations are those that have the potential to lead to large shifts.** Mr. Shapiro argued that when more ideologically predictable Justices are replaced, fervor over vacancies is amplified.

**7 - The Supreme Court rules on many controversies, making political battles unavoidable.** Mr. Shapiro argued that as the Supreme Court’s role in decision-making has expanded beyond what the Framers had intended, leading to political incentives over confirmations.

Mr. Shapiro proposed that Senate nomination hearings be eliminated as they inflict greater cost than benefit, or at a minimum hearings could be held by the Senate in closed session. Mr. Shapiro concluded by attributing recent problems not to the confirmation process, but more largely to overreach by the federal government into what should be diverse state and local decisions.

[Benjamin Wittes](#)

[Written Testimony](#)

[Opening Remarks:](#)

Mr. Wittes’ testimony is based on his past experience as a legal journalist covering judicial confirmations of the Supreme Court and the lower courts during the Bill Clinton and George W. Bush Administrations. Mr. Wittes proceeded to argue five points about the confirmation process:

**1 - Contemporary reform efforts and agitation over the Supreme Court are both a result of a decay in the confirmation process.**

**2 - Both Republicans and Democrats are responsible for escalating the decay in the confirmation process.** Mr. Wittes argued that both sides feel a need to take offensive measures as a form of preemptive self-defense.

**3 - The next step in this escalatory cycle is Supreme Court expansion (or related changes).** Mr. Wittes argued that as soon as one party gains sufficient power to make changes to the size and makeup of the Supreme Court, they will preemptively do so under the assumption that the opposing party will pursue the same agenda upon gaining sufficient power.

**4 - The best way to avoid a “tit-for-tat” cycle of Supreme Court expansion is to negotiate reforms that are aimed at de-escalating the confirmation process.** Mr. Wittes proposed redesigning the confirmation process in a way that lowers the stakes around nominations and reduces the incentives for political gamesmanship.

**5 - As a test of whether a reform proposal represents escalatory or de-escalatory intervention in the Supreme Court, a question should be applied to each reform proposal: “What response will this proposal, if enacted, engender when the House, Senate, and presidency are held by an opposing party?”** Mr. Wittes suggested that reforms that incentivize “tit-for-tat” responses should be avoided, while those that provide a durable basis for keeping political temperatures low should be entertained.

### ***Questions from Commissioners***

**Q: Mr. Geller, the Constitution explicitly gives Congress the ability to shape the Supreme Court’s jurisdiction in many ways, yet the committee you worked with seems to suggest that there would be constitutional problems around a Congressional approach to changing the Supreme Court’s jurisdiction. Can you speak further on the limits to Congress’ power to make changes to the Supreme Court’s jurisdiction?**

Mr. Geller acknowledged that Congress has significant power under the Constitution to control the appellate jurisdiction of the Supreme Court; however, members of the Supreme Court Practitioners committee unanimously found proposals that involve removing the Court’s power to consider the constitutionality of legislation to be problematic from a constitutional and prudential standpoint. Mr. Geller argued that such a change would allow Congress to immunize its own enactments from constitutional scrutiny and create confusion in the lower courts should they still be allowed to consider constitutional issues.

**Q: Mr. Geller, there are reform proposals that involve jurisdiction changes other than removing the Supreme Court’s ability to consider the constitutionality of legislation. Did the committee consider other proposals that focus on subject-matter specific changes to jurisdiction?**

Mr. Geller clarified that the committee did not consider other jurisdiction-related reforms.

**Q: Mr. Henderson, your testimony suggests expanding the lower courts with a focus on diversity. Are there reforms to the lower courts beyond expansion that would address your concerns around diversity?**

Mr. Henderson began by noting that U.S. courts rely on a public sense of trust and argued that diversity of judges helps balance court decisions and promotes a sense of legitimacy from the public. Mr. Henderson pointed out that President Donald Trump appointed 234 judges to lifetime federal seats, 85% of whom were white and 65% of whom were white and male. Mr. Henderson argued that a lack of diversity around race, gender, sexual orientation, background experience, and other areas is harmful to both the lower courts' and Supreme Court's legitimacy.

**Q: Ms. Mahoney, the Supreme Court Practitioners committee was optimistic about reforming stays of execution, but did not recommend any specific standards. Would you recommend adopting the heightened standards of the Antiterrorism and Effective Death Penalty Act (AEDPA), or do you have a different set of standards that you would recommend?**

Ms. Mahoney remarked that the committee was divided on this topic; a minority of members did not feel that there were changes that needed to be made to standards, while the majority of members expressed a desire for heightened standards due to the consequence of error. Ms. Mahoney noted that of those that supported heightened standards, AEDPA was considered, but was not determined to be a perfect fit. Members instead suggested that Congress seriously consider ways to heighten standards around stays of execution.

**Q: Mr. Shapiro, your testimony seems to indicate that at certain points in history, norms of compromise and consultation worked to mitigate partisan division and acrimony. Would you support adopting the following norms today?**

- 1 - When the president's party controls the Senate, the president should nonetheless nominate Justices that could gain bipartisan support, rather than pushing nominees through using the majority advantage.**
- 2 - When the president's party does not control the Senate, the Senate majority should never take the position that they will not confirm nominees from an opposing party.**

Mr. Shapiro began by noting that while the issues at stake and the political environments in which they arise have changed over time, the confirmation process has always been contentious, with the U.S.' first president (George Washington) having had a Supreme Court nominee rejected by the Senate. In response to the proposed norms, Mr. Shapiro suggested that Senate behavior on confirming nominees from an opposing party depends on one's view on what senators are elected to do, and ultimately it falls upon the views of individual senators. Mr. Shapiro remarked that personally, he would want senators to support nominees that pursue an originalist view of the Constitution and oppose those that do not.

**Q: Mr. Peck, it seems that one of the problematic features of the confirmation process is the relationship that develops between nominees and the executive branch, which naturally leads nominees to view the nominating party as friendly and the opposing party as adversarial. Drawing on your familiarity with the confirmation process, do you agree that the relationships that develop during the nomination process are problematic, and if so, how would you address that?**

Mr. Peck stated that he does consider the relationship that develops between nominees and the executive branch to be problematic. Mr. Peck suggested that confirmed nominees should not attend celebratory events hosted by the executive branch. Commenting on other aspects of the relationship between nominees and the executive branch, Mr. Peck did not find it plausible to stop the White House's practice of guiding nominees through the nomination process, but voiced support for norms and other "guardrails" that push back against perceptions that nominees are clients of the White House.

**Q: Mr. Wittes, your testimony states that "Put simply, there would be no significant debate about Court reform and enlargement today, except in certain academic circles, but for the confirmation process. There is no grave problem with the courts that requires reform." There have been proposals for reforms to the Supreme Court's code of conduct, transparency, and docket management. Do you think those are legitimate reform issues, or do you think we should instead focus on reforms that lower political temperatures and create space for a bipartisan examination of the Supreme Court's functioning in our democracy?**

Mr. Wittes clarified that the referenced passage refers to the existence of this Commission in the first place; Supreme Court reform and enlargement did not become salient as a result of concerns with docket management or concerns with how the Supreme Court functions. Instead, Mr. Wittes argued that the political impetus for this discussion is almost entirely a function of the confirmation process.

**Q: Mr. Wittes, some witnesses have testified that there is a broader problem with the role and operation of the Supreme Court in our democracy and that reforms should target these larger issues. Do you feel that focusing on reforms similar to those proposed by Mr. Peck (e.g., rules that require votes to be conducted in a specified period, nominations made in an election year before August 1st to be considered, the FBI to be more impartial, etc.) could help reduce the polarization around Supreme Court reform debates themselves?**

Mr. Wittes noted that he supports Mr. Peck's proposal, and that he himself spent the better part of a decade advocating for similar scale reforms that had no obvious partisan valence, ultimately finding that neither party had an appetite for enacting such reforms.

Instead, Mr. Wittes believes that both parties will engage in a back-and-forth process of pushing through larger partisan reforms upon gaining sufficient power

**Q: Mr. Wittes, is it safe to say that you don't think these kinds of rules (i.e., Senate confirmation rules, the Supreme Court's internal rules) would ignite escalatory "tit-for-tat" themselves, but neither party has an incentive to pursue them, and thus they are cast aside?**

Mr. Wittes confirmed that as his position. Mr. Wittes found it likely that if similar rules were proposed, they would be negotiated over a protracted period until one party managed to achieve sufficient power to cast them aside and impose larger reaching partisan reforms, which the other party would be forced to respond to upon gaining sufficient power of their own.

**Q: Mr. Henderson, as someone that has been deeply involved in the confirmation process, do you think that the proposals put forth by Mr. Peck that reflect conversations with both Democrats and Republicans would be promising in addressing concerns with the Supreme Court, or do you think that they miss the larger picture of what needs to be changed?**

Mr. Henderson supported further consideration of Mr. Peck's proposal, but agreed with Mr. Wittes in saying that the partisan nature of the confirmation process makes it unlikely that the Senate will reach a consensus in support of the proposed rules. Mr. Henderson instead voiced support for the hypothetical reforms posed in one of the prior questions about Senate behavior as an attractive means of governing how the Senate chooses to exercise its advice and consent role in the confirmation process, noting that recent suggestions by senators that they would never consider nominations from an opposing party are inappropriate.

**Q: Mr. Henderson, do you want to comment on the report developed by the Supreme Court Practitioners committee co-chaired by Mr. Geller and Ms. Mahoney?**

Mr. Henderson noted that he appreciates having input from Supreme Court practitioners, but argued that all proposals should remain on the table for consideration, contrary to the committee's suggestion that things should essentially remain the same. Mr. Henderson encouraged the Commission to center the impact of proposals around the people and interests who are most adversely affected, civil and human rights, and other fundamental democratic issues.

**Q: Mr. Peck, how would you respond to other witnesses' skepticism around the possibility of implementing your proposals in a lasting way?**

Mr. Peck remarked that the polarized political environment today makes it difficult not to be skeptical of *any* proposal, whether it has to do with the Supreme Court, the filibuster, or any areas mentioned in his proposal. Mr. Peck suggested that there are two options for moving forward: advocates can give up under the assumption that nothing will ever change or they can pursue alternative paths to change that improve processes. Mr. Peck was optimistic that one way to address skepticism would be to have the discussion around changing senate rules outside of the context of their immediate effect, which is why he proposed implementing changes starting in 2025. Mr. Peck concluded by acknowledging that his proposal is a heavy lift, but remained hopeful that senators might be willing to take a bipartisan approach to rule changes that improve the confirmation process.

**Q: Mr. Geller, on the Supreme Court’s “Shadow Docket,” the Supreme Court Practitioners committee’s report makes the point that legislative intervention would be inappropriate, as matters related to the Shadow Docket are best left to the Supreme Court’s discretion. Would you say that there is a need for the Supreme Court to reflect on its own practices and potentially change them? Particularly in consideration of two of the criticisms that have been raised through testimony: the Court’s increasing use of emergency applications to resolve substantive merits questions and the Court’s changed (and inconsistent) definition of irreparable injury.**

Mr. Geller responded that many members of the committee felt that criticisms of the Shadow Docket have been overstated, pointing out that the label “Shadow Docket” itself unfairly suggests impropriety. Mr. Geller explained that the Supreme Court is required to regularly act without full briefing and oral argument on applications for stays and injunctions pending appeal. Mr. Geller disagreed with the idea that the Supreme Court’s procedures on stays have changed significantly over the years, suggesting instead that in recent years, applications have had higher visibility and publicity. Mr. Geller noted that reform advocates might be misunderstanding what happens during the stay process, arguing that the Supreme Court is not making merits decisions during the stay process, as has been suggested. Mr. Geller argued that disappointment with the results of some of the decisions made by the Supreme Court through the Shadow Docket does not support a need for changes to the process. However, the committee did recommend that the Court itself consider some changes:

- 1 - While not proposing that the Supreme Court have oral argument in every case in which a stay application was filed, the committee suggested that the Court consider occasionally holding oral arguments on cases where difficult issues of law are raised or the facts are unclear.

- 2 - Telephonic oral arguments, implemented as a result of the COVID-19 pandemic, have worked well, and the committee would favor the Supreme Court occasionally holding telephonic oral arguments on stay applications.
- 3 - The committee suggested that the Supreme Court consider being more clear when ruling on stay or injunction applications, particularly when reaching a decision different from the lower courts.

**Q: Mr. Geller, the Supreme Court Practitioners Committee opposes any restrictions or expanded reporting requirements on Justices owning individual stock, writing in its report that there are no apparent problems with the Supreme Court's practices and no evidence of bad faith. Further, such changes would have tax consequences and deprive Justices of an investment vehicle that is generally available to the public. Considering the fact that executive branch officials are frequently deprived of investment vehicles available to the public, and that these kinds of ethical regulations are often imposed for purposes of appearance, can you talk more about why the committee opposes those proposals?**

Mr. Geller responded that the committee was unable to find anything that suggested that the Supreme Court's current processes governing the ownership of individual stock were in need of any significant revision. Mr. Geller pointed out that Justices comply with ethics restrictions that apply to all federal judges, in addition to filing annual disclosures of outside income, gifts, reimbursements, and investments under the Ethics in Government Act of 1978. Therefore, the committee did not feel that the unusual situation of Congressional imposition of rules on a coordinate branch of government was warranted. Mr. Geller noted that the committee also took into account Chief Justice John Roberts' announcement that the Supreme Court itself is looking into revising the rules under which it operates in terms of ethics and disclosure.

**Q: Mr. Geller, following up on your prior response, Congress does impose financial disclosure requirements and regulate the financial interests of senior executive branch officials. What is the risk of applying these requirements to the judicial branch that does not apply to the executive branch? Is it a matter of judicial independence?**

Mr. Geller suggested that the proposed analogy would apply more appropriately to the lower federal courts, not the Supreme Court, as it relates to executive branch officials. If comparing the two branches of government, the requirements referenced would be those that apply to the Supreme Court and the presidency. From this, Mr. Geller noted that he is unaware of significant, unique ethics restrictions imposed on the president by Congress.

## Panel 2: Perspectives on Supreme Court Reform I

*Commissioners: Michael S. Kang, Margaret H. Lemos, Michael Waldman*

*Panel Witnesses: Nan Aron, Christopher Kang, John Malcolm, Gabe Roth*

### ***Witness Testimony***

[Nan Aron](#)

[Written Testimony](#)

[Opening Remarks:](#)

Ms. Aron began her testimony by encouraging the Commission to endorse substantive reforms to the Supreme Court, including reforms that would increase the number of Justices. Ms. Aron noted that in the past she was among those reluctant to support increasing the number of Justices, fearing institutional damage as well as the frequently described “tit-for-tat” retribution attacks that could result, but has since come to believe that changes are now necessary to halt the Supreme Court’s declining legitimacy. Ms. Aron attributed the Supreme Court’s declining legitimacy to an improper constitution of membership. Ms. Aron noted that a Republican candidate has only won the popular vote for presidency once since 1992, yet two-thirds of Supreme Court Justices are Republican-appointed. Ms. Aron went on to argue that the unusual circumstances under which confirmations were made between 2016-2020 also call the legitimacy of the Supreme Court’s makeup into question, as Republicans actively obstructed nominations put forth by Democrats and pushed through Republican nominations by changing rules and violating norms. Ms. Aron continued that the improper makeup of the Supreme Court has proven concerning because Republican Justices have shown a lack of impartiality, often voting in ways that harmed democratic values and civil rights, shaped the law in favor of the wealthy and elite, and cemented the power of their appointing party. Ms. Aron concluded by encouraging the Commission to more actively use its platform to promote reforms to the Supreme Court that protect the integrity of the U.S.’ democratic government, and cautioned that without reforms, Americans’ rights and legal protections will gradually be eroded by the Supreme Court.

[Christopher Kang](#)

[Written Testimony](#)

[Opening Remarks:](#)

Mr. Kang’s testimony argued that contrary to popular belief perpetuated by legal elites and academics that the Supreme Court is apolitical and independent, the Court in reality has been subject to one-sided manipulation by Republicans, resulting in judicial doctrine that favors the Republican Party, corporations, the wealthy, and the elite. Like Mr. Henderson and Ms. Aron, Mr. Kang pointed to Senate Republicans’ behavior during the 2016 nomination of Merrick Garland as evidence of this manipulation. Republicans

refused to entertain President Barack Obama's nomination of Merrick Garland, and altered Senate rules to ensure the successful confirmation of Republican nominated Neil Gorsuch when they failed to get sufficient bipartisan support to fill that same seat under the rules then in place. Mr. Kang went on to suggest that Democrats have not engaged in similar behavior out of concern for the legitimacy and independence of the Supreme Court; however, Mr. Kang argued that the one-sided willingness by Republicans to pursue their party's agenda through the Supreme Court has pushed the Court beyond the bounds of legitimacy and threatened democracy in the U.S. Mr. Kang concluded by arguing that reforms to expand the number of Justices and balance its composition are needed in order to restore the Supreme Court as a legitimate institution. Mr. Kang pointed out that similar reforms have been implemented historically as constitutionally permissible responses to an overly political Supreme Court.

[John Malcolm](#)

[Written Testimony](#)

[Opening Remarks:](#)

Mr. Malcolm began his testimony by cautioning against legitimizing partisan manipulation of the Supreme Court in pursuit of one-sided political agendas. Mr. Malcolm argued that reforms to the Supreme Court should focus on the needs of the Court, not the passions arising from partisan disagreement with the Court's decisions. Mr. Malcolm cautioned that engaging in reform discussions without identifying legitimate underlying issues that need to be addressed can erode the public's confidence in the Supreme Court as trustworthy, apolitical, and independent. Mr. Malcolm focused his testimony on three proposed reforms:

1 - **Court Expansion.** Mr. Malcolm argued that expansion of the Supreme Court is the greatest threat to the judiciary's independence, as the current calls for Court expansion are a dangerous attempt to influence its decisions. In response to arguments that the Supreme Court faces an issue of legitimacy because it is unbalanced in favor of Republicans (6-3), Mr. Malcolm pointed out that all nine justices that served from 1945 to 1955 were appointed by Democratic Party presidents, and yet President Dwight D. Eisenhower, a Republican whose term started in 1953, did not call for Supreme Court expansion. Mr. Malcolm also cautioned that expanding the size of the Supreme Court would likely make way for a cycle of "tit-for-tat" retaliation, wherein each party would add justices upon gaining sufficient power.

2 - **Jurisdiction Stripping.** Mr. Malcolm noted that there is no clear constitutional guidance on whether or not Congress has the authority to decide the cases the Supreme Court can consider. Mr. Malcolm went on to argue that removing the Supreme Court's function as the final arbiter of the Constitution would effectively end its ability to ensure that the Constitution remains the supreme law of the land.

**3 - Term Limits.** Mr. Malcolm found term limits to be the most appealing of the proposed reforms, although he voiced reservation around the frequently proposed length (18 years) and the potential consequences of tying presidential elections to Supreme Court vacancies.

[Gabe Roth](#)

[Written Testimony](#)

[Opening Remarks:](#)

Mr. Roth's testimony focused on reforms that make the Supreme Court more accountable to the public, arguing that the Supreme Court should not be exempt from democratically essential ideals of public scrutiny and transparency as a means of building public trust and legitimacy. Mr. Roth argued that life tenure, a formal code of ethics, and increased transparency around conflicts of interest and finances are the most pressing accountability measures that are needed. Mr. Roth suggested that a framework for implementing reforms that address these concerns could be derived from recent rules and regulations passed by Congress to govern its own operations, such as:

- Allowing the public to watch live congressional hearings and floor activities;
- Requiring members of Congress to release detailed information on third party purchases, expenses, and stock sales/purchases;
- Applying term limits to some committee chairs;
- Requiring members of Congress to post annual financial disclosures; and
- Applying a series of anti-harassment, anti-discrimination, and anti-retaliation laws to congressional staff.

Mr. Roth continued that not only are similar accountability measures democratically desirable, but the idea of applying them to the Supreme Court is deeply popular among the populace. Mr. Roth's research indicated that 70% of Americans believe that livestreaming of Supreme Court proceedings should be required, 70% of Americans support term limits for Justices, and as many as 90% of Americans believe the Supreme Court should adopt an ethics code. Mr. Roth pointed out that accountability reforms do not have the same partisan valence apparent in some other reforms, with members of both parties showing an interest in having Justices more thoughtfully consider conflicts of interest, as well as more generally supporting best practices in allowing for transparency and public access. While Mr. Roth finds it ideal that the Supreme Court might voluntarily adopt these reforms, Justices have pushed back against suggestions that they adopt similar changes. As such, Mr. Roth supported congressional action that ensures members of the judiciary are held to the same high standards of ethics and transparency that apply to Congress and the presidency.

## ***Questions from Commissioners***

**Q: Ms. Aron, many of those concerned about making changes to the Supreme Court often cite the potential for hyper-partisan tensions to commandeer reforms and lead to a process of “tit-for-tat”, ultimately exacerbating the Supreme Court’s problems. Some scholars and advocates argue that instead of changing the size of the Court or term length of Justices, disempowering the Supreme Court (e.g., jurisdiction changes, implementing legislative override, etc.) would be an ideal way of addressing concerns while simultaneously reducing partisan tensions. What strengths and weaknesses do you see in reforms that seek to disempower the Supreme Court?**

Like Mr. Shapiro, Ms. Aron began by pointing out that the confirmation process has always been a contentious partisan affair that was designed to encourage healthy debate, with President George Washington’s first nominee failing confirmation. On the potential for “tit-for-tat”, Ms. Aron argued that Republicans will seek to implement changes that benefit their party regardless of action from Democrats in a one-sided arms race, as evidenced by their sudden escalatory behavior of blocking the appointment of Merrick Garland to the Supreme Court. Ms. Aron continued that if Republicans determine that it is in their best interest to expand the Supreme Court, they will do so regardless of whether Democrats engage in similar behavior. Ms. Aron clarified that she does support consideration of other reforms, such as imposing an ethics code, term limits, and changing jurisdiction; however, Ms. Aron argued that the U.S. is in a moment of existential crisis, and that expanding the Supreme Court is an urgently required remedy.

**Q: Mr. Malcolm, at times in the past conservatives have supported Supreme Court reform proposals, such as changes to jurisdiction, and have likewise been critical of political activism by Justices. From a conservative perspective and without consideration to the current political climate, do you see any value in generally reducing the role of the Supreme Court and shifting some of the federal judiciary’s power back to the political process (i.e., states, Congress, president)?**

Mr. Malcolm began by noting that norm-breaking has been going on for some time, with then Senator Joseph Biden commenting that the Senate Judiciary Committee should not consider election cycle nominations from President George H.W. Bush, and then Senator Barack Obama leading a filibuster of the nomination of Justice Samuel Alito. Pivoting to the question posed, Mr. Malcolm responded that he would not support disempowering reforms in the way that they were posed to Ms. Aron, through mechanisms such as a supermajority voting requirement or other constitutionally questionable means. Mr. Malcolm agreed with Mr. Shapiro in saying that the Supreme Court has taken on issues that likely should have been left to the people and elected

representatives, and that the ideal solution would be for the Supreme Court to voluntarily return to an originalist/textualist interpretation of the Constitution.

**Q: Mr. Roth, you suggested a number of proposals to improve judicial policies and procedures. Do you have any thoughts on improving the confirmation process, whether through regulations, norms, or other means?**

Mr. Roth responded that it is worth pursuing reforms that improve the confirmation process. Mr. Roth endorsed suggestions that the Senate's advice and consent role be limited in order to lower partisan temperatures around confirmations, such as a 2020 bill proposed by Congressional representatives Ro Khanna, Don Beyer, and Joe Kennedy that would have forfeited the Senate's role of advice and consent on nominations if confirmations were not made within 120 days. Mr. Roth noted that his proposal for 18-year term limits was intended to regularize appointments and help reduce partisan tensions around nominations, but reiterated that it would be worthwhile to pursue other rule and norm changes to the confirmation process that would temper partisanship as well. Mr. Roth further suggested that regularizing appointments of lower court judges would be valuable as well.

**Q: Mr. Kang, your testimony argues that Democrats need to abandon the fiction of an apolitical Supreme Court. Is your position that the Supreme Court is inherently a political institution, or that the Supreme Court could be independent and apolitical, but has been and will continue to be politicized by the Republican Party?**

Mr. Kang responded that the Supreme Court could and should be apolitical, but that it has been politicized by the Republican Party to the degree that the Supreme Court's legitimacy has been undermined, which is the heart of the issues facing the Court today. Mr. Kang argued that the Supreme Court cannot be unilaterally depoliticized, so rather than attempt to depoliticize, Democrats should respond by organizing around the Supreme Court and pursuing reforms. Mr. Kang identified term limits as a promising start to depoliticizing the Supreme Court, but noted skepticism that term limits alone would be able to resolve its current unsustainable direction.

**Q: Mr. Kang, following up on your above response, what consequences do you predict if Congress were to add seats to the Supreme Court at the present moment? Would you say that participation by the Democratic Party in "constitutional hardball" as a proportional response to Republicans' behavior would cause Republicans to back down, or otherwise open lines of policy not currently possible, such as term limits?**

Mr. Kang began by opining that Republicans likely would not have forcefully pushed Justice Amy Coney Barrett through the confirmation process during the 2020 election period if they credibly thought that it might lead to a push for additional Supreme Court seats that would result in Republicans having a minority of Justices. Mr. Kang then argued that by showing an unwillingness to respond to Republicans' behavior (e.g., in obstructing the confirmation of Merrick Garland, changing rules to confirm Justice Neil Gorsuch, confirming Justice Brett Kavanaugh despite accusations of sexual assault, etc.), Democrats encouraged Republicans to continue similar problematic behavior, which they have. Mr. Kang concluded that the only way to restore balance is for Democrats to proceed in similar fashion.

**Q: Mr. Kang, you have also argued in favor of pursuing ethics reforms for the Supreme Court. The code of conduct that applies to the lower federal courts is advisory - that is to say it is not binding in the way that a statute would be. What is your vision for a code of conduct for Supreme Court Justices? Do you think there needs to be an enforcement mechanism? If so, what would that look like?**

Mr. Kang first acknowledged that he is not a constitutional scholar, and thus hesitated to speak on enforceability. However, Mr. Kang argued that Justices cannot be trusted to police themselves in abiding by a code of ethics, as evidenced by its lack of a response to allegations of sexual harassment, and its inability to even track complaints, much less respond to them. Mr. Kang agreed that it is problematic that Supreme Court Justices are not bound to a code of conduct, and that sexual assault allegations against Justice Brett Kavanaugh were dismissed as a result of his elevation to the Supreme Court, allegations that would have been investigated and dealt with had he not been confirmed. Mr. Kang concluded that ethics reform is an essential component of restoring the Supreme Court's legitimacy, but is not itself sufficient without further structural reforms that balance the Court.

**Q: Mr. Roth, considering your research on ethics and recusal, do you think an enforcement mechanism would be necessary, and if so what would that look like for the Supreme Court?**

Mr. Roth pointed out that there is already an enforcement mechanism in place, as Congress has the power to impeach Supreme Court Justices. Justices have stated that they abide by the Code of Conduct for United States Judges, and also stated in 2019 that they were working on a separate code of conduct, but have not been responsive to Mr. Roth's requests for an update. Mr. Roth voiced concern over the fact that the U.S.' highest court operates without a code of conduct, and he finds value in having a code as it would serve as an important symbol of propriety for the public, and send a message to other judges throughout the country that ethics should be taken more seriously.

**Q: Mr. Roth, your testimony emphasizes the importance of recusal rules for Justices, as well as requiring them to explain recusals. Is your point that Justices should explain why they do and do not recuse, and if so why is that valuable?**

Mr. Roth explained that 28 USC 455(b) lists circumstances under which judges should recuse and noted that several bills have proposed requiring Justices to cite the specific reason under that list when recusing. Mr. Roth suggested that implementing a similar recusal requirement would lead Justices to become more cognizant of their potential conflicts of interest. Mr. Roth's research has shown that Justices often miss conflicts of interest, which he argued erodes trust in the Supreme Court. Mr. Roth's immediate goal was not to obtain extensive information around recusals, but rather to have Justices be more cognizant of their conflicts of interest and to provide brief and general reasoning. Mr. Roth concluded by pointing out that lower court judges are automatically conflicted out of cases using screening software.

**Q: This is a question for all panelists. The testimony received by the Commission has thus far indicated general acquiescence to term limits from across the political spectrum, whether being supported or just being among the least objectionable reforms discussed. Do you believe that a term limit for Supreme Court Justices could be constitutionally implemented through statute, or would it require constitutional amendment?**

Mr. Malcolm was skeptical that proposals such as Professor Amar's that shift Justices to other offices or require Justices to enter emeritus/senior status would satisfy the Constitution's Good Behavior Clause. Mr. Malcolm confirmed that his position is that implementing term limits would require constitutional amendment, and that regardless of whether it would be statutorily possible, implementing term limits through amendment would be beneficial as it would engender broad bipartisan support by Congress and the general population.

Mr. Kang was confident that it would be statutorily possible to implement term limits for Supreme Court Justices, but acknowledged that the Supreme Court would be unlikely to uphold such a statute. Mr. Kang argued that the problem facing most of the proposed reforms is that they will inevitably be considered by the very body they are meant to affect, and that the Supreme Court will not give up its power easily. As such, Mr. Kang saw a need for legislation that balances the Supreme Court in a way that makes other reforms more plausible.

Ms. Aron added that term limits would likely require years of additional law review articles and congressional debates, and agreed with Mr. Kang in saying that the current Supreme Court would not uphold most of the proposed reforms. Instead of focusing on

term limits, Ms. Aron encouraged the Commission to be bold and pursue Supreme Court expansion.

**Q: Ms. Aron, you noted in your testimony that you previously opposed Supreme Court expansion, but that you now consider it to be the only way to restore the Court's legitimacy. Can you respond to Mr. Malcolm's argument that the unbalanced makeup of the Supreme Court is a normal fluctuation in politics that happens to currently favor Republicans?**

Ms. Aron argued that today is different in that Americans and the Democratic Party have realized how politicized the Supreme Court has become, and are paying more attention to the Court's efforts to make it harder to vote, negatively impact the environment, allow discrimination, and make life more difficult for workers.

**Q: Mr. Malcolm, reducing the power of the Supreme Court would not necessarily require eliminating the power of judicial review; it could mean that authority, when it comes to constitutionality or interpretation, would switch to other actors (e.g., Congress, lower federal courts, state supreme courts, etc.). Federalists often support devolving power and constitutional questions to state courts - do you think that it would be beneficial to similarly shift power from the federal judiciary to the states?**

Mr. Malcolm first offered a rebuttal to Mr. Kang's and Ms. Aron's assertions that Supreme Court Justices are hyper-political actors, noting that 64% of cases decided by the Supreme Court in the past year were decided unanimously or by substantial majorities. Mr. Malcolm also found it noteworthy that the Supreme Court upheld the Affordable Care Act, required President Donald Trump to turn financial records over to the Manhattan District Attorney, and upheld the Deferred Action for Childhood Arrivals (DACA) immigration policy.

Responding to the question posed, Mr. Malcolm acknowledged that in some cases it is appropriate to devolve power to the state courts, and voiced support for a more deferential standard of review by federal courts; however, Mr. Malcolm argued that it is important for the Supreme Court to be the final arbiter of important constitutional questions.

**Q: Ms. Aron, what do you think caused the partisanship around the federal appointment and confirmation process to get worse throughout your career? Certainly politics has always been part of the process, but I think there is a general sense that partisan tensions around the nomination and confirmation process have become worse over the past 50 years.**

Ms. Aron noted that in the early 1970's it was difficult to tell the difference between Democratic and Republican appointed judges. Ms. Aron stated that even if she disagreed with rulings, she felt that they were fairly decided. However, in the 1980's Ms. Aron noticed that Republicans began calling for the appointment of judges that would serve their party's agenda and argued that this was the point at which Republicans began efforts to pack courts with their proxies. Ms. Aron continued that this specific litmus test has continued among Republican presidents into the present, and that the danger of such efforts gained Democratic and public recognition during the Trump Administration.

**Q: Ms. Aron, can you describe your vision for Supreme Court ethics reform?**

Ms. Aron found it problematic that some Justices, such as Antonin Scalia, Samuel Alito, and Clarence Thomas, attend political events that use their names for prestige and fundraising. Ms. Aron argued that other problematic behavior by Justices has included failure to disclose receipt of gifts from parties that might one day appear before the Supreme Court. Ms. Aron pointed out that lower court judges are prohibited from such behavior, and argued that Supreme Court Justices should be subject to similar ethical obligations.

**Q: Ms. Aron, do you agree with Mr. Roth's suggestion that impeachment is a sufficient enforcement mechanism, or do you think there should be a formal complaint filing procedure for Supreme Court Justice, similar to lower court judges?**

Ms. Aron responded that she would support an enforcement mechanism, as it would serve to inhibit improper behavior by Justices.

**Q: Ms. Aron, you mentioned a shift in the 1980's when the Republican Party began emphasizing the judiciary as part of its platform, and noted that while you once were opposed to Supreme Court expansion, you have come to find it necessary. If you could go back in time, at what point would you have begun advocating for a different approach?**

Ms. Aron identified a series of Supreme Court decisions restricting voting in favor of the Republican Party to be the turning points.

**Q: Mr. Malcolm, your testimony points out that Democrats did not call for Supreme Court expansion between 1991 and 1993, despite the fact that there were eight Republican appointed Justices and only one Justice appointed by a Democrat. Considering the fact that at that moment Republicans had won all but one presidential election for the previous 24 years, and today Republicans**

**maintain a supermajority despite having lost the popular vote in seven of the last eight presidential elections, isn't there a greater risk of a loss of legitimacy now than there was then?**

Mr. Malcolm argued that prior elections did not factor into the lack of Supreme Court expansion efforts from 1991-1993, and instead suggested that Democrats at that time were happy with the Republican-appointed Justices on the Supreme Court. Mr. Malcolm pointed out that President Bill Clinton did not garner a majority of the popular vote during either of his elections, yet his Supreme Court appointees (Justices Ruth Bader Ginsburg and Stephen Breyer) are not considered illegitimate. While Justices have different approaches (e.g., originalist, living constitutionalist, etc.), Mr. Malcolm argued that Justices do equal justice regardless of party, and cautioned that Supreme Court expansion is a dangerous path to go down.

**Q: Mr. Roth, you suggested that Justices could use Congress' ethical reform efforts as a model. Do you see any lessons that the Supreme Court could learn from Congress' self-imposed reforms on what *not* to do? Are there any self-imposed reforms that the Supreme Court should avoid?**

Mr. Roth argued that any self-imposed reforms would be a trend in a positive direction. The judiciary has been active in pushing back against calls for reform, but Mr. Roth pointed out that for many process reforms, there is no evidence of negative consequences. Justices have previously been opposed to live audio of oral arguments, but the implementation of this practice in response to the COVID-19 pandemic has shown no apparent downsides. Despite Justices' concerns around live video of oral arguments, Mr. Roth found arguments against their implementation unconvincing and pointed to their use in lower courts as noteworthy. Mr. Roth was confident that live-streaming oral arguments and implementing ethics reforms would strengthen the public's faith in the judiciary.

## Panel 3: Perspectives on Supreme Court Reform II

*Commissioners: Guy-Uriel E. Charles, Caroline Fredrickson, Nancy Gertner*

*Panel Witnesses: Craig Becker, Curt Levey, Sharon McGowan, Dennis Parker*

### **Witness Testimony**

[Craig Becker](#)

[Written Testimony](#)

[Opening Remarks:](#)

Mr. Becker's testimony focused on two discussion points:

**1 - The current Supreme Court has an unprecedented level of partisanship.**

Mr. Becker argued that in recent decades, the Supreme Court has consistently ruled against working people and generally shown a pattern of ruling along partisan lines. Mr. Becker cautioned that in some cases, Justices have shown that they are willing to use their positions of power for judicial activism. As an example, Mr. Becker pointed to Justice Samuel Alito's active solicitation of cases between 2012 and 2018 in an effort to overturn a 40 year-old precedent that was key to collective bargaining in the public sector. The opinion released by Justice Sonia Sotomayor for the case went so far as to say that Justice Alito's opinion "breaks the Court's own rules, and more importantly, disregards principles of judicial restraint." Mr. Becker encouraged the Commission to condemn similar forms of judicial activism in its report.

**2 - The Supreme Court is not equitably accessible.** Mr. Becker pointed to an article by Professor Richard Lazarus, which found that eight lawyers, all of whom are men, accounted for 20% of all arguments made before the Supreme Court over a 10-year period, out of 17,000 lawyers who petitioned the Court. Mr. Becker stressed three reasons why such an imbalance is an issue:

1 - There is a growing perception that the Supreme Court and its bar is a closed and elite "club" that steers the outcome of cases.

2 - The experience and knowledge of these elite lawyers and what they bring to the Supreme Court are narrow, as is the range of clients that they represent. Members of the Supreme Court bar normally will not represent parties with adverse interests to corporate clients, which over time has shaped the law against the working class and in favor of corporate interests.

3 - The Supreme Court bar lacks diversity. Reuters reported that 66 of the 17,000 lawyers who petitioned the Supreme Court succeeded in having their cases heard at "a remarkable rate." Of these 66 members, 63 were white, and 58 were men.

To address inequitable access and reduce the potential for bias and favoritism at the cert stage, Mr. Becker proposed stripping cert submissions of any information that identifies counsel, similar to the concept of blind grading that many schools employ.

[Curt Levey](#)

[Written Testimony](#)

[Opening Remarks:](#)

Mr. Levey began his testimony by suggesting that progressives have recently adopted a view on the Supreme Court that has typically been associated with conservatives: the Supreme Court is an undemocratic, overly powerful institution that intrudes into political and cultural issues better left to democracy. Mr. Levey noted that while conservatives and progressives have converged in their concerns around judicial activism, they reference different concerns when making their points; progressives turn to more recent cases such as *Shelby County v. Holder* and *Citizens United v. Federal Election Commission*, while conservatives point to the direction of the Supreme Court under Chief Justices Earl Warren and Warren Burger. Mr. Levey argued that in order to realistically reform the Supreme Court, advocates will need to gain conservative support, which requires an understanding of conservatives' grievances with the Court. Mr. Levey argued that these concerns revolve around the Court's pattern of interpreting the Constitution as a living, evolving document, when conservatives see the Constitution as a contract that should be read as written, only to be altered through the democratic consent of the amendment process. Mr. Levey went on to caution that a living interpretation of the Constitution leads to unrestrained judicial power that has been used to advance a progressive partisan agenda that would not otherwise have the necessary public support to be enacted through democratic processes. Mr. Levey argued that over time, interpreting the Constitution as a living document has polarized American society. Mr. Levey attributed the breakdown in the confirmation process to the failed confirmation of Robert Bork in 1987. Quoting Senator John McCain, Mr. Levey suggested that "the surest way to restore fairness to the confirmation process is to restore humility to the federal courts." Mr. Levey concluded by advocating for an amendment that fixes the number of Supreme Court Justices at nine as a means of removing the size of the Court as a political issue, as well as noting support for reforms aimed at the confirmation process, such as requiring timely review of nominations and fair and complete consideration of nominees.

[Sharon McGowan](#)

[Written Testimony](#)

[Opening Remarks:](#)

Ms. McGowan's testimony was provided on behalf of the LGBTQ community, arguing that in recent years the credibility of the Supreme Court has been on a path of decline.

Ms. McGowan provided five recommendations for improving the public's confidence in the Supreme Court, in addition to improving the Court's functional capabilities:

**1 - Institute a binding code of ethics for Supreme Court Justices.** Ms.

McGowan argued that the lack of a formal ethics code has contributed to brazen behavior by Justices and that by adopting a code of ethics Justices could convey a commitment to impartiality and propriety. Ms. McGowan suggested that the code of ethics should also limit extrajudicial activities to those that are clearly consistent with the obligations of judicial office, which would necessarily exclude political activities. Ms. McGowan acknowledged that an ethics code alone would not alleviate the concerns of those advocates that have argued that the Supreme Court has been commandeered to serve a partisan agenda. As such, Ms. McGowan encouraged the Commission not to dismiss any reform proposals, including Supreme Court expansion.

**2 - Continue the recently implemented practice of providing live audio of Supreme Court arguments.**

**3 - Limit the Supreme Court's use of the Shadow Docket to shift legal doctrine without the transparency of full briefing, amicus participation, and oral argument.**

**4 - Create additional safeguards in capital cases, especially in instances where bias may have impacted proceedings.**

**5 - Expand and diversify the bench of the lower federal courts.**

Ms. McGowan dismissed concerns that Supreme Court reforms could potentially lead to a political arms race (i.e., "tit-for-tat"), arguing that a one-sided arms race is already underway in the Supreme Court, and that there is no reason to believe that it will relent. Ms. McGowan rebutted claims that the LGBTQ community has been supported by the Supreme Court in recent years, noting that the LGBTQ community still faces blatant discrimination and attempts to stymie their ongoing struggle for equal citizenship under a Supreme Court that seeks to exclude LGBTQ people from constitutional protection. McGowan argued that religious liberty, healthcare, and school athletics are examples of areas that are still weaponized in courts to target the LGBTQ community.

[Dennis Parker](#)

[Written Testimony](#)

[Opening Remarks:](#)

Mr. Parker's testimony focused on the impact of lack of diversity the Supreme Court. Mr. Parker argued that people of color and low-income people with disabilities have historically been denied opportunities to participate in decision-making and excluded from positions of power and, as a result, the judicial system has been shaped in a way that prevents vulnerable people from gaining equitable treatment in the justice system. Mr. Parker lamented that through no fault of their own, vulnerable communities lack access to employment, housing, healthcare, education, public safety, and the

opportunity to live a full and productive life due to unfair policies and practices. Mr. Parker argued that a significant part of the Supreme Court's failure to be responsive to individuals' needs and rights stems from a lack of diversity in the U.S. court system, including the Supreme Court. While encouraging the courts to embrace many different types of diversity, Mr. Parker's testimony focused on two areas where diversity is most strikingly absent: professional diversity and racial diversity. Mr. Parker emphasized the importance of having people with different experiences participating in the consideration of matters that impact the lives of U.S. peoples, and he put forth suggestions that would increase the courts' legitimacy and give meaning to the inscription above the Supreme Court, which states "Equal Justice Under Law".

1 - Mr. Parker pointed out that corporate and government attorneys have vastly different perspectives on questions of standing and class action certification than public interest attorneys who have experienced the way that heightened pleading standards and increasingly stringent class action requirements impose extreme burdens on those with the greatest needs and the least resources. Mr. Parker was confident that adding judges who are members of groups or have otherwise represented people that have experienced discrimination would bring an important perspective to the courts that is painfully absent, as well as adding a perspective that would push back against those that continue to deny the lasting effects that discrimination has on the U.S. judicial system.

2 - Second, Mr. Parker advocated for clear standards and enforcement of disqualification for conflicts of interest. When Justices fail to recuse in cases where there is conflict regarding a particular group of people, a Supreme Court lacking diversity disproportionately reflects the interests of the elite and powerful.

3 - Mr. Parker cautioned that political gamesmanship has impacted the Supreme Court in ways that threaten voting rights, and COVID-19 has raised further concerns around healthcare, eviction, and employment of marginalized communities.

Mr. Parker concluded by advocating for term limits for Supreme Court Justices as a means of mitigating the effects of partisan gamesmanship.

### ***Questions from Commissioners***

**Q: Mr. Becker, your written testimony discusses access to the Supreme Court and the relationship between those who argue before the Court, the cert process, and the development of law and doctrine. Can you expand on that, and provide some potential solutions?**

Mr. Becker identified blind cert review as a promising start to addressing problematic relationships around the Supreme Court, similar to how many schools use blind grading to ensure that teachers don't know the identity of students, ensuring that grades are distributed fairly. Mr. Becker stated that research has conclusively shown that blind

review makes for fair grading, fair acceptance of journal articles, and even fair auditions for those in orchestra. Mr. Becker acknowledged that blind cert review is not a perfect solution, as there is no way to hide the identity of the parties appearing before the Supreme Court. However, Mr. Becker finds value in hiding the identity of counsel and allowing the power of their arguments to sway Justices, rather than familiarity with the names on petitions. As for implementation, Mr. Becker encouraged the Commission to surface the idea in its report and urge the Court to adopt blind cert review, as no similar proposals have been raised as part of current Supreme Court reform debates.

**Q: Mr. Levey, can you give us a better understanding of what you consider to be the problems with the Supreme Court and the solutions that would address those problems? Does having six conservative Justices on the Supreme Court reduce your concerns?**

Mr. Levey pushed back against assertions that there are six conservative Justices on the Supreme Court, arguing that Justice John Roberts is viewed more favorably by liberals than conservatives, and that it is unclear at this point whether Justices Brett Kavanaugh and Amy Coney Barrett are conservative. Responding to the posed question, Mr. Levey argued that it is problematic when Justices interpret the Constitution as a living document, but noted skepticism at the plausibility of getting progressives to give up that philosophy. With the prospect of aligning conservatives' and progressives' judicial philosophies removed from consideration, Mr. Levey noted support for reducing the power of the Supreme Court; however, Mr. Levey cautioned against implementing power reduction reforms that serve political purposes or pave the way for subsequent, more radical reforms.

**Q: Ms. McGowan, much of the prior testimony has focused on the ways in which confirmation procedures have been broken. For the most part, this particular panel seems to be focusing on ways in which *substance* has been broken (e.g., the Supreme Court has become increasingly anti-labor, anti-voting rights, anti-LGBTQ, pro-corporate, insufficiently originalist, etc.). Isn't it dangerous to use criticism of the substance of Supreme Court opinions and decisions as the basis for change? Do you think that using substantive criticisms as the trigger for change could lead to "tit-for-tat" partisan struggles around the Supreme Court?**

Ms. McGowan responded that the Supreme Court's legitimacy is a function of both the substantive outcomes of cases and the perception of whether the system can be trusted to be fair and impartial. Ms. McGowan noted that she supports having an independent judiciary, but went on to argue that the judiciary system is not currently *fair* to all appearing before it, and that the process has been manipulated for substantive ends. While Ms. McGowan finds the substantive direction the courts are headed in to be concerning, particularly around voting rights, she pointed out that the courts' direction is

a result of Republicans' efforts to override the confirmation process and change rules to ensure permanent victory. Ms. McGowan concluded that while she does have normative reasons for testifying (support for constitutional recognition and equality for LGBTQ people), it is apparent that her and others' substantive concerns are a result of procedural machinations that are harming the credibility of the Supreme Court as a fair and impartial institution, and thus urgent reforms are needed to restore the Court's legitimacy.

**Q: Ms. McGowan, would you say that we are at a “break-the-glass” moment (i.e., that the U.S. is facing a crisis around the Supreme Court, and that urgent action is needed to address its problems)?**

Ms. McGowan agreed that a number of Supreme Court decisions have dramatically affected the ability of the U.S.' constitutional democracy to function by elevating corporate rights and suppressing votes (and by extension democracy) and that advocating for the status-quo downplays the significant damage that has been done.

**Q: Ms. McGowan, in your testimony you support expanding the size of the Supreme Court to 13 Justices in alignment with the number of U.S. circuits, and note that tying seats to circuits will prevent justification of further “tit-for-tat” expansion efforts. Considering that Justices no longer ride circuit, isn't that argument a contrivance? Will tying seats to circuits plausibly keep the next Republican administration from expanding the Supreme Court in response?**

Ms. McGowan clarified that her testimony was not provided in order to call for expansion of the Supreme Court to 13 members; rather, it was meant to offer a perspective on the viable reform options that are under discussion. Ms. McGowan argued that expansion of the Supreme Court, regardless of whether it would resolve the Court's larger issues or is pursued for political purposes, is the reform that is most clearly constitutional. As for expanding seats, Ms. McGowan found tying Justices to circuits could potentially serve as a sensible limiting principle; however, Ms. McGowan acknowledged that any recommendations made by the Commission on Supreme Court expansion will not likely prevent expansion in the future by those who find it necessary for executing their political agenda.

**Q: Mr. Becker, your testimony argues that the channels bringing information and cases to the Supreme Court lack diversity, and you implicitly make the case that the expertise of those appearing before the Court is one-sided, as disqualification rules prevent Supreme Court practitioners at big firms from representing individuals. How would you suggest reforming the Supreme Court's diversity? Do you have rules in mind about who can practice?**

Mr. Becker clarified that he sees the problem not so much as a problem of one-sided expertise, but more that there is a very narrow type of expertise held by an increasingly dominant set of lawyers in the Supreme Court bar, which he cautioned has been deleterious to how the Supreme Court decides cases. Mr. Becker argued that these dominant lawyers do not bring a depth of expertise in substantive areas to the Supreme Court, and do not work with a broad enough range of clients that would give them the perspective needed by the Court. Mr. Becker acknowledged that these serious problems are not easy to address as they are caused by many different factors, but he encouraged the Commission to take a first step by helping increase awareness of the problem in its report. Referencing others' testimony, Mr. Becker concluded by agreeing that the predictability of the outcomes of Supreme Court decisions is harming its legitimacy.

**Q: Mr. Parker, your testimony points out that the American Bar Association Code of Judicial Conduct is not binding on Supreme Court Justices, and that while litigants can motion for a Justice to recuse from cases, there is no way to appeal Justices' decisions on recusals, thus parties can end up arguing in front of a biased/conflicted Supreme Court Justice with no recourse. The Supreme Court's unclear, inconsistent, and unenforceable recusal standards have been a source of controversy throughout U.S. history. Can you speak further on this issue and address how it relates to other concerns you have raised, such as the lack of different types of diversity on the Supreme Court?**

Mr. Parker stated that the heart of the problematic connection between the Supreme Court's lack of diversity and unclear standards is not about disagreement with the Supreme Court's decisions, but rather a question of whether the system itself is and appears to be legitimate. Mr. Parker argued that subjecting Justices to common sense rules on conflicts of interest would benefit the Supreme Court by making rules clear, promoting transparency, and allowing litigants to succeed before the Court regardless of their and their lawyers' identities. Mr. Parker emphasized that diversity and accountability is of particular importance to those that do not see themselves reflected on the courts and those that have been historically excluded. Mr. Parker concluded by arguing that people question the legitimacy of the criminal justice system because it operates differently against people of color, and that restoring legitimacy and fairness to the system requires promoting diversity in the Supreme and federal courts to create a sense that they represent and include everyone in the U.S., rather than just a small number of privileged people.

**Q: Mr. Parker, what would you suggest the Commission say in its report that would advance diversity in the judiciary? Do you have any specific proposals in mind?**

Mr. Parker suggested that the courts undergo the same type of self-evaluation that every industry and every other part of the U.S. has, recognize that its practices tend to reinforce a pattern of exclusion, and follow the rest of the U.S. in making an effort to become more diverse and reverse the impact of prior discrimination. Mr. Parker also encouraged changes to standards and the confirmation process that allow for more fair consideration of candidates with experience representing the interests of poor people, and who either themselves have experienced racial discrimination or have represented clients that have experienced racial discrimination. Mr. Parker argued that there has historically been implicit and explicit bias in the confirmation process that has discouraged the nomination of candidates that have the above experiences or otherwise have been advocates of civil rights, which should never be the case. Instead, Mr. Parker voiced support for an affirmative effort to increase the number of candidates from diverse practices.

**Q: Mr. Parker, your response did not suggest any requirements or statutory actions. Is your suggestion that the courts voluntarily pursue diversity?**

Mr. Parker clarified that he is not excluding the possibility of reform through statute, but as a first step his testimony seeks to bring light to the fact that the courts' lack of diversity is not a matter of chance, it is a result of the policies and practices that have been used to exclude a large number of people from positions of power.

**Q: Mr. Parker, this discussion relates to Mr. Becker's testimony on the lack of various kinds of diversity in the Supreme Court bar, and the reverberating effects to law clerks and the lower courts. Can you comment on that?**

Mr. Parker agreed that the pathways to clerkships and subsequent judicial positions are too limited in terms of the backgrounds, experiences, and schools that people come from.

**Q: Ms. McGowan, your testimony argues that concerns that reforms could lead to "tit-for-tat" retaliation are overstated and should not be a barrier to pursuing changes. Given that the U.S. is in a state of extreme polarization, how do you think the Commission should think about reforms if "tit-for-tat" retaliation was a real possibility?**

Ms. McGowan reiterated that "tit-for-tat" concerns, whether plausible or not, should not be a barrier to considering reforms. Ms. McGowan pointed out that nothing the Commission does or does not do will take away either party's incentive to make changes to the Supreme Court for their own political purposes. Ms. McGowan noted that her testimony placed emphasis on a range of proposals beyond Supreme Court expansion because expansion alone is not a permanent solution; the processes

involved in confirming Justices and regulating their behavior are in need of reform as well.

**Q: Mr. Levey, your testimony argues that the only major changes needed to the Supreme Court are for it to adopt a more originalist philosophy and to stop its incursions into social and political issues. However, you also argue that over the past 40 years the Supreme Court has waded into social and political issues in service of the liberal elite. Wouldn't a shift to a more originalist philosophy require the Supreme Court to revisit those social and political issues to undo precedents?**

Mr. Levey confirmed that in his view, the Supreme Court has pushed the law in a progressive direction over the past 60 years following the Warren Court's adoption of a living constitution philosophy. Mr. Levey also confirmed that returning to an originalist interpretation of the Constitution would indeed require the Supreme Court to undo some of the precedents set by the Court, but surmised that many precedents, such as those set by *Obergefell v. Hodges* and *Roe v. Wade*, would more than likely not be overturned. Mr. Levey pivoted to reiterate his opposition to the idea that the Supreme Court is currently considered "right-wing" or illegitimate. Mr. Levey argued that Justices are not frequently ruling in ways that would be predictable based on their appointing party, and that many of its decisions have been more popular among liberals than conservatives.

**Q: Mr. Becker, your testimony seems to disagree with Mr. Levey's suggestion that precedent would likely not be largely overturned, noting that Justices have in some cases actively solicited cases as part of an effort to challenge some precedents. How would you respond to Mr. Levey's position that an originalist Supreme Court would not need further reforms because it would stay in its own lane?**

Mr. Becker disagreed with the premise that under originalism there is only one way to read the Constitution. Mr. Becker argued that data empirically shows that the current Supreme Court is the most pro-corporate, anti-worker Supreme Court in modern history, and that the Court's decisions have become increasingly predictable along partisan lines. Mr. Becker cautioned that the rule of law depends on the public viewing the courts as non-partisan. Responding to the question posed to Ms. McGowan about whether "tit-for-tat" concerns should factor into reform decisions, Mr. Becker agreed with Ms. McGowan in saying that reforms should be pursued regardless of possible "tit-for-tat" retaliation, as urgent changes are needed to address the Supreme Court's declining legitimacy.

**Q: Mr. Parker, how do term limits address the broader issues you raised about the Supreme Court's credibility and the perception of fairness/bias?**

Mr. Parker argued that the Supreme Court's current composition is a good example of why term limits are important, as President Donald Trump filled a disproportionate number of seats compared to other presidents, resulting in a Supreme Court that, without intervention, will be unbalanced for decades. Mr. Parker pointed out that term limits would make it possible to bring new Justices in on a more regular basis.

## Panel 4: Term Limits and Turnover on the Supreme Court

Commissioners: *Bob Bauer, Richard H. Pildes, Caleb Nelson*

Panel Witnesses: *Akhil Amar, Tom Ginsburg, Vicki Jackson*

### ***Witness Testimony***

[\*Akhil Amar\*](#)

[\*Written Testimony\*](#)

[\*Opening Remarks:\*](#)

Professor Amar provided a detailed proposal for a system under which Supreme Court Justices would serve 18 years of active service, followed by lifetime emeritus status.

Professor Amar briefly described his proposal over five points:

**1 - Emeritus Justices would generally not sit en banc with active service**

**Justices, but would perform other Supreme Court functions.** After 18 years, Justices would provide administrative, educational, ceremonial, advisory, and other functions as determined (and revised) by active service Justices.

**2 - This proposal would avoid partisan valence.** Professor Amar noted that his proposal was co-developed by a Republican and a Democrat, and first proposed during the George W. Bush Administration.

**3 - 18-year active terms have several benefits that make them ideal in the U.S. system.** Professor Amar catalogued 18 advantages of 18-year limits on active service in his written testimony, including adding predictable turnover every odd year and allowing two selections to be made during every presidential term, regardless of party affiliation.

**4 - Professor Amar argued that this proposal is constitutionally permissible and could be passed through statute, as it recognizes a single office and is similar to other procedural rules that are accepted as constitutional.**

**5 - Professor Amar argued that his proposal is different from a term limit, as Justices still hold formal office and perform Supreme Court work for life.**

[\*Tom Ginsburg\*](#)

[\*Written Testimony\*](#)

[\*Opening Remarks:\*](#)

Professor Ginsburg provided his testimony to contribute to the comparative perspective on Supreme Court reforms. Professor Ginsburg noted that many of the issues the Supreme Court faces today (e.g., the balance between judicial independence and accountability, how to produce a high quality responsive legal system, etc.) are important concerns that other countries deal with as well. Professor Ginsburg identified lifetime tenure one of the most pointed irregularities that the U.S. has compared to other democracies. The concept of life tenure seems antithetical to democratic values and no

other constitutional democracy in the world operates their highest courts without either term limits or mandatory retirement ages. Professor Ginsburg pointed out that many of the institutions that have term limits in place are considered to be highly independent. Professor Ginsburg argued that the potential to have a party advocate in the Supreme Court for life has also been a factor exacerbating partisan tensions around the confirmation process, as Justices have served for an average of 25 years since 1970. While not supporting a mandatory retirement age, Professor Ginsburg cautioned that declining capacity in advanced age can affect the course of American law, and also finds it noteworthy that of the 106 Justices that have served on the Supreme Court, nearly half have declined to retire before death. Professor Ginsburg did endorse proposals for 18-year term limits, although he concurred with other witnesses that have suggested that 10-12 years would sufficiently ensure judicial independence, in addition to aligning more closely with the term limits more commonly found among allied constitutional democracies.

[Vicki Jackson](#)

[Written Testimony](#)

[Opening Remarks:](#)

Professor Jackson argued three reasons why it is now important to reform the Supreme Court's tenure provisions:

**1 - The experience of global democracies (and U.S. states) has shown life tenure to be unnecessary for judicial independence.**

**2 - There is a gap between public voting and which parties' presidents have appointed Justices to the Supreme Court.** Professor Jackson pointed out that increasing life spans allow Justices to serve for longer periods of time, and it is becoming less common for presidents to be able to make appointments regularly across parties. Professor Jackson argued that uneven distribution of opportunities for appointment reduces the legitimacy derived from having political branches involved in Supreme Court appointments.

**3 - Constitutions are supposed to provide a framework for peaceful resolution of disputes.** Losers of elections and court cases accept results because they trust the overall fairness of the system, but Professor Jackson cautioned that the Supreme Court's current structure contributes to doubts about overall fairness.

Following her above points, Professor Jackson voiced support for 18-year staggered term limits (with employment restrictions after retirement) as a means of addressing uneven opportunities for appointments. Professor Jackson acknowledged that such a system would only achieve the intended results with the cooperation of the Senate, which leads the confirmation process. Professor Jackson was skeptical at the feasibility of statutory term limits, noting that while there have been thoughtful arguments supporting statutory term limits, the weight of counter-arguments would likely leave

constitutional amendment as the only plausible path for implementation. Professor Jackson noted that because expansion of the Supreme Court is constitutionally permissible, one option would be for Congress to increase the size of the Supreme Court and cap its membership at a certain number, or other variations that would allow the size of the Court to fluctuate. Professor Jackson concluded by proposing an incentivized retirement age that could include increased pension benefits conditioned upon retirement at the earlier of either a set age or a term of years. Professor Jackson favored incentivized retirements because they would not run afoul of the Constitution and would also avoid creating incentives for presidents to appoint young Justices.

### ***Questions from Commissioners***

**Q: Professor Amar, the Good Behavior Clause of Article III of the Constitution arguably refers separately to judges of the Supreme Court and judges of the lower federal courts, while the Appointments Clause of Article II specifically addresses “judges of the Supreme Court.” Do you agree that Supreme Court Justices need to be separately appointed to the Supreme Court so that the office that they shall hold during good behavior is that of being a judge of the Supreme Court? Or could Congress establish a term limit system under which appointees serve as judges of the Supreme Court for a set number of years, after which they become a judge on a lower federal court for the rest of their lifetime appointment?**

Professor Amar preferred the former approach, as the latter, while possibly being constitutional, would be more contentious. Professor Amar noted that his proposal for term limits was structured to be indistinguishable from the first Judiciary Act, under which people received one commission as Supreme Court Justice, and rode circuit as a function connected to their role as a Justice.

**Q: Professor Amar, let’s assume that the Constitution does contemplate a distinct office of judge of the Supreme Court and that appointees are entitled to hold that office during good behavior without any fixed term. Under the system that you are proposing, those appointed to the Supreme Court would stay in office for life, yet the duties of that office would dramatically change after 18 years. Can a Justice that can no longer participate in the Supreme Court’s decisions under normal circumstances really be considered a judge of the Supreme Court in the sense that the Constitution contemplates? Is the constitutional essence of being a judge of the Supreme Court satisfied by the existence of a title, some official functions, and a salary? Or does it also include having the authority to participate in the Supreme Court’s exercise of judicial power and its decisions on cases?**

Professor Amar pointed out that originally, Supreme Court Justices’ most important function was to divide and ride circuit, rather than collectively participate en banc, and

that it was common for Justices to perform other educational, ceremonial, public, advisory, and docket management duties. Professor Amar continued that today, Justices still perform administrative duties, testify before Congress, meet foreign diplomats, and educate the public and the international community on the U.S. Constitution. Professor Amar argued that these have historically been important Supreme Court functions, and that Justices still performing these functions could be considered to hold the office of judge of the Supreme Court. Professor Amar paraphrased Justice John Marshall as saying that as long as Justices got their salary and title, other details were negotiable.

**Q: Professor Amar, are there historical examples of Congress passing statutes that prevent Justices from sitting on particular cases that the Supreme Court decides? The circuit riding example that you provided shows that Justices have taken on additional duties, but they still decided Supreme Court cases. Are there examples of statutes that exclude categories of Justices from participating in the Supreme Court’s merits docket?**

Professor Amar responded that recusal rules, both regulatory and statutory, prevent Justices from sitting on categories of cases where they have financial interests. Professor Amar argued that his proposal could be loosely understood in a similar way, with Justices effectively being recused from cases after 18 years.

**Q: Professor Amar, to the extent that Congress does have the flexibility to impose rules in that way, could Congress establish other criteria for stripping Justices of their authority to participate in the Supreme Court’s merits docket aside from length of service? What are the constitutional limits on Congress’ ability to make such flexible rules?**

Professor Amar responded that the word “proper” in the Necessary and Proper Clause guides his view on Congress’ power to impose rules on the Supreme Court, and argued that generally the practices of states and other democratic countries can be helpful to this analysis. On his proposal specifically, Professor Amar argued that altering the duties of Justices after 18 years in such a way is proper, as it does not offer partisan benefits and does not allow for different treatment of Justices depending on congressional displeasure with their rulings or predicted rulings. Professor Amar concluded by pointing out that some states and democratic countries have similar systems in place.

**Q: Professor Amar, some scholars, even among those that support term limits, have raised serious doubts at the constitutionality of statutes that impose term limits in a way similar to what you propose. Should Congress be worried that a statute adopting your proposal would lead to destabilizing disputes about**

**whether the Supreme Court is properly constituted? One could imagine that citizens and public officials that disagree with such a statute would consider all subsequent Supreme Court decisions to be tainted, as the decisions were made by a Supreme Court they viewed as being improperly constituted.**

Professor Amar acknowledged that his proposal should be implemented in a way that maximizes legitimacy, but pointed out that under the Rule of Necessity, Justices would be able to rule on such a statute, which adds to its legitimacy. Professor Amar noted support for giving Justices full participation in deciding the proper functions of their post-18-year Emeritus status as a means of building support for such a change among the Justices and the public. Professor Amar emphasized that he has been open to congressional and judicial involvement in debate about his proposal as a way of identifying and resolving any constitutional concerns.

**Q: Professor Ginsburg, a major feature of term limit proposals is that they would give each president equal opportunity to appoint the same number of Justices (e.g., under the frequently raised 18-year term limit proposals, two appointments would be made during each presidential term). However, during periods of divided government, the Senate might refuse to confirm presidential nominees. If term limits were to be implemented via constitutional amendment, what are some promising ways of ensuring that the system works as intended?**

Professor Ginsburg acknowledged that there should be no expectation of a smooth transition, as unlike most other countries that assume good faith from the legislative process of approval, the U.S. has examples of institutional design that explicitly contemplate obstructionism. Professor Ginsburg's written testimony suggested Mexico as a potential model, where presidents submit rounds of three nominees, and should the Senate reject multiple rounds of nominations the president is able to unilaterally select a nominee. Addressing specifically a general Senate refusal to consider nominations, Professor Ginsburg suggested that Senate rules could be adjusted to require the Senate Judiciary Committee to hold confirmation hearings within a specific timeframe. Professor Ginsburg remarked that constitutional amendment could also be used to ensure that confirmations progress notwithstanding obstructionism.

**Q: Professor Ginsburg, rather than giving the president unilateral power, Professor Jackson's testimony proposes resolving issues posed by Senate obstructionism in a system of term limits by giving chief judges of the court of appeals the power to appoint Justices should the Senate repeatedly fail to confirm. Can you comment on that proposal?**

Professor Ginsburg acknowledged Professor Jackson's proposal as an appropriate solution for political impasse, and he noted that many independent judiciaries around

the world give judges an important role in naming the Justices for their highest courts in a similar manner; however, Professor Ginsburg cautioned that such a system could introduce potential risks, such as a self-appointing Supreme Court.

**Q: Professor Ginsburg, another difficult issue that would need to be addressed in designing an amendment imposing term limits is the transition of existing Justices from life tenure to term limits. One option that has been proposed is to require the most senior Justice to leave on the 3rd odd numbered year after the amendment's enactment (i.e., if the amendment were to be adopted in 2022, the most senior Justice would retire in 2027, and the next in 2029, and so on). A second option is to exempt sitting Justices from the term limit requirement, which would result in a fluctuating number of Justices until the last of the existing Justices left the Supreme Court. Can you give us your thoughts on those proposals, or offer any others?**

Professor Ginsburg suggested it would be more productive to distinguish the options that are politically feasible from those that are ideal. Professor Ginsburg argued that the proposed system of term limits would ideally apply to sitting Justices, avoiding complications such as fluctuations in the size of the Supreme Court and the potential for an even number of Justices for periods of time. However, Professor Ginsburg acknowledged that it would be less politically feasible to impose term limits on sitting Justices, and thus supported exempting sitting Justices from term limits as a second best alternative.

**Q: Professor Jackson, on the constitutional vs statutory alternatives to imposing term limits on Supreme Court Justices, your written testimony notes that you are doubtful that term limits could be imposed by statute, as it would be a “a significant change from how the tenure of Supreme Court Justices has been understood.” How doubtful are you that it would be possible, and how would you respond to Professor Amar's testimony, which essentially argues that the current understanding of Justices' tenure has been misunderstood from its original reasoning?**

Professor Jackson clarified that she is not arguing that a statute imposing term limits would be *clearly* unconstitutional, merely that there are significant counter-arguments to the statutory proposals put forth by Professor Amar and others. Professor Jackson pointed out that the current conceptualization of Justices' tenure is based on centuries of contemplation over the Constitution's intended meaning, and that absent extremely persuasive reasoning it would be difficult to deviate from that historical understanding. Additionally, Professor Jackson noted that Alexander Hamilton made compelling arguments in favor of life tenure for Justices in Federalists 78 and 79, namely that permanency in office is an important mechanism for ensuring that Justices do not have

to worry about their future employment opportunities. In response to Professor Amar's proposal, under which Justices would maintain their title and salary for life, Professor Jackson was skeptical that Justices would be receptive to the loss of power and prestige that would come with emeritus status. Professor Jackson voiced apprehension at the idea of making statutory changes to the office of Supreme Court Justice that would be regarded by Justices as adverse to the interests of their office. Mr. Jackson cautioned that there are international examples where politically motivated changes to the tenure of peak court judges severely damaged those courts' independence.

**Q: Professor Jackson, continuing from the above, your written testimony similarly states that “comparative experience suggests that *statutory* authority to change terms and retirement age is at some risk of being abused, should a tyrannical party gain the presidency and the Congress.” However, your testimony also proposes a procedure for statutorily giving presidents the ability to expand the number of Supreme Court Justices by one each term. Wouldn't your statutory proposal present the same risks?**

Professor Jackson questioned the underlying premise of the question, as Congress' power to adjust the size of the Court is well established, and there is a difference between Congress exercising its power to expand the Supreme Court and taking action that detrimentally affects individual Justices in a way that may cause them to hesitate in rendering a truly independent judgement. Professor Jackson argued against proposals that have been provided to the Commission that seek to expand the court by multiple seats at once in an effort to change its ideological leanings, noting that while Congress has the power to do so, it is an unwise and imprudent escalation. Instead, Professor Jackson argued that a more balanced approach that would not raise concerns of partisan manipulation would allow for the appointment of a Justice during each presidential term on a regular basis.

**Q: Professor Amar, do you think that proceeding with term limits through a statutory proposal, as you suggest, would have destabilizing effects? In the hyperpolarized environment we are in, with the expectation that there will be significant pushback against statutorily imposed term limits from those that oppose them, would it be better to implement them via constitutional amendment?**

Professor Amar argued that objections from those that oppose statutorily imposed term limits would only lead to destabilizing effects if those objections were highly plausible and persuasive. Professor Amar did not feel that any persuasive arguments had yet been raised against statutory term limits. Rebutting Professor Jackson's argument that Justices would not be receptive due to the loss of power and prestige that comes with emeritus status, Professor Amar argued that there is no vested constitutional interest in

the amount of power Justices have, and pointed out that while proposals to statutorily expand the size of the Supreme Court would also dilute individual Justices' power, that proposal is not considered constitutionally objectionable. Professor Amar concluded by noting confidence that his proposal could elicit bipartisan support, as it lowers the stakes around confirmations and has no clear and persuasive arguments against it.

**Q: Professor Ginsburg, you noted concern around the possibility of some Supreme Court reforms being used for authoritarian purposes, as has been done in some other countries. Could reforms that increase turnover of Supreme Court Justices and regularize appointments potentially pose authoritarian risks? Say for instance the U.S. kept the number of Justices capped at nine, but implemented a system of 12-year term limits that would allow two-term presidents to select six Justices. Consider a dangerous president who sets out from the start to get Justices in place that would abide by the president's will and, for example, let the president keep power past the end of their second term. Should we worry about proposals that allow presidents to select either a majority or near majority of Justices?**

Professor Ginsburg remarked that such proposals should not create any more concern than the U.S.' current system. Professor Ginsburg argued that there is an assumption that those placed on the Supreme Court are selected from individuals that generally believe in the rule of law, and that it is unlikely that they would be amenable to spurious arguments, such as extending presidential terms. Contrary to the posed concern, Professor Ginsburg supported frequent turnover of Justices for its potential to broaden the pool of Justices that believe in the rule of law and ultimately improve the performance of the Supreme Court. Professor Ginsburg commented that internationally, partisan motivated peak court expansion has been an example of a reform that has harmed democracies, showing that reforms ought to be undertaken in a bipartisan manner. Professor Ginsburg was confident that ensuring greater rotation of Justices was such a reform, noting that survey data has shown broad American support for limiting the tenure of Justices in some way.

**Q: Professor Jackson, can you speak to that same question? Should we be concerned about reducing the time that it takes for a president to appoint a majority of members of the Supreme Court?**

Professor Jackson argued that 12-year term limits would be too short and would give presidents too much power over constitutional questions. Professor Jackson instead recommended 18-year term limits, as they would achieve the intended effect of regularizing appointments while posing fewer risks than 12-year term limits.

**Q: Professor Jackson, you previously made a point in the Georgetown Law Journal that the system of life tenure for Supreme Court Justices serves as an anchor for those state supreme courts systems under which judges are elected to relatively short terms. How should people think about the way the structure of the federal judiciary intersects with the varying structures of the state judiciaries?**

Professor Jackson clarified that her views had shifted somewhat in the time since that piece was written. Professor Jackson voiced concern at the potential for popular passions to play an oversized role in the minds of state judges that are seated by election, and argued that Supreme Court Justices should have longer terms than state supreme courts to enhance its institutional independence and to counterbalance the democratically-oriented processes of the state supreme courts. Professor Jackson's research has indicated that state supreme court judges' terms range from 6-14 years in length, and thus supported a term limit for Supreme Court Justices exceeding 14 years.

**Q: Professor Jackson, many people assume that a constitutional amendment imposing term limits on Supreme Court Justices would be highly unlikely to be adopted given the rarity and difficulty of constitutional amendment. Yet there seems to be a great deal of support from across the political and professional spectrum to at least consider the idea, including from three Justices currently sitting on the Supreme Court and a bipartisan committee of practitioners that testified before this Commission. Is it really such an impossible hurdle to impose a term limit on Supreme Court Justices via constitutional amendment? How much resistance can we expect from those that study the Supreme Court and those that practice before it?**

Professor Jackson framed her response with the understanding that she does not consider herself to be an expert on political feasibility. However, Professor Jackson did not feel that there was a great deal of resistance from scholars to the idea of a constitutional amendment imposing an 18-year term limit on Supreme Court Justices, and in fact the majority of views Professor Jackson had read supported the idea. However, Professor Jackson reiterated that many details outside of her expertise would need to be rigorously addressed in the course of pursuing such an amendment.

**Q: Professor Amar, one of the concerns raised by comparative experts is the possibility of democratic backsliding, where electoral majorities leverage their power to seize control of independent institutions that might resist their efforts to entrench themselves. Political scientists looking at this issue across democracies have concluded that the systems that are most prone to this electoral authoritarianism are those in which a simple majority can take control of institutions by, for example, changing retirement ages of judges. Do you think that the U.S. is largely immune to the forces that have generated electoral**

**authoritarianism in other democracies in recent years? How concerned ought we to be that legislation imposing term limits would allow future legislative majorities to undermine the democratic system?**

Professor Amar cautioned that the U.S. is not immune to such authoritarianism, and that such concerns should be taken seriously. Professor Amar argued that Donald Trump's presidency chastened perceptions that the U.S.' system had risen above such a possibility. Turning to prior discussions on the ideal length of a term limit for Supreme Court Justices, Professor Amar noted that in 2009, more than 40 constitutional scholars from across the political spectrum signed an open letter in support of Roger Cramton and Paul Carrington's 18-year term limit proposal. In addition to the points raised by Professor Jackson in support of 18-year term limits (e.g., it prevents authoritarian power grabs, is longer than state supreme court terms, etc.), Professor Amar's proposal specified 18-year term limits because:

- 1 - Requiring appointments to be made in years 1 and 3 of each presidential term equally distributes presidential power across pre- and post- midterm elections, allowing for variation in Senate majorities; and
- 2 - Requiring appointments in years 1 and 3 separates them temporally from the political passions of presidential and midterm elections.

In a final comment on Professor Jackson's proposal that judges be given the power to select Supreme Court Justices should the Senate fail to confirm nominees put forth by the president, Professor Amar agreed that involving lower federal court judges in the confirmation process would be an attractive means of reducing political temperatures.

**Q: Professor Ginsburg, when we talk about moving from the Supreme Court's life tenure system to something more limited, there are undoubtedly unanticipated problems and benefits that we cannot foresee. How much consideration should we give to the unknowns? Based on what you know right now, what are the greatest risk areas that you would identify?**

Professor Ginsburg noted that such questions are fundamental aspects of constitutional design, and that the founders took on the same type of speculation when thinking through the design of the U.S.' institutions. Professor Ginsburg suggested that general statistical studies can only go so far in drawing conclusions about the impact of changes, but went on to argue that they are useful for understanding the complications and interdependence of institutions. Addressing the risks referenced in the posed question, Professor Ginsburg pointed out that *not* making changes comes with risks as well. As a specific anticipated risk, Professor Ginsburg cautioned that due to the polarized state of U.S. politics, the intended effects of limiting the tenure of Supreme Court Justices would only be realized if accompanied by changes to the Senate confirmation process, as Senate obstructionism could threaten the structural integrity of the turnover process.

**Q: Professor Jackson, when we consider the possibility that proceeding by statute could lead to constitutional objection and ultimately fail upon final review by the Supreme Court, would you view that as a dispositive objection? Or is it more your view that with strong favorable arguments and bipartisan support, a statutory route would then be an attractive means of implementing term limits for Supreme Court Justices?**

Professor Jackson clarified that she does not think her constitutional doubts should be taken as a dispositive position on any potential routes for implementation. Professor Jackson's remarks on whether term limits should be implemented by statute or constitutional amendment were mostly a matter of feasibility, although she reiterated that the statutory route does pose some additional risks. Addressing the question posed to Professor Ginsburg, Professor Jackson raised two risks:

- 1 - Professor Jackson agreed that the most important front-end issue that needs to be addressed is dysfunction in the Senate confirmation process, which serves as an impediment to implementing effective term limits.
- 2 - Should 18-year term limited Justices choose not to stay on as emeritus judges, there may need to be statutory restrictions on their post-service employment, as is the case in some other countries.

## Panel 5: Composition of the Supreme Court

*Commissioners: Tara Leigh Grove, Cristina M. Rodriguez, Adam White*

*Panel Witnesses: Randy Barnett, Daniel Epps, Michael Klarman, Marin Levy, Neil Siegel*

### ***Witness Testimony***

[Randy Barnett](#)

[Written Testimony](#)

[Opening Remarks:](#)

Professor Barnett argued against expanding the size of the Supreme Court, cautioning that doing so would end the Court's independence, greatly exacerbate partisan polarization, and ultimately harm the Court's institutional role as a protector of rights and liberties. Rebutting suggestions put forth by some other witnesses, Professor Barnett also argued that expansion of the Supreme Court would be unconstitutional. While Congress has in the past made adjustments to the size of the Supreme Court, Professor Barnett noted that those adjustments were made through the power given to Congress under the Constitution's Necessary and Proper Clause. Professor Barnett went on to argue that current efforts to enact legislation adjusting the size of the Supreme Court, which has been set at nine since 1869, would not satisfy the Necessary and Proper Clause, as such changes are being pursued in an effort to affect the Supreme Court's rulings in particular cases. Professor Barnett quoted from Chief Justice John Marshall's criteria for satisfying the Necessary and Proper Clause as: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate . . . Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objectives not entrusted to the government; it would become the painful duty of this tribunal . . . to say such an act was not the law of the land." Professor Barnett argued that Supreme Court expansion as a pretextual partisan attempt to affect Supreme Court rulings is not a legitimate end, interferes with the Supreme Court's independence, and undermines the structure of government established in the Constitution, and thus does not satisfy the Necessary and Proper Clause. Professor Barnett concluded his testimony by quoting the findings of the Senate Judiciary Committee when President Franklin D. Roosevelt attempted to expand the size of the Supreme Court in 1937: "Under the form of the Constitution it seeks to do that which is unconstitutional. Its ultimate operation would be to make this government one of men rather than one of law, and its practical operation would be to make the Constitution what the executive or legislative branches of the government choose to say it is -- an interpretation to be changed with each change of administration. It is a measure, which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America."

[Daniel Epps](#)

[Written Testimony](#)

[Opening Remarks:](#)

Professor Epps testified in order to discuss current Supreme Court reform efforts from the perspective of a reform advocate, as well as to help the Commission explore possibilities for reform. Professor Epps raised three discussion points to help frame Supreme Court reform efforts:

**1 - Underlying problems leading to calls for Supreme Court reform.**

- Life tenure creates instability because Supreme Court vacancies are either produced by unpredictable death or strategic retirement.
- The randomness of vacancies is difficult to justify in a democratic system, as some presidents are able to appoint multiple Justices while others do not get to appoint any Justices.
- Over the past few decades Justices' terms of service have risen.
- Because there are only nine Justices on the Supreme Court, each vacancy becomes an important focal point for the political branches.
- The Supreme Court is very powerful, regularly declaring federal and state statutes unconstitutional and wading into the U.S.' most controversial issues.
- Professor Epps argued that together, these problems lead to the distribution of power in a way that is unpredictable, undemocratic, and unfair.

**2 - Reforms and other changes that might address the above defined problems.** Professor Epps pointed out that his written testimony describes a wider range of proposals, but noted general areas of reform that he finds promising:

- Regularize vacancies so that they correspond to presidential elections more consistently.
- Share power over the Supreme Court so that there is a fixed relationship between Justices' seats and the U.S.' different political coalitions.
- Disempower the Supreme Court so that it becomes less important and consequential.
- Foster greater consensus in U.S. legal culture.

**3 - A cautionary point on reforms that the Commission could facilitate.**

Professor Epps declined to endorse any individual proposals, and instead encouraged the Commission to explore all possibilities without removing any proposals from consideration, noting that there are a wide range of views on the constitutionality and viability of the proposals that have been raised.

[Marin Levy](#)

[Written Testimony](#)

[Opening Remarks:](#)

Professor Levy posed a series of questions about the role and operation of the Supreme Court as a means of framing the Commission's consideration of various proposed reforms. Professor Levy then proceeded to reference her research on state supreme courts as a starting point for comparing recent successes in expanding and contracting state supreme courts to the issues facing the U.S. Supreme Court. The questions she undertook to address are:

- **Would expanding the Supreme Court harm the institution's legitimacy?**
- **Would expansion prompt a series of future expansions?**
- **Could an expanded Supreme Court function well as a single decision-making body?**
- **Would expansion contradict existing constitutional norms and conventions?**

Although some argue that there is a robust constitutional norm against Supreme Court expansion, Professor Levy's research has found that this norm is not robust at the state level; 11 states made at least 20 different attempts to expand their courts of last resort between 2007 and 2019. Professor Levy continued that Republicans succeeded in expanding state supreme courts in Arizona and Georgia, noting that in the case of Arizona the supreme court was expanded with no support from Democrats and over the objection of the existing supreme court judges. Professor Levy pointed out that a majority of the attempts to expand courts were subject to a colorable claim that the attempt was made in order to affect ideological composition in direct response to decisions handed down by those courts.

Professor Levy acknowledged that there is insufficient data for fully answering the questions posed, as well as anticipating how well state and federal court systems can translate lessons. For example, in the cases of successful court expansion in Arizona and Georgia, it is unknown the effects of an on public opinion. Likewise, it is unknown if there will be retaliatory attempts to pack or unpack expanded courts in the future should party control of the state legislature or governorship change. Professor Levy also acknowledged that there are differences between the state and national court systems that make it difficult to translate lessons from one to the other. However, despite their differences and a lack of data that could indicate how effectively practices can be generalized, Professor Levy voiced confidence that state supreme courts can serve as valuable reference points for resolving issues in the federal courts.

[Neil Siegel](#)

[Written Testimony](#)

[Opening Remarks:](#)

Professor Siegel argued that expanding the size of the Supreme Court for the purpose of influencing its decision-making is an extreme act that would severely undermine the Court's independence and put its legal and public legitimacy at risk. Professor Siegel cautioned that the resulting harm to the Supreme Court's legitimacy would impair its ability to perform key functions, such as ensuring the supremacy of federal law, reducing the threat of authoritarianism, vindicating individual rights, and sustaining the rule of law. Professor Siegel acknowledged that the Supreme Court does not always perform these functions well, and that there are other government institutions that share responsibility for these functions; however, Professor Siegel argued that the Supreme Court is the best institution available in the U.S. to at least partially perform these functions. Professor Siegel reiterated that Supreme Court expansion should only be reserved for extreme situations, naming three:

- 1 - Where adding seats would follow a prior instance of Supreme Court expansion, serving as a proportional response to a norm violation by an opposing party.
- 2 - Where Supreme Court expansion would restore the Court's legitimacy after Justices had squandered it by issuing extreme decisions.
- 3 - Where Supreme Court expansion would address a national crisis that is more urgent than the Court's short-term legitimacy. Professor Siegel argued that disagreement with mainstream substantive issues does not constitute a crisis.

Many advocates propose expanding the Supreme Court as a response to politicization of the Senate confirmation process by Republicans, beginning with Republicans' refusal to consider nominees put forth by President Barack Obama and culminating with the confirmation of Justice Amy Coney Barrett. Professor Siegel acknowledged that Republicans conducted a series of escalatory and problematic norm violations; however, Professor Siegel argued that changing the structure of the Supreme Court by adding seats for the first time since 1869 is not a proportional response to Republicans' conduct if the potential consequences to the Court's ability to function, and the legitimization of adjusting the Supreme Court's membership for political purposes, are taken into account.

[Michael Klarman](#)

[Written Testimony](#)

[Opening Remarks:](#)

Professor Klarman began his testimony by arguing that American democracy is under threat from the Republican Party, with President Donald Trump displaying openly aggressive behavior toward the press, damaging judicial independence, politicizing the Department of Justice, delegitimizing U.S. elections, inciting violence against Congress, and praising foreign autocrats. Professor Klarman argued that this threat to democracy extends to the legislative branch as well, with Republican members of Congress showing a willingness to endorse President Donald Trump's troubling behavior and false election claims, in addition to rejecting his impeachment. While Republican leaders *did* condemn President Donald Trump's complicity in the immediate aftermath of January 6th, Professor Klarman argued that support among 60-70% of Republican voters for the claim that the 2020 presidential election was stolen led Republican members of Congress to pursue this narrative, and minimize the violence of the Capitol riots, in an attempt to shift responsibility and interfere with independent Congressional attempts to investigate. Professor Klarman suggested that the degradation of American democracy began around 2000 through state-level anti-democratic efforts to suppress votes and gerrymander voting districts in ways that favor Republicans. Professor Klarman cautioned that these efforts have continued into the present, with Republicans working to control election results and make it more difficult to vote in states such as Georgia. Professor Klarman pointed out that the Supreme Court has done little to curb these threats, and indeed has facilitated them. He argued that:

**1 - Republican Supreme Court Justices have directly furthered their party's political advantages.** Professor Klarman evidenced this point by referencing the Supreme Court's decisions to nullify the preclearance provision of the 1965 Voting Rights Act in 2013, uphold voter purges and strict voter identification laws that disenfranchise Democratic constituencies, and overlook partisan gerrymandering that benefits Republican candidates.

**2 - The Supreme Court's campaign financing rulings have served to benefit wealthy donors and corporations and allowed money to play a large role in politics.** Professor Klarman cautioned that such rules limit the political influence of the American working class, allowing the political landscape to shape in favor of wealthy donors.

**3 - The current Supreme Court Justices have consistently furthered radical libertarian policies that erode American democracy.** Professor Klarman argued that the Supreme Court rules in ways that undermine labor unions, protect corporations from lawsuits, and curb antitrust and anti-discrimination laws.

### ***Questions from Commissioners***

**Q: Professor Klarman, your written testimony argues that the quickest way to restore a stable equilibrium to the Supreme Court after one party has repudiated a norm of cooperation is to reciprocate in kind, and that failing to do so**

**incentivizes more of the norm-breaking behavior. One of the concerns commonly raised by opponents of Supreme Court expansion is that it would lead to “tit-for-tat” gamesmanship, over-enlarging the size of the Court and ultimately harming its legitimacy and independence. Your testimony seems to reinforce the idea that Republicans would be unlikely to refrain from such an escalation. Given that, how would attempts by Democrats to expand the size of the Supreme Court restore equilibrium?**

Professor Klarman offered three responses to arguments that Republicans would retaliate in kind:

1 - Professor Klarman pushed back against the idea that Democrats would be starting the escalation by expanding the size of the Supreme Court, arguing that Republicans’ initiated a conflict over the Supreme Court when they refused to consider the nomination of Merrick Garland in 2016, and that by expanding the size of the Supreme Court Democrats would merely be responding in kind.

2 - Professor Klarman argued that Senate minority leader Mitch McConnell’s behavior over the past 15 years has made it clear that he will break as many norms as necessary to retain Republican control of power, regardless of any actions taken by Democrats, so there is no reason to believe that Republicans won’t seek to expand the size of the Supreme Court upon gaining sufficient power to do so.

3 - Professor Klarman cautioned that it is possible that the Republican Party can become so anti-democratic, unwilling to disavow violence, and willing to suppress votes, that they become a threat to the U.S.’ democratic system. Professor Klarman stated that his goal is not to advantage the Democratic Party, but rather to protect democracy.

**Q: Professor Klarman, your response above raises two additional questions. First, what would prevent a subsequent Republican president and Senate majority from expanding the Supreme Court for their own purposes? What happens to the Supreme Court if that process of back-and-forth expansion is allowed to proceed and iterate? Second, your testimony makes the argument that the structural features of the U.S. result in a type of minority rule due to the structure and composition of the Senate and Electoral College. As a result, the mass enfranchisement that your testimony envisions can’t just depend on the Supreme Court; it depends on state legislatures and Congress enacting expansive voting legislation. How can the structural impediments you identified be addressed in a way that makes Supreme Court reform effective without damaging the judiciary?**

Professor Klarman stated that the U.S. Senate is the most malapportioned legislative body in the world, as he finds no compelling arguments justifying an equal number of

Senators for states with small and large populations. Professor Klarman similarly argued that there is also no good reason that a candidate can win the presidency through the Electoral College, despite losing the popular vote. Professor Klarman identified these features as democratically problematic because while Democrats have won the popular vote in seven of the past eight presidential elections, and 50 Democratic senators currently represent 41 million more voters than 50 Republican senators, Republicans hold a supermajority of Supreme Court seats. Professor Klarman acknowledged that resolving problems in the Senate and Electoral College, which could only be done through constitutional amendment, serves as an obstacle to democratic responsiveness. However, Professor Klarman was optimistic that problems specifically associated with the Supreme Court could be addressed through statute, as expanding its size is rooted in historical precedent. Professor Klarman concluded by arguing that the crisis is rooted in the problem that political parties are supposed to change in response to electoral incentives, yet Republicans instead seek to maintain control of the Supreme Court as a means of circumventing democratic accountability, and are thus no longer bound to electoral incentives. Professor Klarman finds loosening that entrenched control by expanding the Supreme Court to be an important step in protecting democracy.

**Q: Professor Klarman, can you speak more on the role the Supreme Court plays in restoring democracy? Do you envision progressive appointees that push back on attempts to disenfranchise voters? What would limit the majority to those types of laws? What other forms of judicial review do you envision? How will your proposed reforms fit into the back-and-forth between political parties that will be fighting for their lives under your vision?**

Professor Klarman voiced support for reforms to the appointment system, namely for imposing 18-year staggered term limits on Supreme Court Justices as a way of stopping strategic retirements and random appointments. On judicial review, while initially agreeing with Nikolas Bowie in saying that judicial review does not have any clear benefits over alternatives, Professor Klarman declined to advocate for related reforms, as his immediate concern was to expand the size of the Supreme Court as a means of addressing an urgent crisis, which is protecting voting rights and democracy. In the longer term, Professor Klarman agreed that there are many difficult questions that need to be thought through, including the merits of judicial review.

**Q: Professor Barnett, your written testimony argues that partisan Supreme Court expansion is unconstitutional, and that previous Court expansions in 1807 and 1837 were merely responses to a need for more judges as the U.S. was growing at the time. However, arguments have been made that those expansions were also motivated by partisan interests. Indeed when President Franklin Delano Roosevelt proposed expanding the Supreme Court in 1937, he initially cited**

**efficiency concerns, but later acknowledged that his real intention was to change substantive decisions from the Supreme Court. How can we identify Supreme Court reforms that are partisan vs those that are motivated by something else?**

Professor Barnett argued that in general there are thorough attempts to identify legislative pretext by employing a sort of mean-end fit test, where the government is asked to explain the legitimate ends that proposed legislation seeks to achieve, and then the means for facilitating that end are scrutinized. Professor Barnett stated that the relationship between the means and the end ultimately reveals the motivations behind legislation. Addressing historical instances of Supreme Court expansion, Professor Barnett cited an article from Professor Joshua Braver to argue that virtually all of the early examples of Supreme Court expansion were associated with the addition of new states to the U.S., which resulted in a need to add more circuit courts of appeals, staffed in those years by Supreme Court Justices. Professor Barnett argued that the only historical example of successful partisan Supreme Court expansion was the removal of seats (which were later restored) to prevent President Andrew Johnson from obstructing reconstructionism. However, Professor Barnett did not think that that one example sets a precedent in favor of partisan Supreme Court expansion, especially considering the fact that Court expansion has not been accepted for more than 150 years. Professor Barnett concluded by noting that ultimately it is up to the courts to work out the motivations of legislation, but that Congress has a duty to examine the legitimacy and motivations of legislation as well.

**Q: Professor Barnett, continuing on that line of thought, how far does your interpretation of the Necessary and Proper Clause go in the world of Supreme Court reform? Many scholars acknowledge that while Article III of the Constitution shapes Congress' power, it does not actually confer it; instead, congressional power over the Supreme Court comes from the Necessary and Proper Clause. Would you say the same thing about partisan motivated changes to the Supreme Court's jurisdiction? Most historical jurisdiction-stripping measures have split Congress along partisan lines; in your view, does that make them unconstitutional?**

Professor Barnett noted that the jurisdiction of the Supreme Court falls outside of his prepared testimony. Professor Barnett did, however, point out that there have been opinions from the Supreme Court questioning whether measures to remove the Court's jurisdiction are necessarily constitutional under all circumstances. Reiterating his previous response, Professor Barnett argued that every exercise of the Necessary and Proper Clause has to be channeled through an evaluation of whether it is a necessary means to a legitimate end, and whether it is a proper type of law that would otherwise be in conflict with either the letter or the spirit of the Constitution.

**Q: Professor Levy, your testimony described partisan efforts to adjust the sizes of state supreme courts. What was motivating these efforts?**

Professor Levy stated that the motivations behind court adjustments are not always known, but argued that it seems apparent that at least some of the efforts to adjust the sizes of state supreme courts were a partisan response to opinions handed down by the court. In some instances, for example Montana, state lawmakers have gone as far as saying state supreme court expansion was sought to ensure the court would be more amenable to partisan interests in the future. Professor Levy concluded by noting that state supreme court size adjustments are often made under the guise of increasing efficiency, but argued that evidence typically points to partisan motivations.

**Q: Professor Levy, your testimony indicates that efforts to expand or contract state supreme courts seems to be on the rise, but that in most cases these efforts do not succeed; in fact, your research only identified 2 out of 22 instances of success. What effect do you think expansion at the federal level might have on the states? Would expanding the U.S. Supreme Court make it easier for state lawmakers to justify similar measures?**

Professor Levy agreed that it is certainly possible for Supreme Court expansion to serve as a “green light” on the state side, and that efforts to pursue state supreme court size adjustments are indeed on the rise. Professor Levy cautioned that retaliatory attempts to expand or subtract courts in the future should be taken into serious consideration, as there is evidence that these conflicts are already playing out in the court of appeals. Professor Levy cited North Carolina as an example, where legislation was passed in 2017 to remove three seats from the court of appeals; at the time, statements were made that the contraction was a response to Democrats’ expansion of the court in 2000.

**Q: Professor Epps, you have proposed instituting a balanced 15-member Supreme Court bench, with five Republican-appointed Justices, five Democrat-appointed Justices, and then five Justices appointed by those ten sitting Justices. Can you speak more on the practicalities of the initial allotment of ten Justices from political parties?**

Professor Epps noted that his proposal intentionally left the more specific details vague as a means of increasing implementation flexibility. Professor Epps argued that some other countries that have similar norms, such as the German Federal Constitutional Court, where for a long period of time seats were divvied up among governing political coalitions. Professor Epps continued that even in the U.S., some independent agencies have rules that specify the number of commissioners that can come from the same political party.

**Q: Professor Epps, a committee of Supreme Court practitioners raised some practical issues with reforms in their testimony this morning, and noted that they see no institutional benefit to raising the number of Supreme Court Justices above nine. In fact, a majority of those practitioners believe that increasing the size of the Supreme Court would be counterproductive, as it would make oral argument less orderly, it would likely harm deliberation within the Court, and might lead to more fragmented rulings with multiple rationales and less clarity in the law. What are your reactions to those practical concerns with raising the number of Justices?**

Professor Epps remarked that active Supreme Court practitioners are indeed an important source of information and wisdom for the Supreme Court, but cautioned that their perspectives are limited as candid evaluations of the judiciary. Professor Epps suggested that one would first need to weigh the costs, benefits, and plausibility of the stated concerns; Professor Epps' initial reaction was that the stated concerns seem speculative and potentially inconsequential. Professor Epps argued that issues such as the regulation of oral arguments and the fragmentation of rulings are more background concerns when contemplating the overall structure of the U.S. government, and that the potential cons are outweighed by the benefits of his proposals.

**Q: Professor Siegel, much of today's testimony has focused on reciprocal norm violations, which has proven to be a practical difficulty in trying to understand the conventions around the appointments process. Your testimony argues that in 2016, Senate Republicans "violated a constitutional convention requiring good-faith consideration of Supreme Court nominees." How would you recommend identifying what constitutes a convention (i.e., norm) in this context, and whether there are different conventions for election years?**

Professor Siegel stated that part of the difficulty in dealing with constitutional conventions is that they are often unnoticed until they are violated and provoke a response. Professor Siegel argued that the predominant way in which to know a norm exists is to empirically examine how members of the relevant community have behaved and understood themselves, how long these understandings and behavior have been in place, how much bipartisan buy-in these understandings and behavior have, and how these understandings and behavior have contributed to stability.

**Q: Professor Siegel, can you respond to the question posed to Professor Epps on the practicality of adding Justices to the Supreme Court? Your written testimony emphasizes that you don't think there is a current need to add Justices, but you do leave the door open for the possibility of expanding. If Supreme Court expansion were to be pursued, do you have any advice for how Congress ought to add Justices (e.g., all at once, over a period of time, etc.)?**

Professor Siegel suggested that it would depend on the context and the reasons behind the expansion. If the Supreme Court were to be expanded for good-government, non-partisan reasons, Professor Siegel found it sensible to spread the seats out over time so that the party controlling the Senate and presidency would be unknown. On the other hand, if the expansion were to be pursued as a means of influencing future decisions of the Supreme Court, Professor Siegel noted that adding all of the additional seats at once would be a more effective means of guaranteeing the results sought by the nominating party of the additional Justices. Professor Siegel concluded by suggesting that a more important question that should be considered is: “what are the circumstances in which fundamental reform of the most important legal institution in the country is justified?”

**Q: Professor Siegel, your testimony lays out criteria for thinking about the circumstances under which Supreme Court reforms should be considered. How would you assess Professor Klarman’s argument that the U.S. is facing an existential democratic crisis? Is that an extreme enough circumstance for considering Supreme Court expansion? If not, what would an extreme circumstance look like?**

Professor Siegel restated several criteria from his written testimony for considering reforms to the Supreme Court, such as proportionality, restoring the Court’s legitimacy after it has torn the fabric of constitutional law, and addressing a genuine national crisis. Professor Siegel stated that he does not consider ordinary ideological or partisan disagreements to be sufficient justification for expanding the size of the Supreme Court, as otherwise the Court would be in a constant state of fluctuation, which would severely damage the Court and the country. Professor Siegel shared Professor Klarman’s concerns about the possibility of democratic backsliding and authoritarianism in the U.S., but diverged in his view that democracy is not currently in a state of crisis, and that if democracy were to die in the U.S., the Supreme Court would not be the primarily responsible party. The larger problem would be that citizens did not do enough to push back. In terms of sufficiently extreme circumstances that would justify Supreme Court expansion, Professor Siegel suggested that Supreme Court expansion would be justified if the Court were to aid and abet a presidential candidate in stealing a presidential election, or if there was struggle to create a reconstructed Union that was less savagely racist in the aftermath of a civil war.

**Q: Professor Barnett, your testimony argues that the spirit of the Constitution and, in our case, preserving the Supreme Court’s role, should inform the way that lawmakers legislate. Should those also guide lawmakers’ interactions with the Supreme Court in other ways, such as confirmations? You noted that it is fully within the discretion of the Senate to reject or even consider nominees, but if the**

**Senate repeatedly refused to consider nominees to the point that the number of Justices started to drop, could this partisanship become so detrimental to the Supreme Court's role that it violates the spirit of the Constitution?**

Professor Barnett noted that all discretionary power can be abused and agreed that the spirit of the Constitution could indeed be violated in such a manner. Professor Barnett pointed to the Due Process Clause as an example of a limit on discretionary power, which protects people against federal and state abuse of what are otherwise discretionary powers. With respect to those that find Congress' behavior around confirmations to be problematic, Professor Barnett suggested that reforming Senate rules to guarantee that nominees receive a Senate Judiciary Committee hearing and vote would be an improvement.

**Q: Professor Klarman, in the early 2000's there were debates ranging from favoring the filibuster of Supreme Court nominees to eliminating the filibuster altogether, but Congress was able to work things out through bipartisan compromise. Shouldn't we at least consider bipartisan opportunities for reform today, or do you think that those recent examples of bipartisan compromise are exceptions to a broader trend of unilateral escalation?**

Professor Klarman argued that the extent of partisan polarization is much greater today than it was at that time, with political scientists having indicated that partisan polarization in the U.S. is at its greatest level since the Civil War. Professor Klarman expressed hope for reduced partisan polarization in the future, but he stated that he did not believe that bipartisan agreement is currently possible in light of the Republican Party's recent authoritarian, anti-democratic agenda.

## Panel 6: Closing Reflections on the Supreme Court and Constitutional Governance

*Commissioners: Michelle Adams, Thomas B. Griffith, Cristina M. Rodriguez*

*Panel Witnesses: Rosalie Abella, Jamal Greene, Larry Kramer, Margaret Marshall, Stephen Sachs*

### ***Witness Testimony***

[Rosalie Abella](#)

No Written Testimony

Opening Remarks:

Justice Abella offered a comparative perspective on the constitutional protection of rights as a member of the Canadian Supreme Court. Justice Abella noted that under the 1982 Canadian Charter of Rights and Freedoms, the Canadian Supreme Court adopted a theory of living constitutionalism that saw the Charter's role as growing and expanding over time to meet new social, political, and historical realities. Justice Abella continued that under this approach, the Canadian Supreme Court is guided by principles the Court designated as essential to a free and democratic society, such as a commitment to social justice and equality, accommodation of a wide variety of beliefs, and respect for cultural and group identity.

Today, these tenets have led to huge popularity for the Canadian Supreme Court; however, Justice Abella acknowledged that the Court's evolution in this direction did generate controversy in the 1990's, but Justice Abella noted that these criticisms proved evanescent, as the majority of the Canadian public had confidence in their Supreme Court and understood that guaranteeing values and rights serves to strengthen, not undermine, democratic legitimacy. Justice Abella argued that today, the Canadian justice system embraces compassion and respect for human dignity, a tenacious belief in the transcendent importance of human rights, and a commitment to democratic centrality as core national values. Looking at the global ecosystem, Justice Abella cautioned that democracy and human rights are indeed at risk around the world, where too many governments have interfered with the independence of their judges and media, where the vulnerable have become more vulnerable, where hate kills, truth is homeless, and lives do not matter. Justice Abella continued that this polarized global discourse "includes an intense and distractive verbal whirlpool about judges and constitutions and democracy and rights . . . [where] loaded phrases are perpetually spun and important concepts are conveniently disregarded." Justice Abella argued that the most basic central concept that should be reinforced in the global conversation around democracy is that democracy is not, and never was, just about the wishes of the majority; the protection of rights through courts, notwithstanding the wishes of the

majority, serves an equally important democratic imperative. Justice Abella emphasized independent high courts as indispensable national institutions needed to protect these minority rights, noting that “there can be no democracy without respect for rights, no respect for rights without respect for courts, and no respect for courts without respect for their demonstrably independent, impartial, non-partisan, and fearless defense of democracy and rights.”

[Margaret Marshall](#)

[Written Testimony](#)

[Opening Remarks:](#)

Justice Marshall’s testimony focused on proposals to limit the tenure of Supreme Court Justices through constitutional amendment. Justice Marshall explained that, mirroring the U.S. Constitution, the Massachusetts state Constitution originally provided that judges would serve during good behavior, which has largely been understood to equate to life tenure. However, in 1972 Massachusetts amended its constitution and imposed a requirement that all judges retire at age 70. Justice Marshall emphasized several benefits of limited judicial terms:

- At a time of increasing life expectancy, limited terms make sure that there is “room for new generations of judges,” as Judge David Tatel said in his resignation to President Joseph Biden. Justice Marshall pointed out that the Founders couldn’t have known that judges would end up serving for as many as 50 years, and argued that limited terms are entirely consistent with the Founders’ vision for American democracy.
- Having a known departure date allows everyone engaged in the process to plan accordingly. Justice Marshall suggested that this predictability would remove the hurtful and institutionally damaging rhetoric that surfaces when the continued tenure of a particular Justice is under scrutiny.
- Limited terms would undercut the strong reactions to the appointment of relatively young judges.

Justice Marshall cautioned that the Supreme Court and, more globally, judiciaries of all forms are losing credibility as fair, impartial, and independent branches of government. Justice Marshall suggested that it may well be possible to implement term limits for Supreme Court Justices by statute or other means, but favored limiting tenure through constitutional amendment, whether that limit be by age or number of years served. Justice Marshall argued that such fundamental changes should be implemented with support from the widest spectrum of people in the U.S., which would be largely guaranteed if passed through constitutional amendment. Justice Marshall acknowledged that constitutional amendment is an arduous process, but was confident that it is possible, and favored it also as a mechanism for inviting the public to learn anew the fundamental values of constitutional democracy and the important role that independent judges play in democracies. Justice Marshall encouraged the Commission

to make observations about the necessary minimum requirements for a fair, impartial, and independent judiciary as it addresses Court reforms in its report. Justice Marshall identified her primary concern as maintaining the independence of judges in the U.S.’ constitutional democracy, with the “linchpin” being that continuation of tenure does not depend on any review process. Justice Marshall lamented that 47 state courts do have such a review process that puts them fundamentally at odds with the Framers’ intentions, and that the politicization of those state courts makes the politicization of the U.S. Supreme Court pale in comparison. Justice Marshall cautioned that this politicization is all but destroying independent and impartial state judiciaries, and she encouraged the Commission to make that clear in its report.

[Jamal Greene](#)

[Written Testimony](#)

[Opening Remarks:](#)

Professor Greene’s testimony focused on the power that individual Supreme Court Justices wield over American life, arguing that this disproportionate power stands out as being an undeniable, nonpartisan issue that is incompatible with constitutional democracy, and thus necessitates Supreme Court reform. Professor Greene elaborated that Supreme Court Justices are too few, hold office for too long, and exercise too much discretion over the cases they hear and the political identity of their replacements. Professor Greene pointed out that over the past 11 years, the shift of a single vote in the Supreme Court would have led to dramatically different outcomes over a wide range of areas. A shift of one vote would have meant the preservation of Section 5 of the Voting Rights Act, the end of the Affordable Care Act’s individual mandate, the end of race-based affirmative action, state bans on same-sex marriage, and bans on corporate election year expenditures. Professor Greene argued that regardless of one’s normative views on these rulings, such a starkly different political landscape should not consistently turn on the views of a single unelected person that can potentially stay in office for more than 40 years, play a major role in choosing the cases they hear, and effectively choose the party of the Justice replacing them. Professor Greene pointed out that no other constitutional democracy tolerates a single person exercising the degree of power, discretion, longevity, and complete lack of accountability that is enjoyed by U.S. Supreme Court Justices.

Professor Greene went on to argue four aspects of the Supreme Court’s design that combine to give Justices such exceptional power: life tenure, a small absolute number of Justices, a partisan confirmation process, and near complete discretion over the Supreme Court’s docket. Ms. Greene finds that life tenure and a small number of Justices, in particular, combine to turn the Supreme Court into a nearly monarchical body that makes it different from other democracies’ peak courts, as nearly all of the world’s democratic peak courts have either term limits or mandatory retirement ages in

place, and all other high courts in countries of at least 50 million people have more than nine judges. Professor Greene proposed increasing the size of the U.S. Supreme Court to 16 members and imposing 16-year term limits in order to diffuse the Court's power. Professor Greene elaborated on this proposal in his written testimony, but noted that his written proposal leverages Congress' ability to increase the size of the Supreme Court, combined with its ability to shift the functions and jurisdictions of Justices, to provide a framework that enables term limits and other reforms without the need for constitutional amendment.

[Larry Kramer](#)

[Written Testimony](#)

[Opening Remarks:](#)

Mr. Kramer argued that Supreme Court reform is necessary today to address the long-decaying process for nominating and confirming Justices, which has culminated recently in hypocrisy and political gamesmanship. Mr. Kramer finds the decline in the confirmation process to be an unanticipated result of two features of the modern Supreme Court:

**1 - The large growth in the Supreme Court's power since the 1950's.** Mr.

Kramer argued that the Supreme Court's expanding power is a result of widespread acceptance of judicial supremacy, a power that the Court achieved in the years after *Cooper v. Aaron* (1958). As the broader political culture accepted the Supreme Court as the ultimate interpreter of the Constitution, the Court began to more broadly extend and exercise its power. Mr. Kramer continued that Justices' newfound power has been seized as an extension of nominating president's power, resulting in a corrupted and debased appointments process that encourages presidents to appoint young judges committed to the president's politics and causing each appointment to become a moment of high political drama that contributes to the degrade of American democracy.

**2 - The interaction of the Supreme Court's increasing power with Justices' life tenure.**

Mr. Kramer suggested that historically, the Supreme Court's power has been kept in check by action from executive and legislative branches using devices explicitly conferred in the Constitution; presidents can ignore the Supreme Court's mandates, while Congress can change its composition, rules of proceeding, jurisdiction, and budget. However, Mr. Kramer argued that the Supreme Court's successful mission for judicial supremacy involved delegitimizing the above-mentioned devices as a political matter, rendering them off-limits. This shifted the balance of power between the branches to largely favor the judicial branch, with the only mechanism for control being the confirmation process. To restore balance, Mr. Kramer encouraged the Commission to re-legitimize the above devices by suggesting, for example, that concepts like Supreme Court expansion are constitutionally deployable. Mr. Kramer noted that a

simpler, more direct, and more effective solution can be found in a proposal put forth by Deans Roger Cramton and Paul Carrington, under which appointments would be made during every odd-year, and Justices would rotate to altered duties after 18 years. Mr. Kramer argued that this approach is attractive in that it is achievable by statute, would reduce the stakes around appointments, eliminate the incentive to appoint younger Justices, ensure both parties get to make regular appointments, more closely align the Supreme Court with the public, and fully protect judicial independence.

[Stephen Sachs](#)

[Written Testimony](#)

[Opening Remarks:](#)

Professor Sachs began by encouraging the Commission to do the following when considering reforms:

1 - **Preserve judicial independence.** Professor Sachs noted that the courts are relied on not only to reach individual judgments of guilt or liability, but to enforce the limited powers of each branch of government. Professor Sachs argued that reforms that shift judicial powers to another department would not make enforcement more reliable but would instead harm courts' ability to act as neutral tribunals in particular cases.

2 - **Keep politics where it belongs.** Professor Sachs suggested that a Supreme Court that is able to maneuver the law in ways that appear to amend the Constitution under the guise of interpreting it leads to partisan interest in the Court.

3 - **Beware of unforeseen consequences.** Professor Sachs cautioned that the traditions of judicial independence that have developed over time can be destroyed much more quickly than they developed, and that many of the reforms proposed by advocates, such as supermajority voting requirements, Supreme Court expansion, and changes to jurisdiction, could have drastically negative consequences. Professor Sachs encouraged the Commission to increase attention to some of the lower-profile reforms that could be more easily assessed and reversed if needed.

4 - **Be honest with each other and the public.** Professor Sachs suggested that reforms that are not seen by both political parties as enhancing the Supreme Court's legitimacy will have the opposite effect.

Professor Sachs was optimistic that the Supreme Court has shown itself to be responsive to public opinion, evidenced by a recent Gallup poll showing public opinion of the Supreme Court to be at a decade high. Professor Sachs concluded that while there are many improvements that could be made to the Supreme Court, the Court's problems are not yet matters of universal agreement, and it is not clear that there is a

crisis necessitating major reforms that could potentially themselves harm the Supreme Court.

### ***Questions from Commissioners***

**Q: Justice Abella, having recently reached Canada's mandatory retirement age for Supreme Court Justices, what are your thoughts on age limits, their impact on the work of the judiciary, and how they are perceived by the public?**

Justice Abella replied that she supports mandatory retirement ages for judges, as it is difficult for judges to determine for themselves when they are no longer indispensable. Justice Abella also favored regular replacement of judges as a healthy mechanism for renewal of ideas and institutional objectives. Justice Abella noted that most of the Justices that she served with chose to retire before reaching Canada's mandatory retirement age of 75, but she noted that there has never been a perception that these departures were based on strategic partisan motivations.

**Q: Justice Abella, from your international perspective, what is it about the U.S. Supreme Court that you value most? Are there any changes that could enhance its international role?**

Justice Abella remarked that as a law school student from 1967-1970, she saw that the court that Canada looked to as a beacon of how constitutionalism works in a vibrant way was the U.S. Supreme Court. Justice Abella pointed out that while Canada's Constitution did not originally engender the same passion for the protection of rights that the U.S. Bill of Rights did, their consideration of the Charter of Rights and Freedoms in 1982 led them to take a more expansive look at the modern rights that have been developed in democracies all over the world.

**Q: Justice Marshall, can you describe the problems with the Supreme Court that would be solved by implementing term limits?**

Justice Marshall pointed out that Justices on the Supreme Court exercise enormous power, and that moving Justices off at a certain point is an important means of revitalizing the Court. Justice Marshall agreed with prior testimony that great caution should be taken when suggesting changes to the U.S. Constitution, and that potential consequences need to be carefully considered, but was supportive of limiting tenure as a non-revolutionary change that merely aligns the Supreme Court with courts around the world. Justice Marshall also endorsed the practice of offering Justices the ability to take senior status as an effective option for moving judges off courts upon reaching a certain age. Based on personal experience, Justice Marshall was optimistic that the American people would be more open to constitutional change than legislative change.

Justice Marshall disagreed with testimony provided by Professors Dixon and Ginsburg who argued for shorter term lengths, as Justice Marshall considers a lengthy single tenure to be an essential component of independent courts.

**Q: Professor Greene, your testimony frames the Supreme Court as a sort of monarchy. Considering the fact that Congress and the president have a level of political control over the Supreme Court through the appointments process, can you say more about why you consider the Supreme Court to be monarchical?**

Professor Greene stated that his testimony is not meant to indicate that the Supreme Court is a *literal* monarchy, but rather that some of its concerning features are reminiscent of those that make monarchies dangerous. Professor Greene elaborated that giving life tenure to a small number of Justices, with the possibility of having Justices serve for more than 40 years, results in a situation where political control over the Supreme Court is highly diffused. Professor Greene acknowledged that diffused political control is to some degree an intentional feature promoting the independence of the Supreme Court, but he argued that tenure in excess of 40 years is not necessary for judicial independence and has substantial associated costs. Professor Greene identified another concerning monarchical feature of the Supreme Court to be the ability of Justices to strategically time their retirements as a means of functionally choosing replacements who are ideologically compatible.

**Q: Professor Greene, continuing from your response, a big theme in your testimony is the idea that individual Supreme Court Justices have too much power; yet, in making your argument you reference a series of partisan cases such as the Voting Rights Act and the Affordable Care Act. Can you say more about whether the problem is really that Justices have too much individual power, as opposed to an issue of partisanship and the way that Justices have decided on cases?**

Professor Greene responded that the issue is not strictly about partisanship, reiterating that the excessive power held by individual Justices is the heart of his concern. Professor Greene elaborated that the argument is best understood when considering “swing” Justices. Professor Greene argued that over the past 50 years, Justices Anthony Kennedy, Sandra Day O’Connor, and Lewis Powell have been understood to be the Justices whose votes had the largest roles in determining the Supreme Court’s more controversial outcomes (i.e., swing votes). Professor Greene concluded by arguing that the fact that the particular views of these three individual Justices dominated the Supreme Court’s decision-making over the past 50 years is profoundly undemocratic.

**Q: Professor Greene, your written testimony argues that fixed, non-renewable terms for Supreme Court Justices are consistent with the Article III's statement that judges of the Supreme Court "shall hold their offices during good behavior." Can you say more on why that might be the case?**

Professor Greene acknowledged that this is not an obvious constitutional question, and that the Framers of the Constitution were fairly straightforward in suggesting that good behavior was equivalent to life tenure; however, Professor Greene has found arguments from both sides to be compelling and was confident that non-renewable terms over a length of years could still be consistent with the intent of the Constitution's Good Behavior Clause. Professor Greene pointed out that there are instances in which Article III judges are allowed to serve for a specified term of years under recess appointments, which are considered to be consistent with Article III.

**Q: Professor Sachs, your testimony essentially argues that no major reforms should be made to the Supreme Court, and that "weakening one branch of government usually means empowering another branch; typically, reducing the power of courts to increase that of Congress." Can you address the ways in which the Constitution gives Congress significant power over the Supreme Court through Article III's Exceptions Clause and Article I's Necessary and Proper Clause, which gives Congress a large amount of authority in terms of creating rules for government functions?**

Professor Sachs agreed that the Constitution gives Congress a great deal of power over the Supreme Court's appellate jurisdiction, as well as the structure of the Court. On Supreme Court expansion proposals, Professor Sachs argued that while Congress does indeed have the constitutional authority to add any number of Justices, that doesn't mean that such changes would be consistent with U.S. traditions for constitutional government and the separation of powers. Professor Sachs cautioned that Supreme Court expansion would also weaken the Court in a substantive way that allows every Congress and president to add Justices as a means of favorably influencing its decisions. Professor Sachs concluded that his concern is not a matter of whether or not Congress lacks the tools to make changes to the Supreme Court, but rather that misuse of those tools could undermine the U.S.' constitutional structure.

**Q: Professor Sachs, your testimony cautions that Congress might not do as well as the Supreme Court in the protection of individual rights. Can you say more about why you think that might be the case? And specifically on the ability to reverse prior decisions, if Congress were to harm individual rights in some way, would it be easier for the American people to get Congress to correct those mistakes as opposed to getting the Supreme Court to reverse a decision?**

Professor Sachs explained that under the U.S. system, the people are protected from laws that threaten their life, liberty, and property by a system of checks and balances that uses three mechanisms to protect individual rights; Congress can say it will not enact a statute; the president can say a statute will not be enforced; and the courts can say a statute will not be upheld. Professor Sachs argued that the danger in giving Congress the last word on questions of individual rights is that the number of mechanisms protecting individuals is reduced to two, making it easier to violate individual rights, particularly when the congressional mechanism is beholden to the conveniences of electoral and policy goals.

**Q: Mr. Kramer, after noting that the judiciary is absent from Federalist 51, your testimony argues that the judiciary was necessary. For the most part the testimony we have heard has focused on the constitutionality and consequences of reform proposals; can you say more about why the judiciary is necessary in the first place, and more specifically what you think the contemporary role of the Supreme Court should be?**

Mr. Kramer noted that at the time of the U.S.' founding, the courts were deemed necessary as a third branch of government that separated powers, with independent courts being a crucial means of enforcing justice in individual cases. Mr. Kramer argued that the courts were not conceptualized at that time as having the broad policymaking role in constitutional adjudication that has emerged over time. From this perspective of an evolving conception of the courts, Mr. Kramer noted that one's understanding of the role of the Supreme Court depends on the time period in question, as well as the level of government being discussed (e.g., federal courts vs. state courts). In terms of the contemporary U.S. Supreme Court, Mr. Kramer argued that the Court has clearly taken on a role in constitutional politics. Mr. Kramer agreed with testimony emphasizing the importance of the Supreme Court's role as a constitutional interpreter with independent authority (i.e., judicial review), but cautioned that there are underlying problems that are damaging the Court's ability to participate in constitutional politics, namely dysfunction in the confirmation process in the decades following the failed nomination of Robert Bork. Rather than upending U.S. institutions and systems, Mr. Kramer encouraged reforms that focus on root causes, such as the confirmation process.

**Q: Mr. Kramer, you say in your testimony that the “risk of wounding the Court is far smaller than the alternative danger” as part of an argument that the Supreme Court is resilient, as well as savvy in its knowledge of when to back off and preserve its autonomy and independence. How do we know when we are in danger of wounding the Supreme Court, or undermining its role as an independent interpreter of the law?**

Mr. Kramer remarked that there is no scientific assessment for making such a determination, but he suggested that past instances of major Supreme Court controversy that resulted in adjustments can indicate instances of damage to the Court, although in these instances the Court sustained itself well and resumed roughly the same role. Mr. Kramer argued that the hypersensitivity around making *any* Supreme Court changes out of concern for ending its judicial independence is a relatively new development, as historically there have been many changes to the Court. From this, Mr. Kramer concluded that there is zero basis to believe that making changes to the Supreme Court will support some of the significant claims made by opponents.

**Q: Mr. Kramer, your written testimony posits that even if Supreme Court reforms were to lead to a partisan “tit-for-tat” escalation of changes, that it wouldn’t be endless, and that somewhere along the line the parties would begin cooperating. However, your oral testimony seems less optimistic about “tit-for-tat” in our current political climate. How should the politics around the appointments process factor into our consideration of what risks are worth taking on and what risks might threaten the Supreme Court?**

Mr. Kramer stated that his oral testimony was meant to suggest that the likelihood of getting political buy-in for action seems nearly impossible. Mr. Kramer argued that even though Congress has the constitutional authority to adjust the size of the Supreme Court, this authority is almost never exercised because parties have managed to reach political equilibrium. Mr. Kramer noted that public appreciation for the value of an independent judiciary also makes it difficult for Congress to make changes to the Supreme Court’s composition. Mr. Kramer argued that in those instances that the size of the Court was adjusted, it was possible because the same party firmly controlled Congress and the presidency and there was strong national consensus around an agenda that the Supreme Court was working to undermine. Mr. Kramer declined to recommend adjusting the size of the Supreme Court, as he argued that not only would such a change be politically unfeasible, but also unnecessary, as there are simpler solutions that would resolve the problems raised by advocates. Mr. Kramer found value in raising the possibility of expansion and other changes as a means of steering the Supreme Court onto a corrective path. Mr. Kramer concluded by encouraging the Commission to re-legitimize Supreme Court reform in its report, because even though some reforms may be unnecessary, they are clearly constitutional and should be acknowledged as legitimate devices.

**Q: Justice Abella, legitimacy has been raised frequently in testimony, whether it be out of concern that changes to the Supreme Court would threaten its legitimacy or that the Court’s legitimacy is already under threat and changes are needed to protect it. In the Canadian context, how would you characterize**

**legitimacy? In your experience as a Justice, do questions around legitimacy as a court within a democratic system weigh on judges when making decisions?**

Justice Abella responded that judges think about legitimacy all the time, but she noted that the posed question is different from asking to what extent judges take *public opinion* into account. Justice Abella argued that while judges may be aware of public opinion from news sources, public opinion is not evidence, and thus judges do not cross-examine on that basis. Justice Abella noted that independent judges are tasked with making decisions, notwithstanding public or majority opinion, especially when considering the constitutional protection of rights and particularly minority rights. Justice Abella has found that it is not just what judges do that affects their legitimacy, although that is most important; it is also public perception of who judges are and what they are supposed to do. Justice Abella suggested that in a culture that has consensus on the role of the Supreme Court, it's easier for the public to accept decisions they may not agree with. Justice Abella argued that one of the reasons the Canadian Supreme Court is seen as legitimate is because they have a non-partisan appointment process, open-minded Justices do not decide cases in predictably partisan ways, and they are not treated as partisans by the Canadian media. Justice Abella concluded by remarking that Canadian Justices do not strive to avoid controversy, but instead strive for legitimacy of analysis and opinion, which has resulted in public confidence in their judicial institution.

**Q: Mr. Kramer, some critics of the Commission argue that progressives would not be calling for Supreme Court reform if Hillary Clinton had won the presidency in 2016 and appointed three Justices in place of President Donald Trump. What do you make of that criticism?**

Mr. Kramer agreed that progressives likely would not be calling for reform if those appointments were made by a Democrat, but he pointed out that Republicans would instead likely be calling for Supreme Court reforms if that were the case. Mr. Kramer noted that politicians obviously act in their own political interests and recommended that the key question should instead be: given the fact that these reforms come from partisan interests, do proponents have a legitimate claim for addressing a legitimate problem? From Mr. Kramer's perspective, the appointment process has been in a state of decline since the early 1970's, and a solution that addresses the Supreme Court's systemic problems without promoting the interests of one party at the expense of the other is needed. For this reason Mr. Kramer does not support proposals to expand the Supreme Court in a way that shifts its ideological makeup, as they are clearly designed to promote partisan interests; instead, Mr. Kramer encouraged the Commission to consider proposals such as his own or Professor Greene's that would address systemic problems in a way that benefits each party equally.

**Q: Mr. Kramer, Justice Stephen Breyer has emphatically argued that judges are not partisan actors, yet it seems that most of the reform proposals are premised around the idea that judges are partisan. What do you make of Justice Stephen Breyer's insistence that they are not?**

Mr. Kramer agreed that many judges do not appear to serve as partisan actors, but he argued that it does not ultimately matter; judges, like all people, are to some degree ideologically-driven. Mr. Kramer identified the problem as a matter of ideologically-driven individuals deciding Supreme Court cases for periods as long as 35 years; because the Supreme Court's decisions are unavoidably political, it is important to have regular turnover to align Justices with the general consensus of the times.

**Q: Justice Marshall, you have advocated for a constitutional amendment that would limit the terms of Supreme Court Justices. Many of the proposals that have been made suggest statutory, rather than constitutional, term limits. Can you give us more information on imposing term limits through constitutional amendment vs. statute?**

Justice Marshall clarified that she does not disagree with proposals that suggest that term limits can be imposed through statute and acknowledged that it is one potential solution for consideration. Justice Marshall encouraged the Commission to advocate for civic education, as the public should have a better understanding of what is at risk and how the government works. Justice Marshall spoke favorably of tightening the Supreme Court's judicial ethics, as it is important for judicial legitimacy and the rule of law for the public to have confidence that decisions handed down by courts are not subject to outside influences. Justice Marshall noted that were a Massachusetts state supreme court judge to participate in political events or fundraisers, they would be hauled before the Commission on Judicial Conduct for disciplinary procedures. Justice Marshall concluded by endorsing a limit on the tenure of Supreme Court Justices, arguing that increased life expectancy has distorted the conceptualization that the Framers had for life tenure.

**Q: Professor Sachs and Professor Greene, how resilient do you think the Supreme Court is, such that we can contemplate semi-radical reforms that check or restructure its power?**

Professor Sachs suggested that the dangers that come with making larger reforms could be reduced by engendering broader support. While he did not favor proposals for an 18-term limit on Supreme Court Justices, Professor Sachs remarked that such a change would be less concerning if passed through constitutional amendment, which would require broad support. Professor Sachs reiterated concern over statutory changes to the Supreme Court, arguing that some of the proposed statutes would be

unconstitutional, and that those that are constitutional could still be damaging to the Supreme Court and democratic norms. Professor Sachs cautioned that there is a real danger, if Congress starts making significant changes to the only institution capable of resisting it, of people no longer following Supreme Court orders and the rule of law. Professor Sachs identified proposed supermajority voting rules as an example of a dangerous reform proposal: Having a majority of Justices rule in a manner that is not enforced because the decision lacked supermajority support would call the decision into question.

Professor Greene agreed with Professor Sachs that bipartisan support is important for sustaining Supreme Court reforms, as well as settling constitutional questions through non-partisan reflection; however, while Professor Greene also agreed that reforms passed through constitutional amendment are better, Professor Greene was optimistic that bipartisan support could result in effective reforms implemented through statute as well. Professor Greene concluded by encouraging the Commission to look at international comparative examples when trying to understand the impact of reforms, where ideas such as term limits and different appointment processes have been implemented in ways that respect judicial independence.

## **Adjourn**

Commissioner Bauer adjourned the meeting, with thanks to Commissioners, witnesses, experts that responded to information requests, and members of the public that submitted comments. Witnesses were invited to submit further statements in writing if they so wished, and Commissioners may follow up with additional questions at a later date. Members of the public were advised that while the Commission accepts public comment until November 15th, 2021, comment would be most useful if submitted prior to the October 15th deliberative meeting. Public comments and other information are posted to the Commission's website (<https://www.whitehouse.gov/pcscotus/>). The next public meeting is scheduled for October 15th, 2021, and will feature Commission deliberations.

## **Tentative Timeline:**

October 15th, 2021 - Public Meeting 4

November 10th, 2021 - Public Meeting 5

November 15th, 2021 - Release of Final Report

## **Certification of Co-chairs:**

I hereby certify that, to the best of my knowledge, the foregoing minutes of the proceedings are accurate and complete.

Bob Bauer and Cristina M. Rodríguez

October 18, 2021

## **Appendix A: Commissioners in Attendance**

Attendance of Commission members was taken at various points throughout the public meeting. Quorum (simple majority) was maintained throughout the day and all but four members of the Commission were present for two or more panels.

Michelle Adams  
Kate Andrias (Rapporteur)  
Jack M. Balkin  
William Baude  
Bob Bauer (Co-Chair)  
Elise Boddie  
Guy-Uriel E. Charles  
Andrew Manuel Crespo  
Walter Dellinger  
Justin Driver  
Richard H. Fallon, Jr.  
Caroline Fredrickson  
Heather Gerken  
Nancy Gertner  
Thomas B. Griffith  
Tara Leigh Grove  
Bert I. Huang  
Olatunde Johnson  
Michael S. Kang  
Alison L. LaCroix  
Margaret H. Lemos  
Trevor W. Morrison  
Caleb Nelson  
Richard H. Pildes  
Michael D. Ramsey  
Cristina M. Rodriguez (Co-Chair)  
Kermit Roosevelt  
David A. Strauss  
Laurence H. Tribe  
Michael Waldman  
Adam White  
Keith E. Whittington

### **Commissioners Absent:**

Jack Goldsmith  
Sherrilyn Ifill  
David F. Levi  
Bertrall Ross