The Commission met via Videoconference, at 10:00 a.m. EDT, Robert Bauer and Cristina Rodriguez, Co-Chairs, presiding.

PRESENT
ROBERT BAUER, New York University School of Law, Chair
CRISTINA RODRIGUEZ, Yale Law School, Chair
MICHELLE ADAMS, Cardozo School of Law
KATE ANDRIAS, University of Michigan
(Rapporteur)
JACK M. BALKIN, Yale Law School
WILLIAM BAUDE, University of Chicago Law School
ELISE BODDIE, Rutgers University
GUY-URIEL E. CHARLES, Duke Law School
ANDREW MANUEL CRESPO, Harvard University
WALTER DELLINGER, Duke University
JUSTIN DRIVER, Yale Law School
RICHARD H. FALLON, JR., Harvard Law School
CAROLINE FREDRICKSON, Georgetown Law
HEATHER GERKEN, Yale Law School
NANCY GERTNER, Harvard Law School
THOMAS B. GRIFFITH, Hunton Andrews Kurth
TARA LEIGH GROVE, University of Alabama School of Law
BERT I. HUANG, Columbia University
SHERILYNN IFILL, NAACP Legal Defense and Educational Fund, Inc.
OLATUNDE JOHNSON, Columbia Law School
MICHAEL S. KANG, Northwestern Pritzker School of Law
ALISON L. LaCROIX, University of Chicago Law School
MARGARET H. LEMOS, Duke Law School
DAVID F. LEVI, Duke Law School
TREVOR W. MORRISON, NYU School of Law
CALEB NELSON, University of Virginia School of Law
RICHARD H. PILDES, New York University School of Law
MICHAEL D. RAMSEY, University of San Diego School of Law
KERMIT ROOSEVELT, University of Pennsylvania Carey Law School
BERTRALL ROSS, University of California, Berkeley School of Law

DAVID A. STRAUSS, University of Chicago
LAURENCE H. TRIBE, Harvard University
MICHAEL WALDMAN, NYU School of Law
ADAM WHITE, George Mason University's Antonin Scalia Law School
KEITH E. WHITTINGTON, Princeton University
DANA FOWLER, Designated Federal Official
C-O-N-T-E-N-T-S

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>4</td>
</tr>
<tr>
<td>Roll Call</td>
<td>5</td>
</tr>
<tr>
<td>Opening Remarks</td>
<td></td>
</tr>
<tr>
<td>Co-Chair Rodriguez</td>
<td>9</td>
</tr>
<tr>
<td>Co-Chair Bauer</td>
<td>12</td>
</tr>
<tr>
<td>Session Overview</td>
<td>15</td>
</tr>
<tr>
<td>Discussion of Materials</td>
<td>18</td>
</tr>
<tr>
<td>Membership and Size of the Court</td>
<td>57</td>
</tr>
<tr>
<td>Length of Service and Turnover of Justices on the Court</td>
<td>153</td>
</tr>
<tr>
<td>The Court's Role in the Constitutional System</td>
<td>216</td>
</tr>
<tr>
<td>Case Selection and Review: Docket, Rules, and Practices</td>
<td>254</td>
</tr>
<tr>
<td>Closing Remarks</td>
<td>313</td>
</tr>
</tbody>
</table>
Good morning. Welcome to the fourth meeting of the Presidential Commission on the Supreme Court of the United States. My name is Dana Fowler and I am the Designated Federal Officer for this Advisory Committee.

We would like to thank all of our public attendees and stakeholders for joining us today, including those who have provided public comment. Discussion materials that will be the focus of today's meeting are available on our website at whitehouse.gov/pcscotus.

Before we begin, a few reminders. This meeting is being recorded via video conference and is also being streamed live on our website at whitehouse.gov/pcscotus. This Commission is considered a Federal Advisory Committee and is governed by the requirements under the Federal Advisory Committee Act or FACA. My role as the Designated Federal Officer is to manage the day-to-day
administrative operations of the Committee,
attend all Committee meetings and ensure the
Committee operates in compliance with FACA. All
of our commissioners have received training
regarding FACA requirements and their ethics
obligations as Special Government Employees. In
addition, each Commissioner has completed a
financial disclosure report that has been
reviewed by ethics attorneys to identify any
potential conflicts of interest.

Now, in order to begin, I'll take roll
call. Commissioners, if you would please turn on
your cameras. I will call each of you in
alphabetical order. Please unmute when you hear
your name and let us know you're present by
stating here. Michelle Adams.

COMMISSIONER ADAMS: Here.

MS. FOWLER: Kate Andrias.

COMMISSIONER ANDRIAS: Here.

MS. FOWLER: Jack Balkin.

COMMISSIONER BALKIN: Here.

MS. FOWLER: Bob Bauer.
CO-CHAIR BAUER: Here.

MS. FOWLER: Thank you. William Baude.

COMMISSIONER BAUDE: Here.

MS. FOWLER: Elise Boddie.

COMMISSIONER BODDIE: Here.

MS. FOWLER: Guy-Uriel Charles.

COMMISSIONER CHARLES: Here.

MS. FOWLER: Andrew Manuel Crespo.

COMMISSIONER CRESPO: Here.

MS. FOWLER: Walter Dellinger.

COMMISSIONER DELLINGER: I'm here.

MS. FOWLER: Justin Driver.

COMMISSIONER DRIVER: Here.

MS. FOWLER: Richard Fallon.

COMMISSIONER FALLON: Here.

MS. FOWLER: Caroline Frederickson.

COMMISSIONER FREDERICKSON: Here.

MS. FOWLER: Heather Gerken.

COMMISSIONER GERTNER: Here.

MS. FOWLER: Nancy Gertner.

COMMISSIONER GERTNER: Here.
MS. FOWLER: Thomas Griffith.

COMMISSIONER GRIFFITH: Here.

MS. FOWLER: Tara Lee Grove.

COMMISSIONER GROVE: Here.

MS. FOWLER: Bert Huang.

COMMISSIONER HUANG: Here.

MS. FOWLER: Sherrilyn Ifill.

Sherrilyn unfortunately had an unavoidable conflict this morning. She'll be joining us a little later on. Olatunde Johnson.

COMMISSIONER JOHNSON: Here.

MS. FOWLER: Michael Kang.

COMMISSIONER KANG: Here.

MS. FOWLER: Alison LaCroix.

COMMISSIONER LaCROIX: Here.

MS. FOWLER: Margaret Lemos.

COMMISSIONER LEMOS: Here.

MS. FOWLER: David Levi.

COMMISSIONER LEVI: Here.

MS. FOWLER: Trevor Morrison.

COMMISSIONER MORRISON: Here.

MS. FOWLER: Richard Pildes.
COMMISSIONER PILDES:  Here.

MS. FOWLER:  Michael Ramsey.

COMMISSIONER RAMSEY:  Here.

MS. FOWLER:  Cristina Rodriguez.

CO-CHAIR RODRIGUEZ:  Here.

MS. FOWLER:  Kermit Roosevelt.

COMMISSIONER ROOSEVELT:  Here.

MS. FOWLER:  Bertrall Ross.

COMMISSIONER ROSS:  Here.

MS. FOWLER:  David Strauss.

COMMISSIONER STRAUSS:  Here.

MS. FOWLER:  Laurence Tribe.

COMMISSIONER TRIBE:  Here.

MS. FOWLER:  Michael Waldman.

COMMISSIONER WALDMAN:  Here.

MS. FOWLER:  Adam White.

COMMISSIONER WHITE:  Here.

MS. FOWLER:  Keith Whittington.

COMMISSIONER WHITTINGTON:  Here.

MS. FOWLER:  Thank you, Commissioners.

You may now turn off your cameras.  I now have

the pleasure of introducing our Co-Chairs,
Commissioner Bauer and Commissioner Rodriguez for opening remarks.

CO-CHAIR RODRIGUEZ: Good morning everybody. Welcome to all the commissioners. My Co-Chair, Bob Bauer, and I are very happy to see you today. Welcome to all who are watching.

We are gathered here today for our first set of deliberations as a Commission. As my Co-Chair, Bob Bauer, will explain shortly, the rich and wide ranging materials we have before us are not the work of the Commission as a whole, but were prepared to provide a foundation for this deliberation today. We will be discussing the issues and questions raised within them throughout the day in order to learn from, and to inform, each other.

Before we begin those deliberations, I first want to thank Dana Fowler and Patrick McConnell and their team at the General Services Administration. They again were outstanding in facilitating our work in our meetings and we are deeply grateful for their partnership.
I also want to say something about charge and our process. So this Commission was formed on April 9, 2021, by President Biden through an executive order and that order tasks us with providing him an account of the contemporary public debate over the role of the Supreme Court and our Constitutional system. We are charged with providing an analysis and an appraisal over the principle arguments for and against reforming the Court. We are considering the legality, efficacy and potential consequences for our system of government of the reading before proposals that are under a public discussion.

We have been asked to draw from a broad range of views and to assess a broad spectrum of ideas. We are not charged with making specific recommendations, but rather with providing an appraisal of the arguments and proposals that are animating today's debate.

Over the summer, we held two days of hearings and during those hearings we heard from
44 witnesses. Their testimony and that of an additional 23 experts is posted on the Commission website that Ms. Fowler mentioned earlier and I highly recommend reading them.

We have also received approximately 6,500 comments from the public, from members of Congress and public officials, from advocacy organizations, subject matter experts and members of the general public. The comments support a variety of reform proposals as well as retaining the status quo. We continue to welcome comments from the public and we will be receiving them throughout the life of the Commission. The Commission will continue to accept public comment until November 14. However, it is most helpful to the Commission if submitted before November 1 or so.

Public comments may be submitted to the Commission via regulations.gov and all of the comments received to date are available for the public to view on regulations.gov and to find them, you can Google PSCOTUS or you can put that
title into regulations.gov or go to the
Commission's website where you will find a link
to the public comment page.

So, at this point, I will hand it over
to my Co-Chair, Bob Bauer, to frame the meeting
for today and to tell everyone what we're going
to do.

CO-CHAIR BAUER: Thank you very much,
Co-Chair Rodriguez. I thought I'd make a few
preliminary remarks here about the nature and
purpose of this deliberative meeting. There will
be five sessions today to discuss five sets of
draft materials prepared by working groups within
the Commission. The Commission was divided into
five separate groups to research and prepare
materials directing different aspects of the
reform debate, for the whole Commission's
consideration as collectively prepare the report
for the President.

Today, for the first time, the
Commission as a whole is meeting to exchange
views and discuss these prominent reform issues
and proposals as framed and discussed in these materials. The Commission has not edited the material and the material should not be understood to represent the Commission's views or those of any particular commissioner.

To this point and particularly in light of some confusion and uncertainty since the posting of these materials, we refer you to the front page of each of the drafts that have been publically posted that clearly set forth these points. They emphasize that these are not the Commission's drafts, nor a draft report of the Commission. They're materials for deliberation. Those materials attempt to set forth the broad range of arguments that have been made in the course of public debate about court reform. They were designed to be inclusive in their discussion of these arguments to assist the Commission in robust, wide ranging deliberations.

The deliberations of the full Commission on these materials, toward the development of a report to the President, begins
today. One further statement about the
difficulty and sensitivity of the task ahead of
the Commission. As we open these deliberations,
we note that we will of course be discussing
issues of great importance to the country and to
our system of government at a challenging time
for the conduct of public discourse.

The views that we have heard expressed
on the subject of the Supreme Court and witness
testimony and public comments are wide ranging,
sometimes in conflict and deeply held.
Commissioners themselves hold various and
sometimes on some issues very different views.
As a Commission, we are committed to deliberating
over these matters with respect for disagreement
and for complexity. We hope that these
deliberations will help us produce a report for
the President that fairly represents the full
scope of the reform debate and advances public
discussion. Thank you, with those preliminary
marks done, I'd like to turn it back to
Commissioner Rodriguez.
CO-CHAIR RODRIGUEZ: Thank you, Commissioner Bauer. I want to underscore what you said about the difficulty and complexity of the issues that we're debating, but also express high confidence based on the work we have already done together within our groups and in this group's ability to have very rigorous and interesting and respectful discussion of these critical matters that are of interest to the country and also to the President, who charged us to have this discussion.

What I want to do before we begin our first session is just explain a little bit about the mechanics of the day. We will take up each of the sets of draft materials one by one and then invite commissioners to speak to the issues explored in each of them. We will take 10-minute breaks in between the sessions and an hour break for lunch between 1 o'clock and 2 o'clock.

The subjects for discussion include first the materials that set the stage and provide an account of the origins of today's
debates over the Court and outline the criteria for evaluating reform proposals and situate those proposals and today's debates in American history.

The second session will be devoted to a discussion to a discussion of court expansion and other proposals for structural reforms to the Court.

The third session will be devoted to whether and how to apply term limits to the Justices' tenures in office.

The fourth session will involve proposals that would in some way reduce the power of the Court in relation to the role of the other branches, including proposals to impose different limits on the Court's jurisdiction, to change its voting rules or give Congress the power to override Supreme Court invalidations of laws.

Finally, we'll take up a set of materials that raises issues and questions involving the Court's internal operations including its emergency orders docket, its
management of recusal, conflicts of interest and
other ethical standards and questions of
transparency.

With that, we will begin our first
session. In this session, as I've already noted,
we will discuss the materials that lay out the
genesis of the debate over the Supreme Court and
its reform and articulate the Commission's
mission. As Co-Chair Bauer emphasized, these
materials were prepared by a working group within
the Commission and do not reflect the work or
views of the Commission as a whole or of any
particular commissioners. They were designed to
be inclusive in our discussion of the arguments
or the accounts of why we're debating this
question today and to promote wide-ranging
deliberations.

I will first invite a commissioner to
provide us with a summary of the materials after
which the commissioners, who have indicated their
interest in addressing the topics in the
materials, will be invited to begin the
With that, I will call on Commissioner David Strauss, who will summarize what is in these materials and what will be up for debate in this first session. Commissioner Strauss, please turn on your camera.

COMMISSIONER STRAUSS: Thank you, Co-Chair Rodriguez and Co-Chair Bauer. As Commissioner Rodriguez said, I've been asked to summarize the first chapter of these discussion materials. Just let me reiterate what Commissioner Rodriguez said, that these are discussion materials designed to facilitate deliberation among the commissioners and should not be taken to reflect the views of the Commission or any one of us.

This first chapter is designed to provide background to the work of the Commission. It has three parts. The first part gives an account of the events that lead to the Commission's being established. This part discusses, of course, the controversy surrounding
recent nominations to the Supreme Court and the Senate's treatment of those nominations. It describes the extent to which Supreme Court nominations have increasing become subject to partisan disagreement and then the further disagreement about which side is responsible for that.

The second part of this chapter outlines the categories of reform proposals that have been brought to the Commission's attention and the criteria by which reform proposals might be evaluated. This part of the chapter identifies the four categories of reform proposals that Co-Chair Rodriguez just described. First, the proposal is concerned with size and composition of the Court, including the number of Justices.

Second, reform proposals about the Justices' tenure, for example, whether instead of having what amounts to life tenure, they should serve only for a specified number of years.

Third, proposals concerning the power
of the Court in our system including proposals that the Court's power to declare laws unconstitutional be limited or qualified in various ways.

Fourth, proposals about the Court's internal operations which encompass judicial ethics, live transmission of oral arguments and a subject of much recent discussion, the Court's procedures in deciding cases without full briefing or argument.

This part of the chapter then outlines the various criteria that might be used to evaluate these reform proposals and it identifies four such criteria—legitimacy judicial independence, democracy as it pertains to the work of the Court and concerns about efficacy and transparency. The chapter notes that these motions are difficult to define and raise complex questions. Several of them have given rise to an extensive and illuminating academic literature that the report does not claim to summarize or come to grips with.
Just, for example, legitimacy might refer to the Court's ability to have people follow its decisions, even people who disagree with the decisions or it might mean something more evaluative, such as whether there are circumstances in which people should not accept that the Court has the final word on what the law is. And questions about the Court's relationship to democracy raised in those fundamental issues about the role the Court should play in enforcing our Constitution in ways that secure individual rights, protect minorities or ensure that our democracy works as it should, sometimes in opposition to role of elected representatives.

The final section of this first chapter gives a more comprehensive account of the history of controversies about the Court and of reform proposals. Debates about the Court have been a feature of our constitutional history from the beginning. They became particularly prominent in times of political conflict. Right at the founding in the early 1800s after the
transfer of power from the Federalist Party to
the Jeffersonians. During the Jackson
Administration, in the run up to the Civil War,
of course, and in the aftermath of the Civil War
in the Progressive era, in the New Deal era and
closer to our own time.

In each of these episodes, there were
proposals to change the Court's structure or its
powers. Sometimes those proposals were
successful, sometimes they were not. There was
intense controversy in each of these periods over
the relationship of the Court to the political
system and to partisan politics. Some people at
the various times in our history felt strongly
that the reform proposals presented an
existential challenge to the Court. Others
contended, on the contrary, that without reform,
the Court would undermine the American democratic
project.

President Biden's charge to this
Commission is to provide an analysis of the
issues in today's debate about these subjects.
CO-CHAIR RODRIGUEZ: Thank you very much, Commissioner Strauss, for that excellent account of some really interesting foundational materials.

At this point, I'll invite all Commissioners to turn on their cameras and we'll begin our deliberations. It's great to see you all, and we will first hear from Commissioner Richard Fallon.

COMMISSIONER FALLON: Thank you very much, Co-Chair Rodriguez. I'm grateful to you and to the other Co-Chair, Bob Bauer, and to the entire Commission for the opportunity that you have afforded and the wonderful leadership that you have provided.

I wanted to say just a few things about the criteria for evaluation, that David Strauss just very ably laid out, with a central focus on the criteria for evaluating proposals of legitimacy, judicial independence and democracy. Because it seems to me that thinking about how these concepts figure both into debates and into
the thinking and evaluation that the Commission
is going to do, are crucial both to our thinking
clearly about these matters and to presenting a
clear report to the public. Along that line, it
is my sense that there is a kind of ambiguity
about the role that these organizing values of
legitimacy, judicial independence and democracy
play in our thinking and in the report.

In one sense, it seems to me that the
draft of chapter one very successfully and ably
establishes that many of the people who are
promoting and resisting various particular
reforms have cast their arguments as ones that
are supported or validated by arguments from
legitimacy judicial independence or democracy.

When the report does that, when the
draft does that, I think as David Strauss just
pointed out, the draft is wonderfully effective
in noting that different people use these terms
in different ways. So that, for example, some
people want to measure legitimacy in terms of
what they take to be the justifiability of
results by reference to deep constitutional
values, whereas other people want to use term
legitimacy as a gauge of the faith that people
have in the Supreme Court and how good a job the
Supreme Court is doing at any particular time.
These are just fundamentally different gauges.

Then, as we go forward, from Chapter
One to the rest of the report, talking about the
way the different proponents cast their
arguments, I think we ought to try to be as clear
as we possibly can about which arguments are
using the term legitimacy in one way or another.

More than that, I think one of the
particular analytic contributions that we can
make is to point out that in so far as people are
using the term legitimacy to refer to popular
confidence in the Supreme Court as reflected, for
example, in public opinion polls. We may be in a
polarized situation in which there is no possible
reform that would improve everybody's faith in
the Supreme Court.

There may be reforms that would
improve the faith of some people but diminish the
faith of others and so forth. I think it
suffices we're talking about legitimacy as
something involving public faith in the Supreme
Court. We should be clear about that, not only
in the first chapter but in subsequent chapters
when we are talking about legitimacy.

But now I want to switch to the issue
of our evaluative criteria. I started talking
about the vocabulary that we're going to use
largely tracking public discourse to summarize
and describe people's proposals. Do we mean
these analytical criteria of legitimacy, judicial
independence and democracy to be embraced in the
first chapter as the evaluative criteria that we
are going to use? One of the difficulties of
embracing it as the evaluative criteria that we
are going to use, is it might seem to involve us,
from the very outset, in needing to make a choice
that is partly substantive, but partly verbal
about the best, most appropriate way to use the
terms legitimacy, judicial independence and
So as we're thinking about these problems, as we tell the public what to expect in terms of the thinking we're going to be presenting when they start reading with chapter one, do we mean to be buying into these as the most useful analytical rubrics. My sense in response to that question would be in many cases no and if so, then starting the chapter when we have to try to explain how we're going to try to transcend them in one way or the other.

Now I've mostly said everything that I wanted to say using legitimacy as my example, but I just want to say a couple of things very quickly about judicial independence and democracy to illustrate how the problems recurs in those cases as well.

With respect to judicial independence, I think everybody agrees judicial independence minimally means that no judge or justice should ever be punished for a particular position that he or she took in a particular case on the
merits, but there are huge debates, partly
substantive and partly terminological about
whether, for example, an expansion of the size of
the Supreme Court or a reduction in the scope of
its jurisdiction would reflect an intrusion on
judicial independence.

I think as early as the first chapter,
we might want to note that debate and suggest,
this would be my view, that the right way to
think about it is not in terms of the best verbal
understanding of what judicial independence is,
but some substantive balance of values that we
might either be able to agree about or not be
able to agree about. Then with respect to
democracy, some people use that term such that
the more public influence on the way the Supreme
Court decides cases at any particular time, the
better from the perspective of democracy. Other
people would say that ultimate democratic act
underlying our Constitution was its drafting and
ratification and that when Justices of the
Supreme Court deviate from originally intended or
originally understood meanings, they are undermining democracy.

Once again, I think we need to recognize different people use the terms in different ways and think hard about how if we are going to try to mediate these disputes in any way what vocabulary we want to use and whether it is to echo this vocabulary of legitimacy, judicial independence and democracy or to try to find some way to transcend it. I think it is crucial to lay out that vocabulary, but I think it may be equally crucial to discuss ways in which we move to somehow try to transcend it. Thank you.

CO-CHAIR RODRIGUEZ: Thank you so much, Commissioner Fallon. We will next hear from Commissioner Maggie Lemos.

COMMISSIONER LEMOS: Thanks, Co-Chair Rodriguez. I'd also like to thank the commissioners who prepared these discussion materials. They're really excellent and clearly the result of a great deal of hard and careful work.
I think this introductory chapter is poised to add a lot of value to the report as a whole, both by situating the current reform proposals and recent events as well as broader historical context, but also and importantly laying out this conceptual framework for our own evaluation of the proposals.

Building on Commissioner Fallon's comments, I wanted to add a few additional words about the conceptual framework because I think now that we have these preliminary materials that sort of sketch out an analysis of all four categories of reform proposals, we're in a much better position than we have been up until now to refine and maybe expand on this discussion. Then, as Commissioner Fallon suggests, to make use of it in later chapters as well.

Let me start by saying just a quick word about one of the criteria we discussed, but not as much as the first three and that's the last one on efficacy. The draft currently focuses on questions of the Court's efficacy by
focusing on the topics that are covered in the
draft of chapter five right now. But as I read
the discussion materials, I see recurring
attention in several of the chapters to the
question of how different kinds of reform
proposals might affect the efficacy of the Court,
for good or for ill, including, for example, the
Court's ability to oversee and provide guidance
for lower federal courts and state courts and its
ability to provide and promote uniformity in
federal law. We might think about expanding the
frame somewhat on the discussion of efficacy in
the introduction.

    Mostly I wanted to say a little bit
more about judicial independence so as to draw in
some of the more familiar themes in the
commentary without, of course, trying to
summarize a vast literature and also I think to
better track or, I guess, preview what we will
likely say about independence later in the
report.

    As it is, the discussion of
independence in chapter one focuses primarily on
the demands independence might place on judges
themselves. For example, an imperative that
djudges not be or not be perceived to be playing
for one political team. So on that view, I take
it judges themselves might pose threats to
judicial independence or might compromise
independence, as it is put on page nine of the
draft, advancing a partisan agenda.

All of that strikes me as important,
but I tend to think about independence more as a
protection against external threats or
inducements to judges. In other words, I think
it would be possible to say that a judge is quite
biased, but also quite independent and actually
the more independent she is, the more freedom she
might have to decide cases and corrupt or
partisan way. In part because of that, I think a
lot of the commentary on judicial independence is
wrestling with how to strike a balance between
independence on the one hand, which at the
extreme might include a freedom to act in ways
unbecoming a judge, and some of accountability or
constraint or check on the other.

We heard testimony that adopted that
framing that referred to this balance between
independence and accountability and argued that
one of the causes of the current agitation about
the Court is that the political branches in
recent decades have been too reluctant to use the
tools at hand to provide some kind of check on
the Court. Then, of course, the concern on the
other side is that tools like court expansion or
jurisdiction stripping pose too much of a threat
to judicial independence by giving the political
branches too much power vis-a-vis the Court.

So those are the kinds of concerns I
see us discussing currently in later chapters of
the draft and I think it would help to preview
them more in this introductory chapter as well as
to note the concerns on the other side of the
ledger about the dangers of a completely
unchecked judiciary. If we did that, I think we
could make good use of the distinction some
Commentators have drawn between decisional independence, that is the ability of the individual judge to decide cases without fear or favor and institutional independence that has more to do with the place of the judiciary as a whole in our constitutional system.

I think decisional independence is probably what most people think of when or if, I suppose, they think about judicial independence. But I suspect most of what we will end up discussing in this report actually will have more to do with the independence or autonomy or lack thereof of judicial institutions and it might be helpful for us to be more clear about that at the outset.

Co-Chair Rodriguez: Thank you very much, Commissioner Lemos. We will now hear from Commissioner Michael Ramsey.

Commissioner Ramsey: Well thank you very much and I want to start off by echoing the appreciation for the draft that we have in front of us. I think it is an outstanding chapter here
in the draft form and in particular I think it does an admirably balanced job of describing both the current debates over the Court and setting the scene for that and also for describing the historical events that have sort of lead us to this position. I think it's really well done.

I have two comments on the third part, which is the historical part, which I think it's a very challenging part because it tries to cover a lot of history in a short space of time necessarily and I think, on the whole, it does an excellent job. But I worry that in doing so, we may be oversimplifying in some respects and we may be inadvertently perhaps taking positions on matters of historical controversy that perhaps are not necessary for us to take in order to set the stage. My suggestion is that we think carefully about this historical account generally. Perhaps it should be just a very thin descriptive account and I would be nervous about some of the more detailed analysis, which I think is perhaps not necessary.
Let me give one example, it's not the only example I have though, though it was maybe the one that jumped out at me because in my area of specialty, and that's the discussion of Hamilton's Federalist 78, which is on pages 13-14 of the draft. The draft has a quote from the famous Federalist 78 and then there's an extensive discussion afterwards in which it attempts to explain what Hamilton intended in Federalist 78. I'm not sure I agree with all of that discussion, but more importantly, I'm not sure that Hamilton scholars would all agree with that discussion. I also don't think it's really necessary for our project. I think all we really need to do, and this is my idea of a sort of a thin account, is just to say that Hamilton made these comments about the role of the judiciary in the founding era and that's sort of a useful starting point.

I also think in that regard that it would be helpful to then pair those statements by Hamilton with a sort of counterpoint perhaps from
the anti-Federalist Brutus essays, in which
Brutus expresses a much more statute-able view of
the role and the capacity of the federal courts
than Hamilton does and then just sort of leave it
at that, without trying to draw any deep
conclusions because I don't know that they are
necessary for our purposes and may just get us
into controversy that we don't need or want to be
involved in.

So that's just an illustration from
the discussion of Federalist 78, but I would go
through the draft generally with an eye towards
are there ways that we can simplify the analysis
so we don't get ourselves into controversies that
we don't need to be in.

Then just real quickly, my second
comment is about the end of the chapter, which I
thought sort of ended sort of oddly and abruptly
after the FDR court packing episode and then with
a very brief reference to Brown v. Board. I
think there's a lot more to be said about that
time, in particular, for example, I think that
the Court Justices appointed by Roosevelt adopted
a much more deferential approach to particularly
acts of Congress, for better or for worse, you
know, for better in some cases, for worse perhaps
in cases of Korematsu.

Then there was a revival of the
Court's power, the Court's intervention against
the political branches lead by Brown v. Board.
In particular, I think some discussion of Cooper
v. Aaron would be a good idea here and then
leading in to the Warren Court, the controversies
that it inspired up to then under the Burger
Court in Roe v. Wade.

So I think there's just a lot of very
rich material here and consistent with my first
comment, I don't think we should engage in a lot
of analysis to try to say what happened here in
an analytical way so much, it's just to describe
these are things that happened and they are part
of our current controversy. They are background
to our current controversy.

In any event, I thought the decision
to sort of trail off the discussion in the post New Deal period, was unusual and left out some things. I would encourage another couple of pages at the end to bring us up to the modern era.

Thanks a lot and again I want to go back to saying this is a great way to start us off with these materials and thank you so much for it.

CO-CHAIR RODRIGUEZ: Thank you so much, Commissioner Ramsey. Next, we will hear from Commissioner Justin Driver.

COMMISSIONER DRIVER: Thank you, Co-Chair Rodriguez. I'd like to add my voice to the chorus of appreciation for these discussion materials. I know a tremendous amount of thought and hard work went into completing this and I am truly grateful.

I'd like to begin where Commissioner Ramsey left off and that's to echo his idea that the history section that arrives toward the end would benefit from greater elaboration. Like
Commissioner Ramsey, I felt that it ended quite abruptly and I believe that disputes over the Warren Court's legacy cast a long shadow over our modern constitutional order. One of the great virtues of these materials is that it gives readers an opportunity to understand a thumbnail history of the Supreme Court of the United States, but to more or less omit the last, you know, seven or so decades seems unwise to me. I agree that another couple of pages would be advantageous.

At the beginning of the chapter, there is a discussion of conflict over the Court and some particularly controversial nominations. I'd like to propose adding the failed nomination of Judge John J. Parker to the Supreme Court in 1930. Civil Rights groups opposed Judge Parker's nomination in large part because of his position on black equality.

When he was running for Governor of North Carolina, he suggested that black participation in politics was a source of evil
and his nomination to the Supreme Court of the United States went down in no small part because of those views. This episode has been largely forgotten to history and I think it shouldn't be in part because it's important to note this nomination in that it helps to, in my view, make Judge Robert Bork's defeat in the 1980s look less anomalous. Indeed, it seems to be that his views on racial equality played some role in preventing him from making his way to the Supreme Court of the United States.

In our discussion of what happened to Judge Bork, I'm not sure that I recognize it as what actually happened from the eyes of many who were watching at the time. Certainly Judge Bork's credentials were impeccable—a member of a leading law school, former solicitor general, a judge on the D.C. Circuit.

At the same time, Bork also, as a professor, wrote an article in a national magazine opposing what would become Title 2 of the 1964 Civil Rights Act. This is, of course, a
public accommodations measure that ensured that black people would be able to gain access to restaurants and hotels, things of that nature, movie theaters. Professor Bork called this measure, which was again designed to ensure that black people could be full citizens in the United States, he called it a measure that was predicated on a principle of unsurpassed ugliness. Many of us can imagine other principles that are uglier than a measure that was designed to ensure that black people could buy hamburgers.

It's also true that during his hearings, which he received, Judge Bork when asked about why he wanted to be on the Supreme Court of the United States, said that it would be an intellectual feast. I think that many people found that answer to not give full voice to the importance of the Supreme Court of the United States, not as some sort of abstract intellectual endeavor, but instead as we see in these very helpful draft materials, that the Court has an
extraordinary impact on the lives of Americans generally.

Given his prominence in these debates, I think that it would behoove us to have a more expansive recounting of the opposition to Judge Bork. Indeed, it's not clear to me that Judge Bork was actually borked, as we define that concept in these materials. We talk about unfair treatment and I understand that his views were criticized, but I want to emphasize that Judge Bork's article in the New Republic magazine in the 1960s, this wasn't some sort of student newspaper article that he wrote as a high school senior, he was a member of the Yale Law School faculty. Supreme Court Justices are deciding matters in the heat of the moment not sort of retroactively trying to account for honored parts of our constitutional tradition.

The next thing that I would say is about the history that, again I think, is generally quite helpful for offering readers an overview. I would suggest refraining a bit the
treatment of Dred Scott and the Reconstruction Amendments. Our sort of quotation and treatment of Dred Scott in these discussion materials seems to me to sanitize some of the odious language of Dred Scott, which makes that opinion so deeply reviled by many of us today. Obviously, Chief Justice Taney's opinion speaks about black inferiority and black people being reduced to slavery for their benefit and I would propose adding that language to this material.

I would also like to suggest making clear that the 14th Amendment repudiated the Dred Scott opinion and provided for Earth citizenship in the very first section of the 14th Amendment. I don't think that that idea, a relatively rare phenomenon in our constitutional history, I don't think that phenomenon comes through with the clarity that I might have hoped for.

Finally, I would think that it would make sense to mention Frederick Douglass as an important constitutional voice of the 19th century. He made claims on the Constitution and
rejected the Dred Scott decision and said that he had no fear that our national conscience will accept such an open, glaring and scandalous decision.

So adding voices of extraordinary Americans to our thumbnail sketch of our constitutional history who did not sit on the Supreme Court of the United States, it seems to me would improve that history, but let me end where I began by thanking you all for these materials and I'm very grateful, so thanks.

CO-CHAIR RODRIGUEZ: Thank you so much, Commissioner Driver. We have three more commissioners who have expressed their interest in speaking to these materials and we have 15 minutes left. So we will go next to Commissioner Adam White.

COMMISSIONER WHITE: Thanks and thanks everybody. Like all of us, I've been thinking about our role in the Commission and President Biden's executive order going back to what exactly he has tasked us to do. He directed us
to study "the commentary and debate about the role and operation of the Court" among other things. There's an important nuance there, it's the difference between studying the Court itself versus being a commentary debate about the Court and, of course, we need to do both: study the Court and the debate surrounding it.

But I do worry that this first document setting the stage frames things too heavily in terms of the public's perception of the Court without first considering the Court more directly. I'm referring specifically to the discussion paper, pages five to six, where we discuss the "stakes" of the reform debate and pages eight to 12, where we suggest a few "criteria" for evaluating the Court's work.

I think this attempt to frame the debate inadvertently reinforces a narrative about the Court as a primarily political body with political stakes. Our discussion lacks, I think, a sufficient anchor in the fundamental duties and powers of the Court as entrusted with the
Constitution's judicial power and like Richard Fallon, I worry about the document's unclear notions of legitimacy.

I worry that it actually entrenches inadvertently a heckler's veto theory of the Court's legitimacy. These problems come through most clearly at page 12, I think, in our discussion of democracy where we state that "there's no obvious way of determining when Justices have reflected the views of an earlier generation and when they have provided a valuable counterweight to majoritarian accesses." I think a lot of people think that there are criteria by which we can determine these things. We disagree of course.

I'm an originalist and a textualist and that's how I tend to begin to approach these issues, or at least as the foundation for judging the Court's work. I know that we're not all textualists here and our report can't possibly exhaust the timeless debates about how to interpret laws and decide cases. But I do think
we should not declare bankruptcy on these issues at the very outset. I think we needn't exhaust them here, but we should at least acknowledge them before moving on to the perceptions and debates around the Court's work.

More generally, I just want to say at the outset of our discussions that I think the Commission's work should always be governed by the same basic question: what reforms, if any, would do justice to the Court as a court, what would bring out the best aspects of the Court's constitutional character among the Justices individually and collectively in terms of their powers and their constraints? I've gone on a little longer than I meant to, so thank you very much.

CO-CHAIR RODRIGUEZ: Thank you so much, Commissioner White. We will next hear from Commissioner Alison LaCroix.

COMMISSIONER LaCROIX: Thank you, Co-Chair Rodriguez. I have a few thoughts to add to the discussion as well and I think there are many
things obviously to say. There's so much rich
t material here, but I'll make three main points.

First, I think is to be mindful. We
all have to be mindful as we work through these
draft materials and work towards producing a
draft report, of course, of just the length
constraints. I think we'll see that throughout
today's discussions. We will inevitably, as we
have all sort of said many times, end up not
talking about or not being able to talk about or
having to make choices. So, I think that's
something that one typically doesn't have to do
in quite the same way perhaps in one's own
writing, but certainly we're all, I think, faced
with, especially at this stage in the
deliberations.

Second, I've thought a lot about this
point about where should a sort of historical
treatment of the Court maybe stop, and the
current day, how did we get here discussion begin
and this goes to some of the comments about where
the third part of this chapter leaves off.
You know, in my view, there is a certain point at which one is talking much more about the origins of the current moments debates and I think this is something that people have many different views on. Is it the 1980s? Is it 1937? Is it 1787? But I think somewhere around the period of the sort of post Brown v. Board, which of course is indeed a Warren Court decision, but somewhere around that point, maybe after, the 1960s perhaps, seems like the point at which we're getting very close to what people think of as the now of the report.

We see in other parts of the report discussion of the 1960s, for instance, or the sort of later Warren and Burger Courts and so that's, I think, a real question of when does the history and the now begin. Another thing that I think the historical section really can add is fleshing out this sort of history before, say 1937. So in 1937 Franklin Roosevelt and the attempt to expand or pack the Court and the response is something that's been discussed in
the public discourse, the media. People may have
some general sense of that at least.

Going further back, I think, is quite
useful especially to flesh out my third point,
that, I think, one thing that this chapter needs
to do, and especially the historical part, is to
convey the sense that debates about reform began
with the first moment when Article 3 of the
Constitution was written. Reform or change or
restructuring all came together with the kind of
creation of the modern Supreme Court. I think
that's very useful to lay out.

Lastly on, I think, a related note
I'll just say it would be, I think, difficult to
think of a historical section as purely
descriptive. I think we've been charged to
provide analysis. There's always, of course,
selection, but there's also something that
requires interpretation and, indeed, we've been
asked to provide that so, I think, we have to
embrace that and make difficult choices in my
view and keep having these discussions, so thank
you.

CO-CHAIR RODRIGUEZ: Thank you,
Commissioner LaCroix. We will now hear from
Commissioner Trevor Morrison.

COMMISSIONER MORRISON: Thank you, Co-
Chair Rodriguez. I want to echo the thanks that
everyone has expressed this morning and add to
that, thanks for the comments I've heard from my
fellow commissioners this morning. I think we're
starting off in a very helpful and constructive
way.

Of course, as we're all aware across
the country there's deep disagreement on just
about every single issue that we will end up
taking up in our report ultimately and real
disagreement, I think, across this Commission and
one of our challenges then is to both represent
that disagreement, but to work towards
collectively achieving the objectives set out for
us in the President's executive order. I'm
encouraged on the basis of the discussion
materials and the discussion this morning thus
far that we will be able to do that.

Some of the points I wanted to make have already been made. I don't want to simply repeat them, but I'm thinking in particular about Commissioners Fallon, Lemos and White and their discussions of aspects of the evaluative criteria, I thought was very, very helpful. What everyone has said this morning is helpful. With respect to these evaluative criteria, legitimacy, judicial independence, democracy, efficacy, I'm coming away from the discussion materials and what I've heard this morning with a thought that we do need to strive to be precise about the ways in which disagreements could manifest themselves across these criteria.

One could be simply an agreement on the meaning of legitimacy, but a disagreement about whether any particular reform proposed or decision not to pursue a reform proposal, how that would bear on legitimacy. Another is disagreement on the content of legitimacy and I thought Commissioner Fallon was very instructive
this morning and his comments along those lines.

   My own view is that I think we need to
try and do two things. One is to account for the
ways in which legitimacy is understood by
participants in the public debate. As
Commissioner White said, part of our charge is to
represent the public debate, but that's not our
only charge. We are also meant as a body to
provide our analysis and evaluation and so I
think there we're going to, if we can, need to
strive to provide some kind of account of what we
understand legitimacy to mean. Understanding
that there may be some difference between that
and how it is used by other participants in
public debates.

   Then finally, there could be another
kind of disagreement as well which is not over
the meaning of the term and not over the likely
impact of a particular reform with respect to
that criterion, but just whether that impact is a
good or a bad thing. Judicial independence might
be an example here, depending on how that's
defined.

There might be agreement that a particular reform proposal or a decision not to pursue a particular reform proposal might increase or decrease judicial independence or enhance or encumber judicial independence, but there might then be disagreement over whether that is desirable or not. Those are not the same kinds of disagreement.

Those three types and I think more just as an analytical matter, we can be crisp about the differences and in this introductory chapter in particular, note those different domains of potential disagreement and divergence. I'm hoping that that can helpfully set the stage for later discussion where my expectation is in different chapters, the sort of crux of the debate will look different with respect to these forms of disagreement.

The more we can try and have terminological and conceptual clarity at the outset, I think, the more helpful the first
chapter will be to the balance of the report.
I'll leave it there. Thank you.

CO-CHAIR RODRIGUEZ: Thank you so much, Commissioner Morrison. We have four minutes left and so I want to invite any other commissioner who would like to make a very brief comment or observation based on the conversation we've already had. So, if you would like to do that, please use the raise hand function.

Seeing no takers at the moment, I will thank profusely those who assisted in preparing these materials and those who offered their observations on what we have before us. I think what you've highlighted is two things. First, is the challenge we face in how we describe an institution and its value. How we describe a problem and how we describe a history that might be contributing both to our understanding of that institution and to the nature of the problem. But secondly, as a Commission, we have the challenge of figuring out how, in fact, to appraise what will inevitably be different
accounts of those things and how to fit them
together in a way that informs the debate on the
role of the Supreme Court in the American system
and in American life.

So, thank you for starting us out in
that way. We will now take what will be a 12-
minute break and we will reconvene at 11:10 to
talk about court expansion.

(Whereupon, the above-entitled matter
went off the record at 10:58 a.m. and resumed at
11:10 a.m.)

CO-CHAIR BAUER: Welcome back from the
break. We will resume our deliberations today.
We are going to turn next to the materials and
the issues raised in those materials there on the
reform proposals directed to the membership and
size of the Court.

Let me begin by saying because
different members of our audience may in fact
call in or tune in at different times, you'll
hear reference to discussion materials. These
were prepared by a group within the Commission
for deliberation and they don't reflect the views of the Commission as a whole or those of any particular commissioner. They were designed to be inclusive in the discussion of arguments for and against reform and to assist the Commission in robust, wide-ranging deliberations.

After reading the materials in preparation for this deliberation, we have commissioners who have indicated their interest in the topics raised and discussed in these materials, so after a brief summary of the contents of this set of materials, I will call on commissioners to raise their hands and speak to these issues.

But first, I would like to turn things over to Commissioner Grove for a summary of the contents of this section of the draft materials. So, Commissioner Grove, the floor is yours.

COMMISSIONER GROVE: Thank you, Co-Chair Bauer. So there have been calls to expand the Supreme Court beyond its current size of nine members by, for example, adding four seats. The
draft materials explore how to the calls for
court expansion have increased dramatically in
recent years as well as the scope of Congress'
power to modify the size of the Court and
prudential arguments for and against court
expansion. The draft materials also discuss
several other proposals for restructuring the
Supreme Court which I will describe at the end of
my remarks.

Let's start with some constitutional
text in history. The Constitution does not saw
how many judges should be on the Supreme Court.
Instead, the Constitution gives Congress
considerable discretion to shape the Court and
history shows that Congress exercised that power
quite a bit throughout the nation's first
century.

In 1789, the Court had six members.
In subsequent decades, Congress changed the size
of the Supreme Court seven times, setting the
Court's size at between five and 10 members.
These changes were made for a mix of what we
might call institutional and political, maybe
even partisan, reasons. That is, Congress
adjusted the Court size in part to provide more
judicial personnel to serve a growing nation, but
Congress also tended to do so when it trusted the
sitting President to select the nominees, that
is, when Congress and the President were from the
same political party. For example, in 1807, a
Democratic-Republican Congress expanded the Court
from six to seven members, when its party leader,
Thomas Jefferson, would fill the vacancy.

In 1837, a Congress controlled by
Jacksonian Democrats, expanded the Court from
seven to nine members, when its party leader,
President Andrew Jackson, was in charge. In the
1860s, a Republican Congress changed the size of
the Supreme Court on three different occasions,
moving the Court up to 10 to allow President
Abraham Lincoln to shape the Supreme Court in
1863. In 1866, Congress reduced the size of the
Supreme Court from 10 to seven members to prevent
a political opponent, President Andrew Johnson,
from selecting Justices. Then in 1869, Congress moved the number back up to nine in order to allow its fellow Republican, Ulysses S. Grant, who was then in office, to select nominees.

Now the Supreme Court has consisted of nine members since 1869, but in 1937 there was a prominent effort to reshape the Court what came to be known as President Franklin Roosevelt's effort to pack the Court with up to six additional members. President Roosevelt initially claimed that he sought to expand the Court with more and younger personnel so that the Justices could get their work done. But he soon acknowledged that his Court reform plan was really designed as a response to the Supreme Court's rulings invalidating his New Deal programs. Now there was some support in Congress for this plan, but ultimately the 1937 Plan was rejected.

Two decades later in the 1950s, Congress also rejected a Constitutional amendment that would have fixed the size of the Supreme
Now, starting in the mid-20th century, there was a pretty strong norm that said Congress should not modify the size of the Supreme Court, but Congress continues to have very broad power to structure the Supreme Court.

One question today is whether Congress should exercise that power to add seats to the Supreme Court. I will very briefly summarize some of the debates which are discussed in the draft materials. We'll hear far more on these issues throughout this session.

Advocates of court expansion argue in part that the Supreme Court faces a legitimacy crisis because of the controversy surrounding recent nominations to the Court. For example, in 2016, the Senate failed to hold hearings on President Obama's nominee, Judge Merrick Garland, thereby leaving a vacancy for the next President.

Another concern is the direction of the Supreme Court's jurisprudence on the issues, such as voting rights, affirmative action,
reproductive justice and other areas. Advocates argue that court expansion could help restore balance to the Court and help prevent a potential jurisprudential crisis.

Opponents of court expansion respond in part that there is no legitimacy crisis from their perspective, but that court expansion could create one. Opponents also argue that court expansion today could launch a cycle of similar efforts going forward and more generally compromise the independence of the Court.

Now court expansion is not the only structural reform that has been suggested. I will briefly sketch out other proposals to restructure the Supreme Court, which are described in more detail in the draft materials.

One reform aims to ensure more partisan balance in the Court. A second proposal calls for a rotation system, that is, a system by which judges would rotate between service on the Supreme Court and the lower federal courts and a third would create a panel system, that is, the
Justices would decide some cases in panels of, for example, three members. One legal question is whether these rotation or panel systems comport with the Constitutional requirement that there be, to quote Article III, one Supreme Court.

We will explore some of these questions as well and with that, I will turn the proceedings back to you, Co-Chair Bauer.

CO-CHAIR BAUER: Thank you very much, Commissioner Grove. That was extremely helpful and we're going to turn now to the Commissioners who have indicated a desire to speak to these issues. We have an extended period for the discussion of these issues. When we get to the conclusion, if you have not spoken and you've heard something you'd like to address or a point you'd like to raise and we have time remaining, just indicate that by using the raise the hand function. But we'll begin now with Commissioner Driver.

COMMISSIONER DRIVER: Thank you, Co-
Chair Bauer and thanks also to Commissioner Grove for that incredibly lucid overview of these discussion materials. I'm grateful to you for teeing us up for, I'm sure, a lively discussion.

Expanding the Supreme Court has garnered a great deal of attention in this area and I'm sure it will during this session. I wanted to jump on the queue relatively early to talk about a matter that may seem picayune, but I don't believe that it is and that is exactly where Commissioner Grove left off in thinking about panel systems and their constitutionality with respect to Article III's requirement that there be one Supreme Court. You know, I fear that the discussion materials as a whole cast grave doubt on the constitutionality of panel systems and I think that the answer may be more ambiguous and I would propose having sort of a greater balance in the assessment of constitutionality.

I want to be clear here that I'm speaking about the constitutionality of panel
systems rather than the desirability of panel systems. A bad idea is not necessarily an unconstitutional one and I fear that, as it's phrased here, it leaves little room for doubt that a panel system would be unconstitutional. The constitutional text is, of course, quite spare here when we're thinking about one Supreme Court and I fear that the approach is excessively formalist and wooden.

The D.C. Circuit routinely decides matters by a panel and those panel decisions are understood to speak for the entire Circuit, the one D.C. Circuit, and especially if there were under the panel system at the Supreme Court of the United States a mechanism for deciding things en banc, I'm not sure that the panel system at the Supreme Court of the United States would appreciably different than the panel system at the D.C. Circuit and, therefore, that would not run afoul, at least potentially, of having one Supreme Court.

I would also note that we have several
Supreme Court Justices who in the history have said that a panel system would, in fact, violate Article III's language requiring one Supreme Court. That doesn't strike me as especially surprising that Supreme Court Justices would be invested in retaining their power and moving to a panel system may serve to diminish that power so I would tend to not put a great deal of emphasis on that and I would also note that these statements are presumably coming without the benefit of briefing and sometimes though the adversarial process, questions that seem easy at first blush are more complicated upon review.

I would also say that I want to be careful about what people have referred to as the normative power of the actual. This is a term that Professor Paul Mishkin has used and he defines it as that which is law tends by its very existence to generate a sense of being also that which ought to be the law. It's true that we haven't had panel systems at the Supreme Court of the United States for our history, but that
doesn't necessarily mean the decision would be unconstitutional and I would prefer it if the analysis of this section were more even handed than it currently is. Thank you again, Co-Chair Bauer.

CO-CHAIR BAUER: Thank you very much, Commissioner Driver. Then we'll turn next to Commissioner Ramsey for his comments.

COMMISSIONER RAMSEY: Well, thank you very much and again I want to say how impressed I am with the quality of the materials that we're reviewing here and how helpful this section is. I have to think that this is the most challenging section for us to draft and discuss because the proposals that we're considering here are very controversial and made different perspectives on. I think the materials we have here, they've done just an admirable job of giving us a balanced discussion of the many different things that are going into the debate here.

I do have one place in the draft where I think a bit more could be said. Although
parenthetically I'd like to endorse the comments that you just heard from Commissioner Driver, that I think more could be said on this panel system as well, although that's not where I'm going to focus, but I am inclined to agree that perhaps the discussion of the panel system could be enhanced a little bit along the lines that he says.

The area that I'd like to focus on is the constitutionality of increasing the size of the Court. This is the discussion that is in part three at pages 11 and 12 of the draft. I think the Constitution analysis here, I would suggest, is a little bit thin in the following sense.

I think to begin it's useful to identify precisely what the source of Congress' power here is, which is the power to regulate as necessary and proper. In this case to enhance and to carry into effect the powers of other branches of Government; in this case, the Supreme Court, that's the source of the power that
Congress has. Therefore, I think it is quite true, as the draft says, that everyone agrees that this gives Congress the power to, for example, set the size of the Court and in other respects regulate the design of the Court so that the Court is its most effective and efficient.

I do think that there is an issue that has been raised before us by Professor Barnett in his testimony, which is the question of whether Congress goes beyond this power when it, or if it, were adjust the size of the Court merely for the purpose of achieving particular partisan results. I, myself, am not necessarily endorsing this argument, but I think this is an argument that deserves more consideration than has been given currently.

In the draft, there is a reference to Professor Barnett's testimony in a footnote, quite a long footnote, that isn't mostly about him, in footnote 113. I would suggest that this be brought up into the text in a paragraph or so, in which we distinguish between the argument that
Congress can set the size of the Court to make it the most efficient and effective it can be, which Congress clearly has that power and distinguish that from Congress using that power to attempt to compel particular political outcomes. I think these are two different arguments as Professor Barnett has testified to us.

I think that it's worthy of our time briefly to highlight the difference and to highlight this argument. I do think, notwithstanding my own views of the merits of this argument, that if there was a serious proposal acted on in Congress to enhance the size of the Court, that this constitutional argument, identified by Professor Barnett, would be raised against it. And to the extent that Congress made arguments relating to particular political outcomes for its plan to enhance the size of the Court, that would make it more subject to constitutional challenge than if Congress were changing the size of the Court in order to effect an institutional design that it thought was more
appropriate. I think it's appropriate for us to foreground these potential arguments against the Court expansion plan rather than putting them in a footnote, whether or not we, ourselves, agree with them.

That's my suggestion for just a very brief addition to the discussion in Part 3A of the draft, I would just enhance a little bit in that respect. But, otherwise again to say what a great job. Thanks very much, this has been so helpful in our discussions.

CO-CHAIR BAUER: Thank you very much, Commissioner Ramsey. Now I'd like to recognize Commissioner Baude.

COMMISSIONER BAUDE: Thank you, thank you very much. I have two comments about the draft materials here. One of them amplifies something that Mike Ramsey just said about the legality. It seems to me that one of the most important things we as a Commission have to contribute are our views about the law given that this is Commission mostly of legal scholars and
that's one of our areas of core expertise and
it's a place where we have, I think, a special
obligation to try to be as careful and consistent
and avoid special pleading as possible, given the
political nature of the topic. I worry that the
current section regarding court packing would not
do that and we should rethink a lot.

Again, like Mike actually, I don't
think there is a limit on Congress' ability to
change the size of the Court, but I have my
reasons for thinking and I'm not sure whether the
report reflects currently any reasons for
thinking that. There does seem like there are
plausible arguments either that Congress' power
under the necessary and proper cause can be
limited when Congress acts for bad reasons and/or
relatedly, that a norm has solidified in the past
50 to 100 to 150 years imposing some limits on
Congress' ability to use its power. Now I think,
as an originalist, I have a sense of why I don't
necessarily think either of these things are
true, but this is not an originalist Commission
and it's not adopting sort of an originalist
perspective on the Constitution.

So I think we need to know, for those
who don't, why there aren't such arguments.
Clearly, we would really not want to have the
appearance that members of the Commission endorse
non-originalist arguments based on constitutional
norms or endorse implicit limits on what the
legislature done for bad motives sometimes, but
then mysteriously don't do so here.

There are at least three
possibilities. One possibility is there are no
limits on Congress' ability to use any of its
enumerated powers, no sort of implicit, purpose-
based practice-based limits. I'm not sure we
think that.

Another possibility is there are
limits on some powers of Congress, but for some
reason the Court's size changing power derives
necessary and proper clause is free of these
limits. I'm not sure where that would be.

The third would be there actually are
limits and maybe Congress can't do it, as Commissioner Ramsey said, for partisan reasons, but would envision that all these proposals comply with those limits and so that will be important, then we actually have to clarify that there is not a preliminary power that they were envisioning reforms that would comply whatever the limits are. I think whatever is going on here we should especially elect people to think through it and explain it.

Now I do also worry about the draft's discussion about the prudent efficacy and consequences of changing the size of the Court. I do appreciate that the draft acknowledges a lot of the arguments against changing the size of the Court and I'm very glad it doesn't do less of that and that it doesn't do more in suggesting that there is any reason to change the size of the Court, but I do really worry that even given as much oxygen as we do, as seriously as we do, the argument for substantive court packing is dangerous and wrong.
So at the risk of an analogy that people won't like, I think if there were an election commission that was considering the question, should Republican state legislatures cancel elections and appoint the electors themselves rather than having people vote for the President. I think one could write a report saying well it's probably lawful under Article II, there's an argument they can't but it's probably lawful, but is it prudent? Well probably it would be bad for democracy, but if on the other hand, some people think it would be a really good idea. We could write a report like that, I think it would not be a good idea to write a report like that. I think that would itself sort of contribute to destroying a norm that I think many of us believe in and support.

Now I could be wrong about where we have standard admission on that, I mean there are places were the Commission notes that we're divided and this is one of our first chances to really talk as a Commission about that or think...
about that. So if I'm wrong about that, I
probably owe it to the country to tell them, but
if I'm right about that and the number of
commissioners who think that it is currently
prudent to pack the Court is very small, we
probably ought to clarify that so as to avoid
misleadingly contributing to destruction of one
of the most important norms in American politics.
So I guess I think we need to talk more about
that or figure out what we think or be very
careful. I think this draft really goes much
farther in a dangerous direction than it should.
I've talked for a long time so I'm
just going to add one last example of why I think
about this. I recently have been reading John
Harty Ely's work including his famous critique of
Roe v. Wade, and one of the points he makes there
is about the dangers of crying wolf. And to the
Court, he put it as people kept telling the Court
over and over again that it was, in a word,
Lochnering, which he thought it was not, but not
fair. One possible judicial response was to this
style of criticism was to conclude that you might as well be hanged for a sheep as a goat. That as long as you're going to be told no matter what you do, that all you do is Lochner, you might as well Lochner. And while the Court may not think quite that explicitly about it, the chance that it sort of slides in that direction is really too high.

I do worry that's true of a lot of the criticisms of the Court as being at war with democracy and many other things which we heard from testimony, some of which we acknowledged, I think, more than we should. I worry that if we take those critiques too seriously, unless we really think they're true, unless we really think we're in that moment, if we take those critiques too seriously we will lose the ability to make those critiques when they become true. Thanks.

CO-CHAIR BAUER: Thank you very much, Commissioner Baude. Commissioner Ifill. I thought I'd seen you join.

COMMISSIONER IFILL: I'm here.
CO-CHAIR BAUER: Oh, good.

COMMISSIONER IFILL: Good morning and thank you. I will try to be brief and I think my comments fall into two buckets.

First and foremost that I actually don't think that the text of the chapter ultimately reads as a balanced presentation of the issue. I think all of the arguments are marshaled, but the architecture of the section and the way in which it is framed leads to a conclusion that I think is not warranted by the arguments presented in the text, nor do I know it to be warranted by a collective decision of the Commission that expanding the Court is unwise, but that seems to be the conclusion at the beginning and then the various arguments follow.

I think it leads one reading it to believe that that is the collective view of the Commission, when I feel much more comfortable with laying out the various arguments for and against and laying them out in a way that does not suggest the Commission has collectively come
to an answer.

One of the ways in which the report slants in that way is that all of the arguments in favor of court expansion are first presented in a paragraph and then each paragraph ends with but here are all the reasons why that might be problematic, difficult, unwise. The result is that the last word is always to that position and I think even just the architecture of mixing that up a bit in the paragraphs, mixing up the arguments for and against in terms of which leads and which ends, will create a different feeling and tone.

My second concern is a bigger one and that is that this entire discussion is framed in the context of partisan politics and I actually think that is a disservice to the exploration of this issue and to the argument. I do think that there are people who have genuine concerns about the Court, about the discussions that are happening in the public and in the profession about the Court, who care about the reputation of
the Court, who care about the legitimacy of the Court and who care about the rule of law. I count all of us on the Commission as those people.

I don't think any of us who are busy people joined this Commission because we want to advance one partisan objective or another. We joined it because we care about our democracy and at a time in which respect for the rule of law really has been at an all-time low, that we recognize that respect for the law, very often explicitly kind of expressed and seen through respect for the United States Supreme Court, is an important place where people can discern the signals about respect for the rule of law.

I think that's the project that we are about and so to read a chapter in which all of the calculations are about one political party or another to give the Democrats this to give the Republicans this, as though there are no arguments that go to court balanced, that go to the fact that lifetime tenure means that Justices
are locked in for decades in ways that they are not in any other workplace. Often for good reason in terms of impartiality and so forth, but nevertheless ensuring that the personnel of the Court is always kinds of decades out of step with the general population of the country. There are reasons that relate to diversity of background and of profession, of race and of gender, of geography, of law school. There are many reasons why one might support the idea of expanding the Court that don't have to do with your being beholden to a particular partisan agenda or another.

To the extent that this report frames the entire discussion that way, I think it does a disservice and actually silences what are the arguments that I think might be raised by people who are operating in that space of thinking about democracy and respect for the rule of law.

For those of us who represent communities that came to see the Court's role in the context of kind of footnote four in Caroline
Products, who saw the Court being a place where one could be heard when the political processes were closed or were malfunctioning, the Court carries a certain kind of imprimatur in our committees. Therefore, we have a stake and an interest in respect for the Court. For all of those reasons, my greatest concern beyond the lack of balance in terms of the presentation of the arguments is that the framing of this as a purely partisan exercise, I think does a disservice to the Commission and does a disservice to this issue.

Once you put it in that category that this is purely an issue about whether the Democrats should get a greater advantage or whether the Republicans should get a greater advantage, you've basically allowed people to check out from the arguments that actually relate to the legitimacy of the Supreme Court, not its own legitimacy in its eyes, but its legitimacy in the eyes of the public and the public sense that the Supreme Court is a forum and a place where
they feel they can be heard and where they see
themselves. So I'll stop there.

CO-CHAIR BAUER: Thank you very much,

Commissioner Ifill.

COMMISSIONER GRIFFITH: Commissioner

Bauer, I can't hear you, but I think you said

it's my turn.

CO-CHAIR BAUER: I did indeed.

COMMISSIONER GRIFFITH: Okay, great.

Great. Let me echo the voice of Nettie in

thanking you and Chair Rodriguez, and all those

who participate. This is a remarkable

undertaking.

My experience with my working group

has just been remarkable, as we carried on

passionate disagreement with civility and

respect. And I, it's been a, really been a

wonderful experience for me.

I did not see the product of the other

working groups until they were circulated

recently. So, my comments are largely addressed

to some of the assumptions that make up their
work.

And in that regard I want to associate myself first with Commissioner Baude's comment about, we need to be really careful here about the way we describe arguments, and the way we frame this. This has real consequences.

And although my guess is that Commissioner Ifill and I disagree on the merits of court expansion, I couldn't agree more with her comment about the way the issue is framed. And that's, I'd like to, that's what I'd like to speak about.

It's framed in this partisan way of looking at this is democrats versus republicans. And I object to that in this respect and throughout.

In my view too much of this discussion draft reinforces the assumptions of many that the Justices are partisans, just looking for ways to advance policy agendas of the President who appointed them, and the political parties that supported them.
There are at least two problems with this view. First, it's inaccurate. It's just not the way it happens. And second, those who maintain this view I believe do great damage to the Supreme Court, which I believe is an institution that has been largely successful in performing its role under the Constitution.

Frequently these criticisms, which I think are rarely more than expressions of dissatisfactions with the outcome of a particular case, frequently they're couched in terms that question the legitimacy of the Court.

This is a ploy that can only serve to undermine confidence in the Court in a dangerous moment in the Republic's history.

Let me give you an example. I was on the three judge panel of the D.C. Circuit whose decision was overturned by the Supreme Court in Shelby County versus Holder. I think the Supreme Court was gravely mistaken in its decision.

And yet, I totally reject the idea advanced by some that those who took the view
that the pre-clearance requirements of the Voting
Act needed updating by Congress were somehow part
of a nefarious Republican strategy to limit
Democratic electoral success.

That view is A, inaccurate, and B, it's harmful. I joined Judge Tatel to form the
majority in Shelby County. Judge Stephen Williams dissented.

Our opinions were the product of
months of discussion among the three of us. We
got back and forth on both the outcome and the
reasoning.

To coin a phrase, I was in the room
where it happened. And let me assure you that no
thought was ever given to how our decision would
advance or blunt the electoral things that were
the requirements.

And I'm confident the Supreme Court
approached the matter in the same way, even
though I disagree with their outcome. Let me
tell you one reason why I'm confident the Supreme
Court approached it in the same way.
At her confirmation hearing Justice Kagan flatly rejected the idea that there might be some room for personal preferences in judicial decisions.

We remember she said, it's law all the way down, she declared. And she was right. And so was Justice Breyer when he explains, as he's done in his recent book, that Justices are not political partisans.

Justice Sotomayor said much the same at her confirmation hearing, when she described her judicial philosophy. Simple, she said, fidelity to the law. The task of the judge is not to make the law, it's to apply the law.

Now, judges do have different views about how to read a provision of the Constitution, the text of a statute or a regulation. But those views are grounded in their view of the role of a judge under the Constitution, and not as a means to partisan ends.

Too much of the language in this draft
not only disregards this facts, but assumes the contrary. The Republic is in choppy waters. And ominous storm clouds are on the horizon with the revelations that each day we are reminded just how fragile our Republic is.

If we are to withstand the approaching storm we need our institutions of Government to be true to the roles assigned them in the Constitution.

The Supreme Court has played well its vital role. It has repeatedly demonstrated a commitment to the rule of law if it engages in reasoned discourse, expressed civilly.

And despite their vigorous disagreements the Justices respect and have genuine affection for one another. These are public virtues in short supply these days.

I believe the Supreme Court can be a bulwark against the sinister forces of division and contempt that have been let loose, and infect our public discourse.

Now is the time to build confidence in
the Court. Too frequently elements of this draft report does just the opposite. Thank you.

CO-CHAIR BAUER: Thank you very much, Commissioner Griffith. We had some audio issues earlier. I thought my co-chair, Commissioner Rodriguez, would make up the difference here. But if I am audible, I would like to send it to Commissioner Charles.

COMMISSIONER CHARLES: You are audible. Thank you, Commissioner Bauer. And thank you to all of those who have worked on this chapter.

In some respects this draft chapter may reflect what this Commission comes to be associated with. And so, I think the task of those who have worked on it is quite difficult. I think much of it is thoughtful.

I do have two comments that actually follow from the previous comments of Commissioners Griffith and Ifill.

I was struck by the partisan framing of this chapter. I won't say much more about
that, because I think it's been very nicely and eloquently articulated. So, I will amend those parts of my comments.

But I do urge and join those, join the previous comments and urge that upon revision that we think very deeply about an alternative frame for this chapter.

The second point then, I'll just focus on that, which is on the policy considerations. And I think this is, this does present a challenge for this chapter.

So, if we take into account Commissioner Baude's comments, that to take some of the arguments against, in favor of court expansion is to legitimate them in a way that is difficult and dangerous.

And then to think about Commissioner Ifill's comments, which is that, look, there are substantive -- we are in a moment in our polity in which very thoughtful people are considering the role of the Court in this democratic system, and the sense that those arguments have to be
taken seriously and they have to be given voice. And so the question, then, for this chapter, and the challenges, is how do we think through and tie together both of those points?

And I think the way that the policy discussion is currently framed in this chapter makes it hard to do that real work. Because it seems to me that the policy discussions, they shade very much against court expansion, which is not really what I found disturbing from my perspective.

What I found disturbing was more of a shade against court expansion without sufficient basis for doing so. So, it makes it harder to actually surface the underlying tensions here.

To say, okay, how do we take seriously the arguments in favor of court expansion, while also worrying and thinking about the institutional role of the Court, and how court expansion might or might not impact those institutional roles, so that institutional role.

And I don't think we can perform that
function in this chapter and as a Commission if
the policy considerations are speculative. And
if they're not sufficiently even handed and
balanced.

So for example, with respect to the
descriptive diversity claim of court expansion.
That expanding the Court might lead to
descriptive representation on diversity grounds.

The draft simply states that there's
no reason to believe that court expansion would
produce benefits, because there's no guarantee
that a larger Court would be drawn from a diverse
group.

But there's no basis it seems to me
for that conclusion. I don't know how it arrived
at that conclusion. And it seems to move the
ball. It raises the standard by saying, well,
proponents of court expansion would have to
guarantee that diversity result as a consequence
of expansion.

And I think it's, you know, that
doesn't seem to me to be warranted. The
conclusion is drawn by simply changing the burden of proof, and placing it on the reformers.

I think it is important for, on the policy considerations for there to be even handedness for us to think about the deep sets of questions. And the tension that is raised, right, and you see eloquently expressed by Commissioner Ifill, and eloquently expressed by Commissioner Baude.

But we can't have that even handedness in addressing those tensions forthrightly without better balance, and without assuring that conclusions are not based on speculation.

So, those were the two reactions that I had. And in thinking through I think there's so much great work here. I think the draft really in many respects, you all deserve our thanks. Because in many respects this is what we will be associated with. This is the core argument of the day.

But nevertheless, I think achieving what we would like to achieve will be made
easier, and much more effective if we reframe and take out the partisan balance, partisanship of the framework. And then, think much more broadly and carefully in getting more even handedness in the policy considerations. Thank you for listening to me.

CO-CHAIR BAUER: Thank you very much, Commissioner Charles. I would like now to turn to Commissioner Crespo. You have the floor, sir.

COMMISSIONER CRESPO: Thank you, Commissioner Bauer. I agree with Commissioners Ifill and Charles that the current draft in its substance, in its structure, and in its tone communicates a clear position against expanding the Court.

And I was surprised to see this when the draft was circulated to the full Commission for the first time a few days ago.

The arguments in favor of expansion are presented tentatively and at a distance, in the voice of unnamed others. And in every instance they're teed up really just to be
knocked down by arguments against expansion,
which received more comprehensive treatment, and
are stated in the Commission's own voice as its
clearly favored position.

In this respect Chapter 2 strikes me
as different from the other chapters, which
present more balance, and in my view considerably
more fair accounts of the arguments on both sides
of the debate.

Of course, expanding the Court is the
one reform that gets the most attention in that
debate, and with good reason.

As the current draft in my view
correctly explains, it's the one structural
intervention most clearly within Congress's power
to enact.

Chapter 2's rejection of court
expansion thus shapes, and in my view distorts
not just the chapter, but the entire report. The
overarching message sent to those who see deep
problems with the current Court, and with how its
most recent seats have been filled seems to be,
don't do the one thing you can do to address the
problem, court expansion, but consider trying
some things that probably won't work, like
amending the Constitution, or passing statutes of
questionable efficacy or constitutionality.

I think it's impossible to divorce
such a message from an underlying judgment about
whether there is in fact a serious problem
inherent.

Dismissing the most salient and most
viable intervention on the table cannot help but
send a message that the underlying problem the
intervention is trying to address is neither
urgent nor serious, if it even exists.

Suffice to say there are a great many
people who disagree with that conclusion,
including multiple elected leaders at the federal
level, multiple leading scholars, numerous
witnesses to our Commission, and millions of our
fellow citizens.

We were not asked to resolve this
debate, which in addition to being salient and
serious, implicates a complicated and complex set of interbranch dynamics in which Congress's ability to consider using its powers, its ability to keep all of its lawful options on the table is itself an element of the analysis.

Against that backdrop I think it would be presumptuous and unwise for the Commission to try to knock this particular reform off the table by marking it as legal but wrong, as the current draft does.

My hope is that as we reflect on today's deliberations, and prepare our final report in the coming weeks, this chapter will be substantially revised to present a more even handed and fair engagement with both sides of the Court expansion debate.

There are a number of revisions that I think would help achieve that goal. I'll flag just two of them now.

First, I think the chapter should be restructured to avoid treating the pro-expansion arguments as set ups for anti-expansion
knockdowns. And that the Commission, to avoid using its own voice to stick the arguments on only one side of the debate.

Second, as to substance. I think the major arguments in favor of expansion should be given full and fair treatment. I can't give them each full and fair treatment right now. So, I'll just focus on one that I think the current draft treats too dismissively.

To proponents of court expansion increasing the number of seats on the Court is not a violation of existing laws. It's an attempt to enforce, and thus reestablish those norms.

The current draft rejects this framing, and thus rejects a core premise of the Court expansion argument, when it says there is a decades long and unbroken norm against court packing.

To proponents of expansion this is just not true. The norm has been broken recently. If one defines court packing as
Congress using its legislative power to change the size of the Supreme Court of political or partisan reasons there is a fair argument that the Senate violated that norm when it shrunk the size of the Supreme Court to eight seats for the last year of President Obama's term, when it threatened to keep it at eight seats if Hillary Clinton were elected President in 2016, when it returned the Court to nine seats when President Trump was elected, and when it then violated its own newly crafted precedent against election year confirmations by confirming Justice Barrett just weeks before the 2020 election, while voting was already underway.

Put more simply, there is an intelligible, coherent, and to many people persuasive argument that the Supreme Court has been packed twice in the past five years.

Expansion proponents take the reasonable, and to my mind correct view that norms are only norms if their violation means something if the violations are acknowledged and
corrected through action that aims to prevent the norm from being violated again.

To be effective such action needs to neutralize the benefit that those who broke the norm seek to reap. In this instance decades long super majority control of a powerful branch of Government.

Any number of actions might hypothetically be taken to enforce a broken norm. But as the report in its current draft makes clear court expansion for all its potential downsides, for all its potential dangers, is the one response most clearly within Congress's power.

This is one prominent argument in favor of court expansion that the draft I believe treats dismissively. There are others. The overarching effect though is a report that will fairly be read as rejecting court expansion.

That at least is how I read it.

I think this is a mistake. It is not what we were asked to do. It is not what I expected us to do. And I don't think that a
final report submitted in this form would be
presenting a fair or constructive account of the
debate on this important issue.

So, I hope our deliberations will
yield substantial revisions to this chapter.

Thank you again, Commissioner Bauer.

CO-CHAIR BAUER: Thank you very much,
Commissioner Crespo. I would like now to turn to
Commissioner Gertner.

COMMISSIONER GERTNER: Thank you. I
want to start where others have left off. The
meeting today is not just to give the public a
taste of our work. It is literally the first
chance that we all have had to actually
deliberate face to face.

We received the full report only seven
days ago. As the discussion has reflected, there
are real differences of opinion with respect to
the nature of the problem with the Supreme Court,
and the nature of the remedy.

And I don't think that the draft, I
join in this with Commissioners Ifill, and
Charles, and Crespo. I don't think the current
draft reflects, adequately reflects that debate.

There's certainly some people who
believe there is no issue, that changes in the
composition of the Court should not prompt major
reform. And in any event, there will be new
administrations in the future that will perhaps
tilt the Court in a different direction.

Others believe there are problems with
the Supreme Court. But they are limited, easy
cured by minor fixes. Still others, and I'm
among them, who believes that there are
substantial problems that are particularly unique
at this moment in time, in part for the reasons
that Commission Crespo has described, that we are
at a tipping point where reform is crucial. And
that curing these problems, as I said, require
major fixes.

I don't believe that the draft
adequately reflects the latter position. I take
Commissioner Griffith's concern. But I don't
think that this discussion is about partisanship.
We really are looking back from a distance of the
Court to look at structural changes, and why
those structural changes are necessary.

We're looking at the net effect of
changes in the polity, changes in the Government,
and the net effect of rulings that the Supreme
Court has made that will impact the Court for
decades, and decades to come.

Let me focus on Chapter 2. And I
agree with what others have said. Rather than
taking a neutral stance the draft tilts rather
dramatically in one direction. Others have said
this.

The arguments in favor of expansion
are set up as straw men, struck down in
subsequent sentences. Let me give you one
example. At one point in the comparative section
the draft talks about, this is in B4, the risk
that authoritarian regimes may use our example to
undermine their own Court's legitimacy.

It doesn't mention that those
jurisdictions didn't meet our example. They were
already doing that. It doesn't matter, it didn't matter what we do to their efforts to undermine their democracies.

But let me focus on two specific objections. There is a false equivalency in both the introduction and in Chapter 2. A distorted view of how we got here.

It talks about how the Republicans breached norms guiding the confirmation process when they blocked a hearing for Merrick Garland, because President Obama had proposed him during an election year, namely ten months before the 2016 election.

And then it says that Republicans breached confirmation norms, arguably, when they raced through their nomination just months before the 2020 election, even as people were actually voting.

If cites to a Wall Street Journal editorial. This is the introduction, which asserts that after all the Republicans were only doing what Democrats have done in the past. And
somehow this was ordinary politics.

Chapter 2 reflects the same false equivalence. I'll talk about that in a moment.
But so, my first point is about a false equivalent on one side, on the other, which I don't think is true.

My second point is about democracy.
It's not about democracy in the sense of the legitimacy of the institution, the extent to which courts overturn legislation.
The draft doesn't talk about how unique this moment is for our democracy, when one party apparently is seeking to embed its power for years and years to come through voting changes.

And where the current Supreme Court, whether intentionally or unintentionally, whether in good faith or not is enabling that. So, this is not about the usual ebb and flow of our politics. This is about distorting the electoral process itself, and ensuring that one, the Court will remain as presently constituted for years,
and years, and years to come.

Let me just talk for a moment about the false equivalency problem, which is Page 3 and 4 of the introduction and in Chapter 2.

Again, the general produce that the Democrats after all have done what the Republicans have done before, which contributes to what Commissioner Ifill said about this sense that this is really just partisan jabbering.

It's really not the case. The quote that the Wall Street Journal article rests on was from Senator Schumer who said, let's reverse the presumption of confirmation in an election year. Look more critically at it.

It doesn't say no confirmations in an election year. He doesn't say too close to an election. And in fact, he urged the nomination of a consensus candidate, not like someone on one side or the other on the ideological spectrum.

I would suggest that the draft reflect what he said, as opposed to characterizing it as they're both wrong.
And while the Republicans fault the Democrats for their criticisms of Republican nominee Bork, the fact is he had a hearing. He had a hearing. That it seems to me is a major difference.

The second point I want to make, just because of the time, is about this unique moment in time. Unique threats to democracy, which I don't think the draft adequately represents.

And again, it's not just a question of disagreeing with this or that ruling. I understand that that's not, should not motivate our conversations. I appreciate the concern about that.

This is not about the Court overturning legislative enactments. It is not only about legitimacy. It really is that the net effect, whatever the motive, whatever the basis, the net effect of rulings of this Court, ratifying efforts to restrict the voting of racial minorities, to regulate money in politics, restrict partisan gerrymandering, the net effect
of those rulings is to enable one party, the party supported by a minority of citizens to secure a tactical advantage for a long time, regardless of demographic trends.

Whatever balance is usually created by future appointments will be lost for years and years to come. But simply the usual self-correcting mechanisms of the Court will not work now when confirmation norms are ignored, and when the net effect is to ensure on party's continuation in power.

I appreciate the work in putting together Chapter 2. But as others have said, when you read Chapter 2 in connection with the other chapters you're left with a sense, you know, there's not really anything we can do, or even there's anything we should do. I don't think that that's the case. And I surely would hope --

The purpose of this Commission was to encourage discussion, as opposed to stop it. I think that the current chapter as currently
drafted stops that discussion, at least with respect to expansion. And I don't think that adequately, accurately reflects where the Commissioners are. Thank you.

CO-CHAIR BAUER: Thank you, Commissioner Gertner. I just want to make one quick comment, because we may have people tuning in at various points during the proceedings and they'll hear some very intense commentary focused on the drafts.

This draft obviously addresses a very sensitive and controversial issue. As all the Commissioners know, and as some Commissioners have noted, this working group draft was intended to jump-start deliberations on a very sensitive issue. I think we can agree from this energetic conversation that it has precisely succeeded in that objective.

Those who did work on the draft certainly understood they were not speaking for the Commission, or in the voice of the Commission. They were framing the issues. And
criticism of the kind that we're hearing on both sides are precisely what we would expect to hear in a vigorous debate.

But I want to make sure, because, again, I don't know who's getting on when, that they understand that the draft under discussion is a working group draft for deliberative purposes. And was not written by those who are involved in the preparation of the draft to forecast in any way, or to head count in any way, how Commissioners thought about this particular issue.

They were there to lay these issues out. There have been questions of balance raised here. Perfectly reasonable. And that's an excellent debate currently taking place, and precisely the one I would hope we would have.

But I just wanted to clarify for people tuning in: we're not talking about a draft report. We're talking about a working group deliberative document that is, by the way, accomplishing its purpose. It is certainly
motivating a very, very active conversation.

So, with that, I'd like to turn to Commissioner Tribe. Commissioner Tribe, I think your audio's off, I believe.

COMMISSIONER TRIBE: Sorry. Thank you, Commissioner Bauer, and Co-chairs Bauer and Rodriguez. I join everyone in complimenting you on the quality of the working groups that you've put together.

And I am emphasize as you did that we don't really have a draft report in front of us. This is our first opportunity to deliberate. And I think something that Commissioner Driver said earlier about Judge Bork makes me think about the nature of this discussion, which is intellectually lovely.

It is indeed an intellectual feast. But just as the nation was distressed when Judge Bork described that as his reason for wanting to be on the Supreme Court, I'm somewhat distressed by the meta level of this discussion.

We're talking about balance. We're
talking about theme, and tone, and style, and
sequence, and how some arguments are set up only
to be knocked down.

I appreciate all of those discussions.

But I think the time has come to talk about the
merits. That is, what really are the pros and
cons of various important changes?

I take as a central theme the point
that many people, and I include myself in this,
who believe that we are indeed at a break the
glass moment, a moment when we cannot simply
treat disagreements about particular trends of
decisions as matters of more or less, but a
moment at which, as Commissioner Gertner suggests
we may be on an irreversible path, the kind of
one way ratchet in which a series of decisions
suppressing voting rights, saying that the courts
are powerless to deal with gerrymandering,
eliminating the pre-clearance provision of the
Voting Rights Act, then gutting what is left of
the Voting Rights Act.

And these aren't always along partisan
lines. One of the first decisions in that series, a 2008 decision in the Crawford case, which essentially gave the Court's blessing to photographic identification in voting, regardless of disparate racial impact.

The entire series of decisions, the whole body of law is profoundly constrictive of democratic self-government. It is not just like any line of decisions, however important, that one might disagree with. The affirmative action decisions, the reproductive rights decisions, the gay and lesbian rights decisions.

These decisions that many of us regard as putting us on a collision course with a kind of wall, or a cliff over which we dare not fall, lest we lose our democracy, these decisions go to the very fabric of the American form of Government.

And for those who believe that that is the course on which the current Court has put us, whether because of the games that one political party or another played, for those who believe
that it is not just a question of the style of a
report, it's a question of the survival of what
we care the most about.

That's why the discussions in which
Commissioner Baude and Commissioner Griffith say
that essentially they don't want to give so much
oxygen to the view that people like me express.
They think this reports gives this too much
oxygen.

And Commissioner Ifill, and Charles,
and Crespo, and Gertner I think rightly say the
report gives too little oxygen to the positive
side of doing something fairly drastic to the
Court. It's not just a matter of the
distribution of oxygen. It's a distribution of
voting power in American society.

So, I think it's important to focus on
the merits of decisions. Not individual ones
like Shelby County. I appreciate that
Commissioner Griffith was in the room when it
happened.

And my objection to it is not that the
ultimate result in Shelby County was somehow
designed to help the Republican party. It's the
combined effect of those decisions to dismantle
the Voting Rights Act.

And that to cement malapportionment
and partisan gerrymandering, the combined effect
is to endanger the survival of self-government.

Now, I understand that there is no
obvious match between increasing the number of
Justices and reversing that course of decisions.

Among the things that the current
working group's paper suggests is that if you add
Justices they might still feel bound by decisions
like Crawford and Shelby County and Brnovich.
For all we know, we will continue along that
course.

But for those who believe that the
course is profoundly misguided, to say that the
only clearly constitutional path is blocked is
essentially saying, stop worrying about the
Court. The situation isn't all that drastic.
And for this report to send that message when one
believes the opposite I think would be a profound mistake.

And when I say this is the one clearly constitutional step that could be taken, the addition of the Justices to overcome what happened with the vacancy that was left for an entire year, followed by the sudden filling of a seat during an election, when I say it's clearly constitutional I obviously am in part addressing Commissioners Ramsey and Baude, who are not ready to say that it's beyond Congress's power to expand the Court, but who are adding fuel to the fire that will confront anyone who urges court expansion.

It will be said, even that is not clearly constitutional. Because some might question the motives that Congress has. If its motives were simply to improve the efficiency of the courts, that would be fine. But if the motive relates to the substance of the series of decisions, somehow that's wrong.

But it seems to me there's a big
difference between doing something to a Judge because you disagree with her ruling, and responding in a democratic way to an anti-democratic course of jurisprudence. The first compromises traditional independence. The second does not.

It seems to me also rather dubious to think that one could ferret out the motives of a multitudinous body like Congress. People will have different motives for doing something.

And the jurisprudence that I'm familiar with suggests that you don't invalidate an Act of Congress because you have doubts about the reasons that it had for doing what it did.

And while we're at it, what would be the reasons for a Court invalidating an enlargement by Act of Congress? Would one then not worry about the motives of individual Justices, about diluting their power by expanding their number?

I say, set aside those questions of motive, and ask, does it make structural sense in
terms of the survival of democracy to keep on the
table the one obviously clear exercise of
classical power available to Congress, to
send a signal of profound disapproval with a
jurisprudential trend that threatens an important
core value of our democratic system.

It's for that reason that I am
troubled by these working papers. They create
the impression that although as a theoretical
matter enlarging the Court is a possibility, the
arguments for it are swamped by the arguments
against, including now we are told that it may be
unconstitutional if you don't do it for the right
reasons.

I think a report that pours cold water
on the one clearly legitimate exercise of
Congressional power to respond to a dangerous
jurisprudential trend, a report that poured cold
water on that would be a report that I would have
trouble signing. Thank you very much.

CO-CHAIR BAUER: Thank you very much,
Professor Tribe. And let me now turn to
Commissioner Whittington.

COMMISSIONER WHITTINGTON: Thank you. I appreciate the work that my colleagues have put in to getting us to this point. We are tasked with difficult and divisive issues in the report, issues that divide not only the country at large, but the Commission itself. And I appreciate the efforts of the Commissioners in wrestling with the challenges of navigating those disagreements as best we can.

I understand that there are those who think we face Flight 93 choices, and dramatic actions will be needed to avert disaster. In such circumstances it is hard to find common ground. And I hope that we are able to continue trying to make progress to find that common ground.

I've been a sizable force to my scholarly career damning the informal workings of our constitutional order. By design and by necessity legal powers and duties of Government officials laid out by the text of the
Constitution have been supplemented over time with a flexible and sometimes less durable, but critically important set of understandings, practices, norms, and conventions, what I would call constructions that form and guide the operation of the constitutional system.

There are many occasions in which the Constitution delegates substantial discretion to Government officials that just like power. The framers understood that such delegations of power risked the possibility the power might be abused.

But they thought correctly that those risks had to be borne.

In many instances we have constructed a set of norms that have reduced the likelihood of abuse and hem in the range of choices that we think Government officials can responsibly make within the constant order.

These norms might not be judicially enforceable. But they are nonetheless viable to preserving the proper functioning of the constitutional order, and in some cases of a
constitutional democracy itself.

The violation or alteration of some of those norms would have immediate dire consequences. Commissioner Baude mentioned one, the possibility of state legislatures replacing a slate of presidential electors because they did not like the outcome of a popular election.

In other cases the violation or alteration of those norms would put us on a dangerous new path, with unpredictable and potentially grim results.

I do not think that the current materials do enough to acknowledge how big of a departure from deeply rooted constitutional norms court expansion under present circumstance would be, and how great the down side risk of going down that path would be.

I hope the final report will explain more the scope of the Congressional power in regard to court expansion. And also set out clearly the potential dangers of using the legislative power to reshape the membership of
the Supreme Court and alter the substance, in
order to alter the substance of the Court's
jurisprudence. Thank you.

CO-CHAIR BAUER: Thank you very much,
Commissioner Whittington. And I'd like now to
turn to Commissioner Grove.

COMMISSIONER GROVE: All right. Thank
you. Thank you so much. I've learned a lot from
all the comments today. And I think this chapter
in particular underscores something about our
larger society.

This discussion is kind of a microcosm
of our broader society that the level of
disagreement, not just what to do about some
problem, but whether there's a problem at all.

And I think it's valuable that we've
been talking about these things. I don't think
people in our society talk enough about issues on
which they fundamentally disagree. And we have
brought people together who do fundamentally
disagree.

So, of course for those who are
working on these materials, whether it's Chapter 1, Chapter 2, or some other part of the draft materials makes it a challenge. Because we can do certain things in terms of tone and balance. And I thought Commissioners Ifill, and Charles, and Griffith made wonderful comments along this line. They were very constructive.

But when people fundamentally disagree on the basics that makes it hard to find compromise. I nonetheless believe that we as a Commission can do so.

And I think this discussion shows just how committed we all are to finding these points of agreement. So, I think that we can. And I believe that we will.

Just a couple of comments about the specific parts of Chapter 2. I agree with Commissioner Driver that there's more to say about the panel systems.

And one thing that we don't say is actually a point that matters a lot to some of this constitutional interpretation. That is the
fact of, that it, it just has been historical practice.

We have historical practice from 1789 to the present that says that the Supreme Court sits as a single unit, rather than in panels. And when panel systems have been proposed they have been consistently rejected. And I think that's another point that one could have in this chapter. And I hope as it gets revised we include that.

And I'm very interested in the arguments that were articulated saying that court expansion might be unconstitutional if it's done on partisan grounds, or because members of Congress are concerned about Supreme Court decisions.

And I think that's a very interesting argument that seems to have percolated in very recent years. It's a very hard argument to make about court-packing legislation writ large, which usually is based on the necessary and proper clause of Article I.
Virtually every time in American history, from 1789 to the present, when members of Congress or the Executive Branch have proposed reform to the Supreme Court, those reforms have been supported more by one political party than another political party.

It doesn't mean they're partisan. It just means that political parties represent different perspectives and ideologies. That has been true of jurisdiction stripping legislation. And I've actually done the math on this to look at the votes on jurisdiction stripping legislation.

For example, proposals in 2004 and 2006 to take away the Supreme Court's jurisdiction over certain constitutional issues were overwhelmingly supported by House Republicans, and overwhelmingly opposed by House Democrats.

One can explain this in part on partisanship grounds. But it's also different perspectives on constitutional issues. So, I
want to associate myself with Commissioner Tribe's arguments. But it would be extremely hard in this context, and probably many others, to say that any particular legislation is unconstitutional because it is partisan.

So, those are just a couple of comments. I do think on the merits there's a lot of work to be done in this chapter, not only in tone, and I think Commissioner Crespo pointed to one argument that could be fleshed out far more than it is, and in powerful ways.

But I also see that people disagree substantially on these issues. And it's going to be a challenge, but one that I think we can meet. And I'll stop there.

CO-CHAIR BAUER: Thank you very much, Commissioner Grove. I would like to now invite, we do have time, and we wanted to make sure we had time. So, Commissioners who would like to use raise the hand function and join the conversation, please do so. And we can begin with Commissioner Baude.
COMMISSIONER BAUDE: Thanks. First, I have two examples about the constitutional point, and two thoughts on common ground.

So, on the constitutional point I think jurisdiction stripping is a good analogy. So, there's a lot of ink spilled. Congress has power to (audio interference) the federal courts more explicitly than it does over the power to control the size of the federal courts. And yet there's a ton of ink spilled in scholarly theories about when jurisdiction to bring legislation might still be improper, because it gerrymanders the disfavored norm, or has an improper intent, or is designed to control the Court's decisions. We'll talk about that of course later on at this meeting.

And I just note, none of that sort of nuance, or complications, or complexity has yet been brought to the court-packing debate. So, I think one just obvious question would be, are there similar analogies?

You know, if one thinks it would be
unconstitutional for the Court to, for Congress
to strip jurisdiction of our free speech cases
with the intent to disfavor our free speech
rights, would it be similarly unconstitutional
for Congress to do the same through court
packing, to try to overturn a free speech
decision or do something else?

Maybe not. Maybe there's some reason
that the two are disanalogous. But I think right
now we're willing to treat the discussion much
more complexly in other areas, and maybe have
missed this same kind of complexity or
distinctions that are on here.

Another example would be partisan
gerrymandering. I think a lot of people believe
that there should be some constitutionally
recognized norm against partisan, some type of
partisan districting behavior, at least for the
state legislatures. I assume also by the federal
legislature.

If one things that's true, then if
there's some norm about partisan gerrymandering
via the Supreme Court maybe those puzzles
wouldn't count as part of the gerrymandering
because they're, you know, changing the numbers
in a good way, rather than a bad way, or
something.

But these are not sort of fanciful
arguments. They're arguments that are taken
seriously in other areas. And I think we need to
think about why they don't apply here.

I'll just say, I don't mean to be
anti-common ground. I actually think the best
arguments for court packing are something like a
combination of what Commissioners Crespo and
Tribe have said.

I think if one things we are at the
break glass moment, and this is the only way to
break the glass, that is a very good argument for
court change.

And I think maybe it's, if we just
acknowledge them in those terms that the only
reason to do so is, this is that set of extreme
circumstances, then of course we're too
deadlocked to, you know, to disagree whether we're there. That might actually be more helpful than a lot of what was said. Thank you.

CO-CHAIR BAUER: Thank you very much, Commissioner Baude. And now I'd like to turn to Commissioner Ross.

COMMISSIONER ROSS: Thank you, Commissioner Bauer. A lot of the points that I would have made have been helpfully made already. So, I'll just make a small point that might be helpful to include in this chapter of the report.

There's a lot of discussion about the inevitability of a tit-for-tat following a sort of court expansion that would lead to a slippery slope regarding the number of Justices in the future, with one report citing, one study citing 60 to 65 Justices in the future.

And one thing I would love the report to expand upon is the context of the 1860s, where we did see an expansion, and a contraction, and then the expansion of the Court that didn't ultimately lead to a tit-for-tat and a slippery
I think it would helpful to kind of get a sense of what might have been different about that context that might lead us to think in this context we might head down that slippery slope.

Because often that argument is used as a conversation stopper with any sort of court expansion. Because I think many people fear, and recognize that a Court tit-for-tat expansion approach would be damaging to the legitimacy and the standing of the Court.

So, some reflections to the extent that there are any available about that particular era, and what stopped that particular kind of contraction and expansion. And whether proposals that just a gradual expansion of the Court that are also mentioned in this chapter of the report, that talk about expanding the Court one Justice at a time per administration might be used as tools that could resist any sort of tit-for-tat game.
CO-CHAIR BAUER: Thank you very much, Commissioner Ross. Commissioner Fallon.

COMMISSIONER FALLON: I can't express my thanks deeply enough to everybody who's participated in this conversation. I can scarcely remember a conversation that I felt more informed by, as we come to the end of the time allotted.

And I hope that some of what has come out in the conversation could be reflected in the report, perhaps in the following way. I completely understand that there are large issues about how to structure the chapter about which compromise may be very difficult. But one of the things that has been so helpful to me in listening to this conversation is, coming to understand better than I had before the perspectives from which people making some of the arguments were coming. And the great disparity in the perception of the relevant background facts between people on opposing sides.

As I said, I don't think that there's
any possible way that this Commission could reconcile those, or come to a consensus conclusion. But I think it would be so helpful to other people trying to understand what's going on here if the positions could be formulated with the nuance, and in some instances the passion that we've heard over the past hour or so.

And so, to my fellow Commissioners, if some of you who have spoken so marvelously, informatively, and passionately would be willing to write a few paragraphs, casting into writing what you have put before us here orally

And if there was some way to weave these together so that everybody reading the report would have the benefit of those nuanced and passionate perspectives, I think it would be a great, great, great step forward for this Commission toward accomplishing the most that we reasonably hope to accomplish.

CO-CHAIR BAUER: Thank you very much, Commissioner Fallon. I'd like to turn now to Commissioner Boddie.
COMMISSIONER BODDIE: Yes, hi. So first of all I, this has been a very powerful exchange, and a really important debate. And I just want to make a few quick points.

One is, obviously this is an issue that is very much in the public eye. And so I think, especially to Commissioner Ifill's point about the need to acknowledge that this is a matter to which there's significant public attention.

And that to the extent that we are privileging a very elite frame of these views, that we really need to be much more attentive to how, you know, folks who don't necessarily, or are not necessarily well versed in constitutional law or don't teach constitutional law, how they're perceiving that debate.

So, in terms of the language that we use, and in terms of how we frame these debates I think it's critically important.

The other question that I had, and then I'll be quiet, is the, I'm not sure that
I've heard a response to the points that Commissioner Crespo made about the decision by the Senate to disregard essentially, or to refuse to act on Judge Garland's nomination, and the consequences of that decision, which was to leave the Court at the number of eight.

And so, that was already a disruption of a norm. And I'm not sure that I've heard a response to that. So, if anyone cares to give it, that would be great.

CO-CHAIR BAUER: Thank you, Commissioner Boddie. If somebody does want to give a response I have a couple of other people in the queue here. But let me go now to Commissioner LaCroix.

COMMISSIONER LACROIX: Yes. I have a few thoughts related to both this discussion, and I think what we'll be discussing with Chapter 4 a little bit later.

And I guess I want to say something about this doctrinal and legal analysis of court expansion, and of Congressional control more
broadly, which again we'll talk about in Chapter 4. And that is, so first I think this is something that the chapter, both chapters could profitably talk about more.

But I think something that is very difficult in this case law, and in the constitutional law of this area is distinguishing between political and partisan efforts.

So something, you know, those of us who teach constitutional law or, obviously all of us are equally engaged in these debates, so we encounter this.

But it's just, a difficult distinction I find in teaching is to convey to students the appropriateness of political control, which is distinct from partisan control.

And that the political branches, understood as the President and Congress, have a constitutional role to play. And this is why we have checks and balances as one of our kind of key values.

And so, if political means something
different from partisan, what might that mean?
And this ties in with some of the comments that
have just been made. Is it appropriate for the
Court to be acted upon by the other two branches
of Government? I think the Constitution says
yes, in fact, that is entirely appropriate.

And so, the people's mechanisms, we
the people's mechanisms of control come through
the President and Congress, the other branches.
It doesn't necessarily mean that those are
therefore partisan. Although, as Commissioner
Grove pointed out, they may have worked out that
way, or track that way.

So, one could say the Commission is
engaged in that, because we have been convened by
the Executive to think about precisely these
sorts of, if not controls, sort of discourses
with the Judicial Branch, the Court itself.

And then I'll just say as another note
about doctrine, one of the big cases about
Congressional control of the Supreme Court, again
on the subject of jurisdiction stripping, which
we'll talk more about, ex parte McCordle, the
Court clearly says motive is irrelevant.

Now, they also say -- and as we know
kind of looking back on that case, the Court was
trying to save reconstruction, its Chief Justice
Chase, a proponent of radical reconstruction.
But we still say in looking what the Court says,
the Court says it's not about motive. That's not
really part of our inquiry.

So, I guess I would just leave it at
that. But just this political versus partisan
distinction I think is really important. And
it's just lost in a public debate. Thank you.

CO-CHAIR BAUER: Thank you very much,
Commissioner LaCroix. Commissioner Adams. I'm
afraid your audio is off, Commissioner Adams.
Yes, it's still off. Is that, hold one second.

COMMISSIONER ADAMS: Can you hear me?

CO-CHAIR BAUER: Yes. Perfect. Thank
you.

COMMISSIONER ADAMS: Now of course I
can't hear you. Hold on one second. Why don't
you go to another Commissioner, and let me see if
I can fix this problem.

CO-CHAIR BAUER: Is Commissioner Adams
generally audible to people? I can hear her
clearly, yes. You are audible. No? Turning
off. We'll come back to you, Commissioner Adams,
momentarily.

CO-CHAIR RODRIGUEZ: Commissioner
Bauer, you turned your audio off.

CO-CHAIR BAUER: Yes. Here I am.
Commissioner Rodriguez, and then Commissioner
Tribe.

CO-CHAIR RODRIGUEZ: Thank you,
Commissioner Bauer. I first wanted to venture a
kind of answer to Elisa's questions that she
posed at Commissioner Boddie's questions. She
posed it.

And the individual groups have had
debates about how to situate the recent
nominations. How to tell an account of them that
explains why we are where we are.

And this particular doc chapter tells
one version of that story, in an effort to explain why the calls for court packing began in 2017, 2018, the kinds of calls that have not been heard until relatively recently, by telling the story of these nominations.

But even reconstructing this recent past requires interpretation. And it also raises a hard question to answer, which is what determines when a norm has been violated. And perhaps more importantly, when is it appropriate for norms to give way to new understandings?

And as much of this discussion I think underscores, no one will be satisfied with one version of that story. But it is relevant in thinking through how to understand the Court today, and the possibilities of reforming it.

I also wanted to raise a point that has been raised to us in public commentary quite forcefully. And that is that there is support not only for keeping the Supreme Court at nine, but for enacting a Constitutional Amendment to fix the number of Justices at nine.
And there are members of Congress, hundreds of members of Congress who support this amendment. And I think the amendment reflects what Commissioner Driver said in the last session about the normative power of the actual. But the reason given by those who support this amendment is so that Congress can never interfere with the size of the Court for partisan reasons, or reasons that favor one point of view, or one political party.

And so, that's the principle behind taking away Congress' power through a Constitutional Amendment. And in some way, by implication, the proposal of the amendment suggests that Congress might well in fact have that power absent a change to the Constitution.

But I think that this question about whether we should fix the Constitution to never, to not allow Congress to ever interfere with the size of the Court for partisan or political reasons leads to the central question that is
animating this discussion.

And that is, is it possible in this moment to pursue expansion without seeming partisan, or without, because of seeming partisan, to prompt retaliation?

And even if the motivation for expansion is not partisan, and follows what Commissioner LaCroix just said about the difference between partisan and political, how do we decide if it's based on disagreement with the Court's jurisprudence? And how do we know if it is based on much more fundamental concerns, as have been expressed by some Commissioners?

And I think one of the things that we're learning from this conversation is that as a Commission we're only going to be able to answer that question as a collective. And it may not be possible to answer it at all to all people's satisfaction. But it is a question on which people's points of view ought to be expressed.

And then the last thing I want to say,
that some of this conversation brings to mind, and it relates back to this question of conventions or norms.

And that is, when thinking about expansion of the Court as a potential reform, or not even imaging it as a reform, but thinking about introducing it into public discussion, in that discussion where does the burden lie?

Does it lie with those who would purport to change the structure of the Court, to address what they think of as either a threat to the future of democracy, or something less than that, but still justifying expansion?

That doing so would in fact, or is likely to serve the institution, but in fact or is likely to serve the people? Would pursue or solidify the value of criteria that we talked about in the last session?

Or is the burden of persuasion instead on those who would raise the risks of expansion as a way of trying to prevent that conversation from proceeding, to prove that those risks would
in fact materialize?

And again, I don't think that either of these questions is one that we as a Commission could answer. But those are the kinds of questions on which we I think are well suited, and have begun to offer perspectives that should hopefully inform the debate.

CO-CHAIR BAUER: Thank you very much, Co-Chair Rodriguez. I am, I have in the queue Commissioner Tribe and Commissioner Charles. What I would like to do is just quickly double check to see whether the audio has been fixed for Commissioner Adams. Because I know --

COMMISSIONER ADAMS: Hi. Can you hear me?

CO-CHAIR BAUER: We can hear you.

COMMISSIONER ADAMS: Oh, that's wonderful. I'm going to make a very, very short intervention. So, I want to make sure that we're going to have time for everybody who is queued to be able to speak.

I simply want to go back to a point
that Commissioner Fallon raised, which was about trying to capture some of the texture of this conversation in this chapter.

I think it's pretty clear that it's going to be difficult to get consensus on the Commission around Chapter 2. But what I do think we've done today is model something that I think is increasingly rare in our political consciousness.

And that is the ability to talk to each other, notwithstanding our differences. And so, it might be useful in framing the chapter, both taking up Commissioner Fallon's idea of having maybe some short excerpts of some of the presentations that have come today.

But to also say that even if we cannot reach some level of agreement or consensus on the chapter, that there's a good faith ongoing desire to engage in the kind of discussion that are the hallmarks of a democratic republic, one which I very much believe in.

CO-CHAIR BAUER: Thank you very much,
Commissioner Adams. Commissioner Tribe,
Commissioner Charles, and then Commissioner Levi.
But I'll come back and recognize each of you.
Begin please, Commissioner Tribe.

COMMISSIONER TRIBE: The reason I put
my hand down is that I've decided I didn't really
have to speak.

CO-CHAIR BAUER: Okay.

COMMISSIONER TRIBE: Silence is
sometimes golden, I suppose.

CO-CHAIR BAUER: Thank you,
Commissioner Tribe. Commissioner Charles.

COMMISSIONER CHARLES: Seconding the
comments of Commissioner Adams, and always taking
the opportunity to associate myself with
Commissioner Fallon, I do think that there is a
common ground in terms of surfacing the
questions.

Resolution is, may not be possible.

But just articulating and surfacing the various
questions that we are surfacing today and now I
think is important and beneficial, both for us,
but for the country as a whole.

CO-CHAIR BAUER: Thank you very much, Commissioner Charles. Commissioner Levi.

COMMISSIONER LEVI: This is not intended, this really is a response to Commissioner Crespo. But just to give a bit of context.

Speaking as a former federal judge, and as a chief judge in a highly impacted district, one of the frustrations that members of the judiciary have had is that Congress has been unwilling to confirm nominees, many of whom, from my point of view were quite obviously well qualified for the position, whatever their party, during the run up to an election.

And it's just quite commonplace to hear members of Congress say that the door has shut. And sometimes they think the door has shut at six months, sometimes it's at eight months. Whatever it is, this has become something of a tradition.

And I don't say that it's a justified
tradition. In fact, I feel quite the reverse about it. But they do not feel that they have changed, for example, the size of the D.C. Circuit when they refuse to confirm or act on a nomination to the Circuit.

And I suspect that at least one way to view the nomination of such a qualified person as Merrick Garland is that they did not consider that they were changing the size of the Court, but they were simply waiting for the election, as they do in so many other judicial nominations.

Not that I think it's a good practice, because I don't. Thank you.

CO-CHAIR BAUER: Thank you very much, Commissioner Levi. I want to give, we have a few more minutes. And I'm going to also just take one concluding remark, if I can abuse my position as moderator. But let me invite any further comments along these lines. Commissioner Gertner.

COMMISSIONER GERTNER: This is a bit along the lines of what Commissioner Levi just
said. I think it's important that what we do, even if we can't come to a resolution, that what we do enables the conversation to go forward. That's what I thought the task of this Commission was going to be. Not necessarily coming up with a slate of recommendations, but to enable the conversation going forward.

The concern that criticism of the Court, and I say this as a formal federal judge, is while the criticism somehow undermines judicial independence, I think is just not true. If the institution is so fragile that criticism undermines it, then we are really in trouble.

Likewise, I fear that worrying about partisanship in these conversations also stops the conversation. And particularly the argument that partisanship even flows into our conversations here will, you know, doom the constitutionality of any reform.

I think that those are really conversational stopping. And I think that's not where we ought to be. Everything should be on
the table. All criticisms should be on the table. Not this or that decision. I appreciate that. But criticisms about structural issues, the impact of a series of decisions on the political process, that's a fair criticism. And it seems to me that could enter into our discussion.

I agree with others that we're not going to come to a resolution of this. The most that we can come to is, it seems to me, the ability to fairly describe all sides of the debate, so that the conversation can continue.

CO-CHAIR BAUER: Thank you, Commissioner Gertner. Is there any other Commissioner who would like to speak to the issue in the few minutes that we have remaining?

Let me just close this out by saying, I want to associate myself with, first of all, those who think this conversation has been extremely constructive.

I want to associate myself particularly with what Commissioner Adams said
about just precisely this kind of engagement being so important to this country at this particular time, and with Commissioner Fallon's suggestion that if we capture this conversation in our draft, then we would be doing what our charge called upon us to do, to inform the public debate.

And that's what the President asked us to do, to provide a thorough, balanced, critical appraisal and account of that debate. And so, I really am very impressed with what I've heard over the last more than an hour. And I think it is an experience that we should all take with us into the next round of conversations.

And I just want to emphasize again for those who tuned in later, this is the first day of deliberations. And as you can see, they're going to be informative, constructive, and engaged.

So, I'll concluded on that note. We will recess for lunch, and return at 1:00 p.m.

COMMISSIONER TRIBE: He means 2:00
p.m.

CO-CHAIR BAUER: Right, 2:00 p.m.

Sorry about that.

(Whereupon, the above-entitled matter went off the record at 12:50 p.m. and resumed at 2:00 p.m.)

COMMISSIONER ANDRIAS: Welcome back, everyone. Hi, welcome back. My name is Kate Andrias. I serve as the Rapporteur for the Commission as well as a Commissioner. Thank you to everyone for an extraordinarily productive deliberation this morning.

In this session, we will discuss the materials on term limits. As with the prior sessions, these discussion materials were prepared by a working group within the Commission and do not reflect the work or views of the Commission as a whole or of any particular Commissioner.

They were designed to be inclusive in their discussion of the arguments for and against reform to assist the Commission in robust, wide
ranging deliberations.

We will once again begin with a brief summary of the content of this set of materials, after which point I will call on the Commissioners who have indicated, in preparation for this meeting, their interest in addressing the topics.

Commissioner Rick Pildes will start us off by summarizing the materials. Commissioner Pildes?

COMMISSIONER PILDES: Thanks very much, Kate. And I want to, like everybody else, thank the co-chairs of the Commission and also all my fellow Commissioners.

So I'll summarize the discussion materials that have been distributed regarding proposals that the country should consider changing the current system of life tenure for Supreme Court Justices to a system in which the Justices would serve for a fixed term of a specific number of years.

I'll refer to this as a system of term
limits for Supreme Court Justices, and it's one of the proposals that has been central in discussion of possible Supreme Court reform going back at least the last 20 years or so. So it's a proposal that pre-dates the more recent controversies around the Court.

I think it'll be clear as first to describe how a system if term limits for the Supreme Court would work, and then I'll briefly summarize some of the main reasons materials discuss as to why a system of term limits would be better for the Court and for the country as well as some of the concerns that a term limit proposal raises.

The main term limits proposal that the materials address is one in which Justices would be appointed to terms of office that would last for 18 years. This proposal, that would mean that each President, in a four-year Presidential term, would have the opportunity to nominate two Justices to the Court.

Most proposals suggest that the
President's first nomination should arise in year one of a new presidential term, and the second in year three, to avoid nominations arising during election years. So in short (audio interference) would serve for 18 years. Each President, in a presidential term, would have a similar number to nominations.

The materials first survey the practices in our state Supreme Courts and the top courts in other major constitutional democracies. And as the materials describe, every state but one imposes either term limits, or mandatory retirement ages, or both, for their state Supreme Court judges.

And similarly, the United States is the only major Constitutional democracy that does not impose either term limits, or mandatory retirement ages, or both, on the judges for their highest courts.

The materials that discuss the following main justifications for term limits, and I'll highlight a few in the short time here,
first, term limits would regularize the
appointments process and make appointments more
predictable.

Under the current system, there's a
great deal of randomness in the number of
nominations that a President has the opportunity
to make during a four-year presidential term.
Whether seats on the Court become vacant during
any presidential term depends on the vagaries of
when Justices just happen to leave the bench,
whether it's through illness, retirement, or
death.

Some Presidents have the opportunity
to fill several seats during a four-year term.
Other Presidents end up with no vacancies during
a four-year presidential term.

Given that the Constitution has
created a political mechanism for filling seats
on the Court, that is presidential nomination and
Senate confirmation, term limit proponents argue
there's no obvious justification for why
different Presidents should have such different
opportunities to nominate members for the Court.

   In addition, the current system
creates a risk that some members of the public
will perceive Justices to be retiring, or failing
to retire, for what materials call strategic reasons. That is the Justices can be perceived
as choosing to retire based on the timing of
whether they prefer a particular President to
fill their seat. Whether this occurs or not,
the perception that it occurs could undermine
public confidence in the Court.

By regularizing Supreme Court
appointments, a system of term limits would make
the appointments process, in the view of
supporters of this proposal, appear to be more
fair, less arbitrary, more predictable and, in
addition, since all Justices would serve 18 years
and only 18 years, term limits would also remove
the incentive that currently exists for
Presidents to consider only relatively young
nominees who have the potential to serve for many
decades.
The materials provide additional justifications for term limits, but to keep these comments brief, I also want to highlight some of the concerns about term limits the materials discuss. One is a concern about whether a system of term limits would compromise at all the extremely important value of judicial independence.

Another concern the materials discuss is whether term limits might destabilize judicial doctrine, because there would be more frequent turnover on the Court.

Yet another concern is that when it known that each President will have the opportunity to nominate two Justices, will that make the Court even more of an issue in electoral politics? And how would this affect public perceptions of the Court as an institution?

Finally, the materials discuss the important issue of whether the adoption of term limits would require a constitutional amendment or whether it would be constitutional as well as
prudent for Congress, through ordinary legislation, to change the system of life tenure to one of (audio interference) appointments to the Court.

The materials also discuss in detail various practical issues that would have to be addressed in implementing a term limits proposal. But I'll stop here to provide as much opportunity for discussion as possible.

COMMISSIONER ANDRIAS: Thank you, Commission Pildes. I'd like to invite all Commissioners who are able to turn their cameras on, we will hear from those Commissioners who have indicated a desire to address this issue. And then with any time remaining, please feel free to raise your hand, and I'll call on you.

Commissioner Michael Kang?

COMMISSIONER KANG: Hi, thank you, Commissioner Andrias. So I had a question about whether changing the Supreme Court term from a lifetime tenure determines the type of justice we end up with on the Court.
So changing the term obviously changes the job to a degree. And you might expect Presidents to nominate a slightly different set of candidates. The job might become more attractive to some candidates, less attractive to others, with an 18-year term. And it might not be safe to assume that Congress can impose a term limit, and we end up with the same people on the Court as Justices.

So for example, without life tenure the job becomes less of a career capper leading directly into retirement. A worry might be that a term limit shifts the candidate pool toward nominees who hope to leapfrog to other offices. Maybe they're more ideologically extreme or partisan in connection with that worry. Maybe they're less focused on their jobs with the Supreme Court and a little bit more worried about what happens after their 18 years on the Supreme Court.

Now, there is some reason to think that this is what happens with some elected
offices that are term limited at the state and
local level. And having raised that concern, I
wanted to take a shot at helping to address it.

A co-author and I have proposed term
limits for state supreme courts. And in our
work, we actually conclude that a term limit at
state level probably wouldn't significantly
change the candidate pool in the ways that I'm
wondering about here.

And there we argue that high judicial
office still requires candidates to reach a
certain level of experience and seniority, at
which point a sufficiently long single term still
allows them to reach the same tenure length and
retirement age that they do now without a term
limit. At the state level, the average term is
about 12 and a half years, average tenure. And
they typically retire, on average, around 64
years old.

In other words, state justices would
still be retiring after a similar number of years
in office, similar age as they do without a term
limit. And if that's right, a term limit
wouldn't dramatically change career incentives
for state justices.

Now, of course, state Supreme Court
and the U.S. Supreme Court are really different
institutions. State justices, for instance,
typically need to be elected. But that said, I
think there might be similar arguments here at
the federal level why an 18-year term wouldn't
necessarily change everyone's incentives in a
problematic direction.

So for one thing, an 18-year term is
probably long enough, and most viable Supreme
Court nominees old enough when they're nominated,
that an 18-year term would probably put most
Justices in striking range of retirement anyway
after 18 years. And if that's true, we might end
up with a similar set of Justices, because it's
not changing their career trajectory too much.
It still leads, effectively, to retirement at a
similar age.

And what's more, as Commissioner
Pildes said, with a term limit, as opposed to life tenure, Presidents would no longer be incentivized to nominate younger nominees. They'd probably nominate, on average, people who are a little bit older than maybe now.

And older Justices mean that Justices are a little bit closer to retirement on average, and maybe they wouldn't be as influenced by what they're going to do after their 18 years are up and their post-Court, or at least their post-junior Justice, career is over.

So I think there are good answers, actually, to the concern I raised, including the ones that I've brought up and others, but I wondered if it made some sense to address these points in the chapter itself. Thanks.

COMMISSIONER ANDRIAS: Thank you.

Commissioner David Strauss.

COMMISSIONER STRAUSS: Thank, Commissioner Andrias. And thanks to the members of the Commission who put together this chapter which I thought did really a marvelous job of
marshaling evidence from other places, and the
term limits there, and also the part of the
chapter that works through all the complexities
in imposing term limits.

I had two concerns, and they really
are directed more to the report than to the way
Commissioner Pildes presented the report, which
to some degree are maybe these concerns. But
they did strike me when I read the draft. So let
me try to articulate them.

One is small, one is bigger. The
smaller one is that I think there are arguments
for term limits beyond those made in the draft.
The ones made in the draft really are focused on
kind of the political aspects of appointments,
not using that many the majority of the way, but
Presidents will make -- the number of
appointments a President makes will be arbitrary.
There will be various kinds of political
machinations around appointments.

There are reasons for term limits that
really don't have anything to do with courts or
with political appointments. So my impression is that, if you look at the boards of corporations or of not for profit entities, that term limits are common and, I think, are considered best practice. And the reasons for that should apply to courts to some extent as well.

You want -- and with what I'm trying to articulate, that when people stay in a job too long they recycle old ideas, they basically stop thinking. Term limits can provide some of the benefits that mandatory retirement ages do without running into some of the complications of natural retirement ages like forcing the age of appointment lower.

They can provide a kind of generational diversity which is generally a good thing. And just in the idea that you want, it's useful to have a fresh set of eyes looking at problems that are complicated and require the exercise of good judgment.

And the fact that this is accepted in these other realms where people have
responsibilities that obviously are not -- but they aren't completely different either, maybe furnishes some additional arguments for that side, not necessarily to say that they are conclusive arguments.

The bigger concern I had, which is a little bit related to that, is that what comes through to me from the chapter is that the main argument for term limits is maintaining a long term political balance on the Court.

As the report says, as the chapter says, not the report, the chapter says, the draft chapter, says at one point the parties who win the White House should have the same or roughly equal chance to shape the Supreme Court through new nominations. And that's essential argument in the draft. It's repeated in various ways a couple of times.

And I get the point. It's an important point, but my concern is that it will normalize the idea that appointments are kind of an extension of a party's agenda into the courts,
that judicial appointments are the judicial wing
of that party, or that administration, or that
movement. And I think we should not normalize
that.

Now, there are some shades of gray
here which make this a difficult kind of point to
make. One shade of gray is, you know, we do
want, as the draft says, the draft says we do
want the Court, long-term, to be in some way
responsive to public opinion. We don't want it
to be completely out of touch with public
opinion. I think that is generally accepted. I
think, for what it's worth, it's right. But it's
not easy to (audio interference) should be. If
we really wanted to be responsive to long term
public opinion, or public opinion as it ebbs and
flows, then that Justice should stand for
election. And since that's not something that is
being widely advocated, we want some limit on the
extent to which there is this political
responsiveness.

But it's hard to specify exactly where
that line should be. My own preference would be
to put it in negative terms, that it's a bad
thing if the Court gets too far out of line with
public opinion for too long, granted that we want
some mechanism to make sure it stays up with
public opinion, which is a little bit the flavor
I got from some passages in the draft.

But however we do that, I think it is
a difficult question. But we should be careful
not to present it as simply a matter of, you
know, if you win a lot of elections you get to
make a lot of appointments. If you don't, you
don't. It's more complicated than that.

And the other question is to what
extent a President's anticipation of how a
prospective Justice will vote plays a role in the
appointment. Where, again, the sort of absolute
position is, oh, it should play no role whatever,
or, oh no, that is exactly what the President
should be thinking about.

You know, my own view at least would
be we need to reject both of those. The first
one is both not realistic and not really what our system seems to envision. And I also think the latter one, which is that the President should be intently focused on the specific positions that a nominee would take, that we have to make sure this person is, quote, unquote, "sound."

I think that has crept into the system, maybe not crept. It's become, in some ways I think, central to appointments. You see symptoms of that, this very careful vetting, not just to make sure that this is a person whose general orientation the President is comfortable with, you know, forget the President, our folks, our movement folks don't like this opinion, take that person off the list. I think some of that is going on and I think it's a bad thing.

You also see it in the cries of betrayal when an appointee votes in a way that people of the party that appointed him or her don't like, the idea they betrayed us and they were disloyal to the team. And the cry of let's not have anymore of Justice X, referring to a
previous appointee who was a disappointment. Let's make sure that we don't get a Justice X again.

I think all of these are symptoms something very unfortunate. And I think, to some degree, the argument that the point of term limits is to give Presidents a chance to shape the Court normalizes that. And I think we should not normalize that. I think we should -- at least my view is we should not -- my view is that should not be normalized as far as what position the Commission should take. I think the position should be surfaced that there are concerns about normalizing that, even if there are arguments on the other side.

COMMISSIONER ANDRIAS: Thank you, Commissioner Strauss.

Commissioner White, Adam White.

COMMISSIONER WHITE: Thank you. Thanks again, everyone. My comments actually pick up a bit where Commissioner Strauss left off. The proposals in this document for term
limits, they do present profound risks, I think.

Some of them are foreseeable, and they're
foreseen in the document. But other risks are
subtler, and I think they should be highlighted
in the final report.

The document describes new processes
for judicial appointments to help guarantee that
every presidential election delivers not just two
new Supreme Court vacancies but also two
Justices. And the document identifies some of
the practical problems inherent in those
proposals.

COMMISSIONER WHITE: But more
fundamentally, the new process for judicial
appointments would further expand and entrench
presidential power at the cost of the Court, and
the Court's reputation, and at the cost of the
Senate and, I think, at the cost of our
Constitutional politics which are already very,
very presidentially centric. And I think that
we, the Commission, should recognize and consider
these problems.
As was just noted, the term limits framework would cement a notion that Presidents are entitled, eventually, to Justices of their choosing. Our Constitutional system's never guaranteed this, and for good reason. And in an era when Presidents wield ever more power and political weight, relative to the rest of government, we shouldn't vest them with even more power and political weight.

The proposal would also cement a notion that the Senate should jump into action whenever the President (audio interference) and our constitutional system has never guaranteed this and, again, for good reason. Our system requires Presidents to persuade the Senate to act, and that creates better incentives for both the Presidents and the Senates. The nation should preserve constitutional processes that empower the Congress and not create still more trends to further disembowel Congress.

Finally, there's real danger in treating seats on the (audio interference)
expecting two of them to be delivered
automatically after every inauguration. Our
Constitution doesn't map judicial vacancies onto
the cycles of presidential elections. Professor
Feldman noted this in his testimony when he
observed that the vacancies, quote, "are
distributed roughly randomly across time." They
are therefore, in an important way, accents.

Any accidental feature preserves the
independence of the judiciary, even in the face
of the reality of the political appointment
process. Who controls the Court,
jurisprudentially speaking, is at least, to some
degree, the result of chance.

Now of course, we know that it's not
completely random, and that there is a trend of
judges, at all levels of the judiciary, leaving
their court at a time that seems politically or
ideologically convenient.

To the extent that this Commission
sees that as a problem, I do think it is a
problem. I think we ought to confront it
directly, and I don't think that can be solved through the changing of the laws so much as changing of norms and pushing back against that kind of mindset among judges.

But I think it would be a mistake to try to actually entrench that mindset, not just the minds of judges and the minds of the rest of the system. Presidents shouldn't treat the Supreme Court (audio interference) own office's property, nor should the Justices themselves, nor should the rest of us. And our reports shouldn't implicitly or explicitly endorse reforms that reinforce a mistake in a dangerous (audio interference) power over the Courts and a presidential election's power over our constitutional order.

The reason why I asked to speak to this issue in particular is, I have to admit, I came to the Commission with, I think, instincts in favor of term limits, recognizing some of the problems that have been identified in the report and thinking that maybe the time has come for a
change.

I have to admit the more that we've studied it as a Commission, and as I've thought through the draft document here, I've been, I think, convinced strongly in the other direction, precisely for the underlying constitutional norms regarding presidential power that I think this document inadvertently entrenches.

Thank you.

COMMISSIONER ANDRIAS: Thank you.

Commissioner Griffith?

COMMISSIONER GRIFFITH: Thank you, Commissioner Andrias. And I just want to associate myself with everything that Commissioner White said. He said it better than I would. I won't repeat. I'll try and find some distinctive points.

I want to start with one that the Commission has been repeatedly told that we're not to make recommendations. This chapter comes awfully close to me to seeming like we're making a recommendation. I think it crosses that line.
I think the points that you had opposed term limits are not given as much discussion as they should be. So that would be my first comment.

Second, I agree with Commissioner Strauss that the discussion assumes that party control of the Court is a given and it's not something to be resisted. It implies that the membership of the Court needs to keep changing to keep in step with election results.

As I said earlier today, I thoroughly reject that idea of judging. Now, I don't deny that Presidents, Congress, view Supreme Court appointments as political spoils. But I think we should do what we can to resist that and move away from it where we can. I think the way that the term limits discussion is teed up here, that doesn't do that.

Just two quick points in closing. Will shorter term limits, terms lead to less contentious set of confirmation hearings? I'm not certain of that. That's not clear to me. In
fact, it might make the appointment of Justices
even more deeply embedded in the politics of the
moment. And I agree with Professor Feldman here,
I don't think that's a good thing. I think it's
likely to lead to less judicial independence.

And, finally, just to note, I think
there's much that would be lost by limiting a
Justice's service to 18 years. Here's just a
partial list of the Justices who served more than
18 years: Chief Justice Marshall, Chief Justice
Story, Justice Holmes, Brandeis, Brennan, Scalia,
and Ginsburg.

I think most of us would agree that
their service, as varied as their views were,
were a great public service to the nation. And
I'd hate to lose the benefit of those sorts of
careers, with the experience that comes with them
and even more. So, thank you.

COMMISSIONER ANDRIAS: Thank you.

Commissioner Whittington?

COMMISSIONER WHITTINGTON: This
section grapples with an important and
fundamental feature of constitutional design. And I think the draft materials do a reasonable job of exposing many of the complexities.

Determining how to design the process of filling judiciary, and more generally how to design an appointment system, was difficult enough in 1787, but it's probably even more difficult for us. The framers could assume, or at least hope that both parties would not plan an important role in how the Constitutional system would work. They're wrong about that.

And we would have to grapple with that reality in designing an alternative framework. I'm not very enthusiastic about the current way in which we fill vacancies in the judiciary. But I'm not yet convinced that we've really grappled with all the difficulties of the alternatives either.

In this particular context we have to deal with two particular problems. First the Court has become a much more powerful and important institution within our constitutional
system than it once was. That has developed over
a long period of time.

But we are also faced with a second
and much more recent development, and that is
that we have deep partisan polarized divides over
how to think about constitutional adjudication
and the substance of the constitutional rules.

I'm not sure that the current
materials do enough to grapple with that reality.
In particular, the materials are written in a way
that ties the discussion very closely to
presidential elections and the presidential
election cycle. But it is not clear why
presidential dominance and a presidential
perspective should be our starting point if we
were thinking anew about how to staff the
judiciary from scratch.

And given the setup of the argument on
behalf of term limits in particular, the bill is
also going to regularize the timing of changes in
the membership of the Court. The term limits
only really, and really only partially, addresses
half of that equation, the timing of vacancies. But the whole plan is thrown into disarray if the other half of the equation is not (audio interference) appointments. And obviously the real problem here is the prospect the vacancies occurred during a period of divided government. And I think we have to grab that bull by the horns and actually deal with it much more directly than the current materials do.

I think solving that particular problem has to be front and center. And the chapter might need to be bolder and more ambitious to actually meet that challenge. For example, should we want to preserve anything like the current Senate confirmation process if we were starting fresh and knowing what we know now.

If we want to take into account Senate elections as well as presidential elections, then that would push us in one direction. If we really want to avoid giving any (audio interference) effect of divided government, then that would push in a very different direction.
It is not obvious to me, at the end of the day, that there's a better alternative than what we have now. But I think we'll need to do more to expose the difficulties of the alternative proposals. Thank you.

COMMISSIONER ANDRIAS: Thank you.

Commissioner Roosevelt?

COMMISSIONER ROOSEVELT: Thank you, Commissioner Andrias. I'd like to start by agreeing with some of what Commissioners Griffith and Commissioner Strauss have said. Because I don't think the Commission should endorse a view of judges as partisan actors or of appointments as a way to maximize political power. I don't think we should say that those are good things. And I think the report can make clear that we aren't doing that.

Now, that said, I think we do have to acknowledge that it matters who the judges are. People wouldn't care so much about the Court, they wouldn't fight so much over the appointment process if it didn't matter.
Now that doesn't mean that judges are partisan. As Commission Griffith mentioned earlier, Justice Breyer recently wrote a book warning against a partisan understanding of judging. But part of what he said there was that, of course, judges differ. Different people have different backgrounds and experiences that shape their world views. And that can affect judging.

And then they have different jurisprudential philosophies about constitutional interpretation or about when and whether judges should defer to the views of political actors. And they may resolve tensions between constitutional values in different ways. So the constitutional (audio interference) individual liberty, and state sovereignty, and democratic participation, and federal supremacy, and lots of other things that are sometimes intentioned. And sometimes judges have to balance those values.

There are different ways of doing that. And within some bounds, they're all
plausible, they're all legitimate, they're all based in a reasonable attempt to find the right answer under the Constitution. So they're not partisan, but they are different.

And I think everyone would agree, for instance, that the Warren Court and the Rehnquist Court, and the Roberts Court are different. And taking them as an example, the question that term limits presents really, I think, is what should determine which of those courts we have.

Under our current system, some of it is random chance if Justices can't control the time of their departure from the Court. Some of it is strategic behavior if they can control the timing. Some of it is partisan hardball as the political parties fight to fill vacancies or stop the other side from doing so.

And I think it would make more sense to connect it, in a consistent and predictable way, to the outcome of presidential elections. And I don't think that's just my view. I think it's the Constitution's view too. Because as
Commissioner LaCroix mentioned earlier, the framers quite deliberately gave the appoint power to the President and the Senate.

Now they could have allowed judges to pick their own successors. They could have set the Courts completely apart from the democratic process. But a feature of the system they designed was to give the political branches the power to determine not how the judges decide but who the judges are.

And they did that for a reason, because they were creating a system that would make not individual judges but the institution of the judiciary ultimately responsive to the results of national elections. And they weren't thinking about partisanship there, because they didn't foresee our party system, as Commissioner Whittington just mentioned.

But they were thinking that elections should have consequences. And I think that there are strong arguments, and if fact I think the emergence of the party system has made them
stronger, that a term limits approach would help
that system work better. Thank you.

COMMISSIONER ANDRIAS: Thank you.

Commissioner Johnson?

COMMISSIONER JOHNSON: Yes, hi. Thank
you. So I thought these have been a great set of
comments that have been raised about the
discussion draft on term limits.

I wanted to emphasize some components
that really are in line with the very specific
concerns that I've raised about term limits but
also, I think, are responsive or at least attempt
to be somewhat responsive to the broader concerns
we've been talking about all day around
legitimacy, democracy, political responsiveness,
and partisanship.

So, I mean, one concern that I really
hear about term limits is that it may sacrifice
judicial independence or make the Court appear,
to either the political process or to voters, as
more partisan. We don't want a normalize those
kinds of perceptions of the Court. And I really
I do want to point out one practical thing about the discussion draft that I think is important which is that (audio interference) 18-year term limit. And that's still quite long. I mean, it's longer than most Americans stay in their jobs, of course. It's maybe seven years short of a generation. It's longer than most elected bodies, the presidency, two terms of a presidency, two terms of Senate. It's long in comparative terms. I mean, look at the state constitutional approaches, most of them anyway. And when you look at other countries, functionally and formally, 18 years is long.

And so the point here is that with that length, I'm not sure if 18 years is the perfect length. But it at least reflects an idea that you can balance out this concern around judicial independence with some degree of political responsiveness.

And so I think that that question of length should maybe give some solace or really
not minimize or take away, but maybe soften some of the concerns about it seeming just like a partisan process.

I also think it's a lot of time to develop a kind of wisdom that you get both through that length of term and also through maybe prior experience as a lawyer or as a lower court judge. And this maybe incentivizes putting people in, as has been mentioned, that are a bit older.

I do think that these questions around separation of powers, responsiveness to national elections maybe need to be thought more in terms of the language, perhaps, of the final draft. I need to understand more what it is about an 18-year term that would create more weakening of the Senate's role, because I don't see it that way, or overplaying the President's role which is a concern that I have as well.

And I don't actually see how 18-year term limits themselves affect that. Separation of power is a calculus. But I hear very much
Commissioner Strauss' recommendation that perhaps softening the language around political responsiveness to also put it in the negative might be helpful.

And then just the last thing I wanted to say is that throughout this discussion, I am thinking we have to careful about how we think about these terms of politics, partisanship, ideology. And none of us like the idea that judges are mere partisans, but in some ways I think we should stop saying that, because we all maybe would agree with that.

I think that the questions really are about the way in which partisans attempt to place on the Court people of particular ideology, or judicial methodology, or judicial philosophy. And that is something that has, in fact, did process.

And then this is the very last thing I'd say is that, I think, that with regard to term limits, even if we didn't have the problems around confirmation that we've had in recent
years, and some of the conflicts that we had discussed earlier, I think there would be strong arguments, nevertheless, for considering term limits in terms of any time you were, like, taking a fresh look at optimal constitutional design. And I think some of the lessons from other jurisdictions tell us that, that they're worth taking seriously on that measure. So thank you.

COMMISSIONER ANDRIAS: Thank you. Commissioner Balkin?

COMMISSIONER BALKIN: Thank you, Commission Andrias. I wanted to add a few words to what Commissioner Whittington has said. Although he should not be held responsible for what I'm about to say.

I myself have supported the idea of term limits for the Supreme Court for a very long time. But like Mr. Whittington, I agree that we can't just think about court reform without paying attention to the confirmation process. And today, that process is broken.
And this is not just a problem for term limits proposals. It's also a problem for other forums that might change the Court's jurisdiction, its size, its structure, or its vetting rules.

If the Senate simply refuses to act, or if it simply refuses to appoint new Justices, almost all of these proposed reforms can be undermined in one way or another. At the very least, we now need a speedy confirmation act that guarantees regular consideration of an action on the Supreme Court nominees.

Now, although the Commission was not asked to propose changes in the Senate's procedures for the reasons I just suggested, the inquiry is pretty much unavoidable. The current draft discusses some aspects of reform, but there is much more we could say, and I hope that we will.

Even so, there are real limits to what this Commission can suggest. We live in a period of high polarization and intense party
competition that we haven't seen since the middle
of the 19th century. And our Constitution was
not designed for such politics. And indeed, as
has been pointed out before, the framers did not
even expect that there would be political parties
of the kind that we have today.

The muscles and the connective tissue
in our democracy are under intense strain and, in
some cases, are simply failing. The larger
reason why the appointments process is broken is
that the United States Senate is broken. And it
has been broken for some time. This point is not
a new one. It has been made repeatedly by
political scientists, by students of the
institution, and by former senators themselves.

People often think of the courts as a
counter majoritarian institution in American
democracy. And that's why they think its powers
need special justification. But in today's
America, the most powerful counter majoritarian
institution is not the Supreme Court. It is the
United States Senate.
The Senate no longer functions
according to the famous metaphor, as the saucer
that cools the passions of the public. Today, it
functions more like a black hole. It is where
the democratic wheel of the American public goes
to die.

And this is true whether you are a
conservative or a liberal, a Republican or a
Democrat. Not just the confirmation process, but
the senate itself is a broken institution. And
many of our current fights over the courts are a
consequence of its disrepair.

Now as Commissioners, we have been
asked to discuss the pros and cons of potential
reforms to the Supreme Court and not reforms to
the other branches. We were not asked to, nor
can we solve the deeper problems that threaten
American democracy.

But in considering reforms to the
courts, we must understand their relationship to
other parts of our political structure which are
increasingly counter majoritarian and decrepit.
Thank you.

COMMISSIONER ANDRIAS: Thank you.

Commissioner Gerken?

COMMISSIONER GERKEN: Thank you. I thought I would just say a few words about this discussion and how it relates to the rest of the day.

Like Commissioner Johnson, I was heartened to see how much commonality there is in the discussions across each chapter as we're all, in different parts of this, wrestling with the same challenging questions. And it's been incredibly useful to hear this conversation unfold as we try to figure out where there's common ground.

I also just wanted to say that I really appreciate all of the Commissioners who commented on this set of the deliberative materials in their efforts to not just offer a critique but to help offer a solution, as we all try to find our way to something that we can agree upon.
And finally, I'll just note that, about this conversation in particular, that it largely is not exclusively centered around questions of the prudential rather than traditionally legal. And that is, of course, I think, where all of the law professors, at least in this room, are most tentative, because we understand that this is where expertise is probably weakest.

And we're all making our best judgments based on the set of institutions that we know well and the set of structures that we know well. But we are all making predictions that we are not always accustomed to doing. And so I actually think that fact makes it easier for us to come to common ground, because we are less sure-footed here.

And this is an opportunity for us really to think through to get this together and to recognize the potential weaknesses of our arguments and to recognize the potential unanticipated consequences that we are trying to
think through. So I just wanted to thank all the Commissioners for the really excellent discussion.

COMMISSIONER ANDRIAS: Thank you. We have some time remaining. Is there anyone else who would like to address this material.

Commissioner Fredrickson?

COMMISSIONER FREDRICKSON: Thank you very much to everyone for these great materials. And it's been a very interesting discussion. And I just want to add very briefly that one of the things I think is real interesting about this particular area of discussion is how very broad the spectrum is of those who think that term limits is an idea worth entertaining.

And so, you know, I think although it definitely raises a whole host of differences among different people, nonetheless, the differences don't necessarily center on a right or left, Democrat or Republican, conservative or liberal. They're really about sort of the merits of the proposal.
I think it makes it very interesting for the discussion that we can have here. You know, does it make sense, how would you go about doing it if so. And just as someone who is currently a law professor, but hasn't been one for very long, I know this is something that resonates very broadly among the American public as well.

And so I just say that to put it out as an issue that may engage a much broader swath of the great, large audience that we have now, that will continue, I think, the subject of discussion going forward. And it's just something for this Commission to think about.

COMMISSIONER ANDRIAS: Thank you.

Commissioner Ramsey?

COMMISSIONER RAMSEY: Thanks. I just wanted to quickly echo what Judge Griffith said, I think, about the tone of this draft. I found it, like Judge Griffith, that it seemed almost an implicit endorsement of term limits, and particularly because the section that discusses
the pros of term limits is cast in the voice of
the Commission rather than in the voice of
proponents of term limits. And there was an
implication of a consensus of the Commissioners
behind the idea of term limits.

And I would encourage the final draft
not to take that view. First, because I think
it's not our role to decide what we favor but
rather, simply, to set out arguments and
considerations on both sides.

And second, to the extent there is any
assumption of a consensus in favor of term limits
among the Commission, I wanted to disassociate
myself from that consensus.

Like Professor White, I have found
that, in thinking about this more closely, that
term limits seem less a good idea than I once
supposed. And indeed, I find them to be
something in the nature of a solution in search
of a problem with, as Professor Whittington has
pointed out, on the back end some very serious
implication problems were we to go down that
path. So I think that we should not present this in any way as sort of an idea that we were all rallying around.

COMMISSIONER ANDRIAS: Thank you.

Commissioner Levy.

COMMISSIONER LEVI: Thank you. I'll try not to repeat other people's points. There are some rhetorical lapses, I think, in this section that can be fixed. I think we should avoid talking about the parties taking control of the Court. That's quite inflammatory, at least for me. It pushes my buttons.

I think also that it would be useful for the drafters to consider whether the arguments they make concerning the Supreme Court are equally availing as to the lower courts, to the circuit courts and to the federal courts where, I may say, most of the action is in our legal system. And if the arguments don't fly there, then I think we have to explain why this is.

Now, this probably goes back to
Commissioner Strauss' point. There are arguments for term limits which are not made here. I don't wish to seem as if I support term limits, because reading these materials actually convinced me that I don't, at least not at this point.

But you might just say that Supreme Court Justices have so much authority now, and it's a very American kind of impulse to say that people should not have authority for a very long time. We have term limits for Presidents and Lord Acton told us that absolute power corrupts, and we have a feeling that people who have extraordinary power, maybe there should be limits on their time in office.

But that is not the theory of this chapter. This chapter is about representativeness. And that I cannot, I don't agree to and, I think, would apply to the lower courts as well equally. And again, I don't think it flies.

Finally, I think some attention should be given to, I think, what Commissioner Balkin
was talking about. In a system that is as rough as our current system, having regular confirmation hearings, and more of them, is a bold move. More of what we have now is not going to be beneficial, I don't think, to the country.

And I fear that we've seen sort of a version of this in recent history which is if Presidents who are presidential candidates know, and the public knows, I will have, I will certainly have two appointments in the next four years, then I think we're going to get very close to a system in which those candidates identify the exact people that they will appoint, and will encourage them to join them on the campaign trail. And we will have a version of elected Justices.

And that is not something, I think, any of us really wants to see. But it's very hard to, for me anyway, to see that something very close to that would happen. Because we've already experienced it to some degree when President Trump knew that he would have an
appointment when he was a candidate. He put
together a list of people. And it's just a very
short step to identifying a list of a person or
two people. Thank you.

COMMISSIONER ANDRIAS: Thank you.

Commissioner Waldman.

COMMISSIONER WALDMAN: Thank you.

First of all, I want to also thank all those who
worked on these papers, and on this paper, for
all the volume of skilled analysis and for
wrestling with some difficult issues.

I want to -- what I'm going say, in a
sense, is to associate myself with what was just
said, but to say that that isn't all bad. One of
the things that I think that this paper could do
more is to really take a look at what this would
mean for the interplay between the presidency,
and presidential elections, and Supreme Court
nominations.

I think it is right that the fact that
each winner gets to make two nominations would be
front and center in presidential elections. I
think though that that is a norm that has largely been shattered already, whether overtly or by sly innuendo. We know that President Trump, in effect, announced his potential list of nominees. We know that candidates of both parties talk about, in effect, litmus tests on issues like abortion rights and other matters.

And I think that, I think in a sense it would be not necessarily an increased politicization of these nominations but a regularized and honest interplay between the political process and the nominations. And in any case, I think that the paper could benefit from a little bit of addressing that.

The other point relating to that, as well as to the notion of partisan balance, simply without accepting the properness, the propriety of parties viewing seats as theirs or needing a partisan balance, it is nevertheless an empirical fact that regularized appointments simply will bring greater partisan balance in terms of who appoints and nominates the Justices.
In all likelihood, simply by dint of how voters vote, or even how the Electoral College chooses people, certainly over the last half century, voters and the Electoral College have divided the presidency far more evenly among parties than the nominations for Supreme Court Justices.

So it would have, in that way as well, and I think this can be addressed, something of a function of pulling the Court more in line, overall and in an general terms, with public sentiment a balanced way, again without it being mechanistic. But, again, thank you to everybody who worked on all of these, and on this paper in particular.

COMMISSIONER ANDRIAS: Thank you.

Commission Baude.

COMMISSIONER BAUDE: Thank you. I do just want to share the views of several other people who don't necessarily think term limits are a wise or prudent thing to do. But I, you know, I don't have any special expertise on that
issue.

And I do think it's different from some of these. It's different from other proposals in that this may well be harmless as to some of the sort of prudential arguments against it are the, you know, question of whether there's really enough of a problem or if this is a solution in search of a problem.

I'm not entirely sure that term limits would be harmless, especially because of the possibility of Justices doing other things after they serve, which is something that the draft is quite right to grapple with, and the questions of, you know, what else Justices might go on to do.

But I worry that the draft doesn't have quite enough imagination. I mean, there was a time when Supreme Court Justices were interested in running for the presidency. And it's, you know, easy to imagine people being on the Supreme Court and becoming tempted for that kind of limelight. And that could change
incentives. I suppose a constitutional amendment, not a statute, could say that a former Supreme Court Justice could never run for President, that would be something.

And even the draft currently retains the possibility that, well, it would harmless if they go on to do something like became a law school lecturer. And I'm not sure that's true either. I don't think we'd want Supreme Court Justices worrying about whether or not, sort of, their law school lectureship is in jeopardy if they say something contrary to the norms of the Legal Academy or, you know, their Fox News commentaryship, or whatever.

But even just the roles of sort of commentary and public intellectualism, I think might -- we might want the Justices to care less about what people like us think rather than more.

But I do think another good thing about this proposal is that it, you know, it's better than a lot of the other proposals. And so focusing on it might be much more healthy.
Another thing I'm just struck by
listening to this discussion, especially
Commissioner Balkin and Commissioner
Whittington's comments, is term limits seem to be
an area where there is a broad by-partisan
consensus among a lot elites that it would be a
good idea.

But I think it's right that they would
require a similar form of the confirmation
process. And then there's very little by-
partisan or elite consensus about what the form
of the confirmation process would look like.

And this becomes illustrated when we
have to start coming up with schemes like letting
a randomly selected set of chief judges of the
courts of appeals somehow get involved in the
process as the way to fix it or other things like
that.

So I do worry that, you know, the
actual consensus would rest on details upon which
is actually it's much more of a sandy defense
than it appears. And that makes me nervous about
the whole thing.

COMMISSIONER ANDRIAS: Thank you. Co-Chair Rodriguez. And then if there's time, we'll hear from Commissioners Tribe and Ross.

CO-CHAIR RODRIGUEZ: I'd just make two observations by way of appreciation quickly so that Commissioners Tribe and Ross can have a say.

The first is that one of the things I especially appreciate about these materials is it has required us to grapple with this question of responsiveness and the extent to which the Court ought to be either responsive or reflective of the political process.

And it's obviously quite difficult to articulate what the value of responsiveness entails. And it's easy for that to slide into a notion that we think of the Court as solely partisan or as representing the views of the party.

But as we've talked about throughout the day, there is a difference between a court that is motivated to advance the agenda of a
particular party and court that is responsive to the people in some sense. And how you specify that sense, I think, is the challenge.

And this chapter in particular requires us to figure out how to articulate that and may encourage us to continue to try to do that in a way that is both capacious but also reflective of what someone already invoked as part of the original design, which is that the political appointment process injects a measure of accountability over the judiciary.

The second observation I want to make is that these materials are especially helpful in the way that they provide a blueprint for a major constitutional reform. And for that reason, I think that we can make a big contribution by demonstrating the kinds of questions that would have to be answered were someone to want to pursue this line of reform.

Now, the debate in part revolves around whether a constitutional amendment would be required. And the fact that this would
dramatically restructure the Supreme Court might be a reason, regardless of the merits of that issue to pursue it through an amendment.

But the note that I wanted to end on is to say that the fact that a change, that might actually make a system better, would require a constitutional amendment is not a reason not to pursue it, and not to debate it, and that one of the valuable functions of a Commission like this one is to contribute that kind of insight to a debate that might not be resolved in the next year. It might not be resolved in our lifetime. But it's certainly something that should continue to be debated as we figure out how to make our Constitution better than it is.

COMMISSIONER ANDRIAS: Thank you.

Commissioner Tribe?

COMMISSIONER TRIBE: I began by thinking that, despite the assumption of some, that this could be done without a constitutional amendment. It probably would require one.

My view on that hasn't really changed.
I began as someone who did, including Commissioner White, with an assumption that, of all the possible changes, this would be the most obvious one that would be relatively uncontroversial, widely supported across the spectrum, and probably beneficial.

The course of reading and studying what has been generated in this chapter convinced me to lean very much in the other direction. I no longer think it's likely that this would be a good idea. I think what's really broken, as Commissioner Balkin points out, is the Senate.

I don't think we could solve that problem by having more confirmation hearings. And I think that the difficulties of implementation, how one would deal with the paralysis of the Senate with the vacancies that might not be filled, and with the unintended side effects of term limits, lead me to conclude, in an exercise that really illustrates the value of this process, lead me to conclude that something I began by thinking was a good idea, I end by
thinking is probably a bad one.

But again it's, as everyone has said, not our job to make recommendations. I think though, that a fair statement of the pros and cons, a fair appraisal would lead people to emerge from this report less enthusiastic about term limits than they began.

And I think that's quite a healthy thing, subject to my one worry that, if we end up reducing enthusiasm about any major change, that may well be dispiriting in the extreme to those who are convinced that there is a problem that needs to be addressed.

COMMISSIONER ANDRIAS: Thank you.

Commissioner Ross? You'll have the final word.

COMMISSIONER ROSS: Thank you. So I think that in terms of thinking about this particular chapter and this working group's responsibility, I think what it's run into is the problem that the accidents that Professor Feldman described with respect to Supreme Court vacancies are becoming fewer and fewer.
And even those that are associated with a passing in office have become opportunities for strategic behavior. And one of the things that this group has to wrestle with, and I don't know, maybe term limits are or are not the answers, I don't know what a better answer is, is to respond to the fact that strategic behavior has become a predominant mode of turnover on the Supreme Court which can contribute to the entrenchment of power of one particular political perspective over the other.

I think that we're still struggling, as Professor, or Commissioner LaCroix identified, with the differentiation between what's partisan and what's political. But I do want to associate myself with Commission Roosevelt's point that the Court is a political institution comprised of political actors who have a different set of political beliefs that tend to, tend to, but not necessarily always, associate with, at least in these days, the partisan preferences of our two dominant political parties.
And so if we have a turnover process that's dominated by strategic behavior, and that can lead to the entrenchment of particular political perspectives on the Court, then the question has to be, well, what do we do?

Commissioner White described changing the norm to guarding strategic retirements. And I completely support that. I just don't know how that can be done. And I don't know how do we change the sort of political hardball tactics that I predict will become a more endemic feature of our confirmation processes in the future.

So those are kind of the challenges and difficulties that I struggle with. And abandoning term limits kind of leaves us in the situation that we're in that could undermine, over time, the legitimacy of the Court because of the declining popular support for a Court that's seen not only in political terms, in which it appropriately is seen, but more in partisan entrenched terms over time. And so that's just a point that I want to raise regarding this
particular chapter.

COMMISSIONER ANDRIAS: Thank you.

Thank you to everyone for those really helpful comments.

I wanted to make just two brief remarks in closing. One is to thank the drafters of these materials for engaging not only with these very important credential considerations but also, with the legal arguments aside, regarding whether or not term limits could be accomplished by statute or rather whether they would require a constitutional amendment. The draft goes into some detail on those points.

And second, I just wanted to highlight that we did hear testimony about prudential reforms to the confirmation process. And that might be something to keep in mind as we continue in our deliberations.

We will reconvene promptly at 3:10. And thanks to everybody for your comments.

(Whereupon, the above-entitled matter went off the record at 3:01 p.m. and resumed at
3:10 p.m.)

CO-CHAIR RODRIGUEZ: We will now resume our deliberations with our fourth set of materials. In the session, we will be discussing the materials that present an analysis of proposals that would in some way reduce the power of the Court in relation to the role of the other branches of government.

As we've been emphasizing throughout the day, these materials were prepared by working groups within the Commission and do not reflect the work or views of the Commission as a whole or of any particular Commissioner and they were designed to be inclusive in the arguments they raised for and against reform.

After hearing a brief summary of the contents of these materials, I will again call on the Commissioners who've expressed an interest in raising their views.

And for an initially summary of what's presented in these materials I turn to Commissioner Carolina Fredrickson. Commissioner
Fredrickson, you have the floor.

COMMISSIONER FREDRICKSON: Thank you so much, Commissioner Rodriguez and Co-Chair Bauer as well as the other Commissioners. I'm very grateful of all of the hard work that has been put in to prepare these materials and for this very rich discussion.

This chapter looks to the proposals that would actually reduce the power of the Supreme Court or of the judicial branch as a whole.

Many of the proposals for reforming the Court accept the scope of its power more or less as a given. By contrast, the proposals that this chapter examines would curve the Justices' capacity to invalidate legislation as a way of shifting power to resolve major social, political and cultural issues from the Court to the political branches.

It does not look at all possible mechanisms to do so, but looks most closely at jurisdiction stripping, super majority voting
requirements, as well as other rules that would require greater deference to political branches, and legislative overrides by Congress of Court decisions.

We analyzed how central forms might affect the Courts for the Courts' role in relation to the other branches of Government, potential benefits and costs of the proposals, and whether they could be achieved without constitutional amendment.

These proposals generally rest on two interrelated assumptions. First, a determination that a statute violates the constitution typically requires exercising judgment about the meeting of the constitution.

And that's actually something that people can disagree on as the Justices themselves so frequently do in constitutional cases.

And second, that in a democracy, the judiciary as well, needs to be subject to checks and balances. Some even argue that the principals of democracy require that a final
determination on the constitutionality of legislation should be left to the political branches.

There's also a view that the Court should be checked because the Court has itself stepped into political battles that are better resolved by elected officials and that includes issues from abortion to voting rights.

In addition, as has been mentioned earlier, Supreme Court Justices can be viewed as most always drawn from a certain elite and not representative of the population as a whole.

Those who would check the Court's power also note that because of what's called judicial supremacy, the view that the Court has held that has the last word on constitutional interpretation and then its decisions by not only the parties in a particular case, but also future action by the President, Congress and the states, the Court's decisions are extremely difficult to challenge.

Especially because the Constitution in
itself is so difficult to amend. And as the
Justices serve for life, that they become
increasingly unrepresentative over time.

So as I mentioned, we focused on
jurisdiction stripping, supermajority voting
requirements and Congressional overrides. Some
of these even within these proposals specifically
target the Supreme Court while others would apply
to the lower courts.

Some would insulate broad categories
of legislation from judicial review. Others
would limit judicial power only with respect to
specifically identified issues.

So the chapter looks at the extent to
which such proposals would affect the Supreme
Court's rule or that of the judiciary as a whole
in relation to other branches of government to
resolve important questions as well as the
counterarguments for those proposals.

Those who criticize these proposals
worry that such reforms might undermine
protections for individual rights, in particular,
minority rights.

Or that because of the possibility of competing interpretations, the law could become less settled or reflect less well-reasoned constitutional decision making.

Critics also emphasize that these reforms could undermine the rule of law by eliminating the Court's role in ensuring officials' accountability.

And, of course, as you've heard already, some might question whether in fact courts necessarily operate in ways that are anti-democratic.

That is, is there a problem here? Our discussion is predominately analytical rather than purporting to resolve the fundamental questions of democratic and political theory that any substantial disempowering of the Courts have raised.

But instead, we analyze the extent to which the various proposals to disempower the Courts would reach the goals proponents hope to
achieve and identify some of the potential costs, including from the perspective of those who emphasize the importance of the Courts in protecting individual rights, federalism or other constitutional values and structures.

And finally, the chapter discusses the constitutional issues they pose and evaluate whether the proposals could be achieved without constitutional amendment.

Ultimately, the efficacy of the proposals seems to depend on the details, including whether they also affect lower court and state court decision making.

And the mechanisms that would most directly reduce the Supreme Court's and other courts' power are also the ones that the Courts themselves would most likely find unconstitutional absent constitutional amendment.

Without taking a position on the ultimate merits of these proposals, the chapter aims to help inform public debate about whether such reforms would be worth pursuing and how such
a system might be designed consistent with broader constitutional principles.

So thank you so much for allowing me to present the summary of the chapter.

CO-CHAIR RODRIGUEZ: Thank you very much, Commissioner Fredrickson. If you haven't already, I now invite the Commissioners to turn on their cameras. And we'll turn first to Commissioner Grove for her observations.

COMMISSIONER GROVE: All right. Thank you so much Commissioner Fredrickson for that terrific summary and thanks so much to all those who worked on these draft materials.

They're very meticulous and comprehensive and very impressive. So I have two relatively minor comments on this chapter and then kind of an overall broader observation about our discussions thus far.

So my two smaller observations on the chapter, in jurisdiction stricken section, it says on Page 6, in this section, we consider proposals to strip courts of their jurisdiction
to renew the constitutionality of executive and legislative enactments.

And then it goes on to review the constitutionality of taking away jurisdiction over legislative enactments at both the federal and the state level, but it doesn't really go on to talk much about executive action.

And it seems to me that questions about democracy and concerns about legitimacy might be very different if we're taking away federal jurisdiction to review legislative enactments as opposed to say, an executive order or proclamation or other Presidential directive.

Something that we've seen more frequently in recent times. So that's just something that might warrant more discussion in the chapter.

The second that might warrant more discussion in the chapter is in the supermajority section, the chapter invokes fair quite a bit and then goes on to talk about whether we have supermajority requirements for review of federal
legislation only federal and state legislation potentially.

And what I want to suggest is the invocation of James Bradley Thayer is not entirely appropriate in that context because Thayer was arguing that there should be strong deference toward Congress.

But he expressly said there should not be strong deference toward the states and so I think the draft could use a little bit more work on why a supermajority requirement might be appropriate if it's appropriate in the context of state legislation as opposed to federal legislation.

So those are the two comments. The broader comment as I've been listening to our discussions over the last several sessions, picking up on things that Commissioner Rodriguez and Commissioner LaCroix and Commissioner Ross have said, I think this, one of the challenges that we face as a commission is we're dealing with some of these challenging issues.
We talk about terms like judicial ideology and principle and we talk about terms like partisanship and politics. And what I have found in looking at Court-curbing legislation, including jurisdiction stripping legislation is that to, what is to one person principle, is to another person partisanship.

And you see this repeatedly in debates over Court-curbing legislation from 1789 to the present. People saying, well I'm asking to take away the Court's jurisdiction because as a matter of principle, it's power needs to be reduced and the other side accuses it of partisanship.

And I think we've seen that kind of divide and disagreement in usage of terms in this conversation as well. And I just want to suggest that I think it's a very healthy debate to talk about are we talking about principle or partisanship and it really, it may depend on one's perspective.

I also want to suggest that it's a challenge for us as we continue in the writing
going forward to try to be sensitive to the fact that what is to one person principle is to another person a partisan attack on the judiciary.

And I think it makes it a challenge for us to be as we need to do a good job of representing both sides, but it can be a challenge in doing so.

CO-CHAIR RODRIGUEZ: Thank you so much, Commissioner Grove. We'll next hear from Commissioner Richard Pildes.

COMMISSIONER PILDES: Thanks, Chairman Rodriguez. I want to first echo Professor Grove's praise for the care and detail in these materials.

But the materials discuss the view of some constitutional scholars that the system of judicial review in the United States was not meant to be one of judicial supremacy.

And I think that there needs to be a lot of clarification that's brought to the discussion that's currently in the materials
about that complicated issue.

So and this has concrete implications for the discussion of whether Congress has the power to override a Supreme Court decision by statute.

So the issue concerning judicial supremacy that the scholars that the materials cite, like Professor Kramer and Professor Worman raise, is the issue about whether the Supreme Court should be understood to have the exclusive power to interpret the Constitution.

And the alternative that they put forward and I don't have any substantial disagreement with them about this in terms of the history that they describe, but the alternative is what is typically called departmentalism which means other parts of the Government also have the power to interpret the Constitution.

And very importantly, that they don't have to agree with the Supreme Court's interpretation of the Constitution. So the classic example for the 19th Century is the
Supreme Court says Congress has the power to
create a National Bank of the United States.

President Jackson then vetoes the
second bank of the United States legislation
because he disagrees with that view of the
Constitution and that's all fine.

But everyone, as far as I know in this
discussion, agrees the Court issues a specific
order to specific parties in a specific case.
Those orders have to be complied with.

And if the rule of law means anything,
it means that at the very least. And I think
there's confusion about that in this
presentation.

So what does this mean for Congress's
power, vis-à-vis the Court, even if we accept the
departmentalist view or the view of the critics
of judicial supremacy as a description of how our
system was designed and how it operated for many,
many years.

It means that if Congress enacts a
statute making it a crime to burn the flag of the
United States, for example, the Supreme Court holds that the First Amendment is violated when the Government tries to prosecute someone for burning the flag, that the Supreme Court decision doesn't mean that Congress has to just lie down and play dead and that's the end of the matter.

Congress would still have the power to say we disagree with the Court's interpretation, we're going to re-enact this law, we're going to challenge the Court's view.

But it also means that if the Court sticks to its view, and again, enjoins the criminal prosecution of someone for burning the flag or overturns a criminal conviction because someone has burned the flag, the Court's order has to be complied with.

And so I think all scholars agree on that. Including the departmentalists that these materials cite. And so this means Congress cannot override a Supreme Court decision by statute at least in the way the report presents this.
At least as I understand the arguments in the scholarship here. If Congress cannot by statute do what is permitted by the Constitutions of some other countries that are cited here like the Canadian system where there can be a legislative override and the override has the final legal effect.

That cannot happen in our system. And I don't believe anyone actually argues for that. So again, maybe I misunderstand these arguments, but as I understand them, Congress can disagree with the Court, it can pass a statute expressing that disagreement.

But if the Court adheres to its position on the meaning of the Constitution and issues an order that the statute is unconstitutional or can't be enforced, the rule of law requires that be accepted.

And in fact, I think it's quite dangerous to suggest otherwise. So I think that concluding paragraph for example on Page 31 is not clear as the earlier discussions also are not
clear about what people who argue against judicial supremacy actually are arguing and what the consequences are of the diction.

And I very much hope that this is something we can clear up when we redraft unless I'm misunderstanding something about the arguments.

CO-CHAIR RODRIGUEZ: Thank you very much, Commissioner Pildes. I will next hear from Commissioner Whittington.

COMMISSIONER WHITTINGTON: That's very convenient because I've written quite a lot about judicial supremacy and departmentalism and I certainly share some of Commissioner Pildes' concerns with some of the language currently in this section.

What I wanted to spend a couple of minutes talking about though is something that's slightly adjacent, but touches on some of the same issues focusing on this question of legislative of overrides of judicial decisions.

Legislative overrides I think have
some difficulties in general, but they have
particular difficulty in the specific American
context in which the Supreme Court exercises the
power of interpreting both constitutions and
statutes and construes an appliance of the
Constitution in the context specific and concrete
cases and controversies.

As for term limits, I am concerned
that we are unclear on what problem we are trying
to solve here and as a consequence, not as clear
as we should be about the nature of the potential
solutions.

If we are going to address the
possibility of legislative overrides, it seems to
me that we ought to address what I think is the
obvious alternative for accomplishing basically
the same goal which is making it easier to amend
the Constitution.

Article V of the Constitution creates
a high hurdle to amending the Constitution that
has benefits and drawbacks, but it seems to me
that Article V is the real source of the problem
that legislative overrides are trying to solve.

And if think that the real problem
that needs to be solved is lowering the barrier
to constitutional amendments, then actually
lowering that barrier is the better solution.

There is hydraulic pressure to
movements to constitutional change. We should
want to channel such pressure as I think through
the constitutional amendment process so that we
can have Democratic deliberation and decision
making on what our fundamental rules should be.

But if it is too hard to formally
amend the Constitution, the hydraulic pressure
will find other outlets to try to achieve the
same results. That is what we see today.

We should try to redirect those
pressures through the amendment process.
Moreover, constitutional amendments would focus
our attention more squarely on the key issue.

What do we think the constitutional
rules should be going forward let's say if
overrides are much messier? They are too closely
tied to the specific details of particular
controversies.

And it is not clear what exactly we
should be hoping to override in such cases. If
what we really want is a political mechanism for
reconsidering the constitutional rules as they
have been interpreted by the Court and the best
mechanism is constitutional amendment.

If we think the barrier to amendment
is currently too high, then we should consider
amending Article V to lower that barrier to some
degree.

And, frankly, I think a consideration
of amending Article V would be a more valuable
direction for a forum than anything else
currently being considered in the court, at least
when we are talking about things that might
require constitutional amendment to accomplish.

Thank you.

CO-CHAIR RODRIGUEZ: Thank you very
much, Commissioner Whittington. We'll next hear
from Commissioner Boddie.
COMMISSIONER BODDIE: Thank you. So first of all, I'd just like to add my thanks for all the terrific, hard, extraordinary work that has been done on this chapter.

I have two quick points. So I want to, various talk about the drafts discussion, the possible disadvantages of a supermajority voting requirement for Court decisions that strike down legislation on constitutional grounds.

And I just want to quickly frame my remarks as applied to the rights of people of color. Excuse me. As the draft indicates, skeptics of the supermajority voting requirement have pointed to the long-standing conventional view that courts play a valuable role in checking or limiting the excesses of political majorities that disadvantage individual rights.

I'd urged the working group to examine the empirical basis for the conventional view that the Court is better at protecting rights, individual rights as applied to people of color.

Not just that the Court is
theoretically better suited, but that it is and it has in fact been better at protecting individual rights.

As some of our witnesses have argued, the Court's overall record could be read to suggest that the Court has been hostile to minority rights referring here specifically to racial minorities as shall be counted being only the most recent example.

My second point is about the use of the term minorities when referring to people of color because the term can obscure the political or the power dynamic in the political process.

There are instances when people we think of as minorities are, in fact, the numerical majority in the places where they vote, but because they are subject to voter suppression, they are disempowered in the political process.

And the term minorities doesn't really capture that distinction. We might consider using the term minoritized which captures a
context in which racial and ethnic groups who
might have strength in numbers don't have
strength that alliance with their actual power in
the political process. Thank you so much.

CO-CHIAR RODRIGUEZ: Thank you so
much, Commissioner Boddie. We'll hear next from
Commissioner Baude.

COMMISSIONER BAUDE: Thank you. I
think I agree with just about everything that's
been said so far. I really appreciate all of the
comments.

I was just going to say a couple of
small things about jurisdiction stripping I
think. So the, you know, the issue of the power
of Congress over the jurisdiction of Federal and
State Courts has probably 100 times more of a
developed literature at its legality than almost
everything else which the Commission has
considered, you know, combined.

So it is one big problem here that the
Justices have to oversimplify in order to present
it useful to anybody, including the public. But
I think Commissioner Grove is right. That the oversimplification of the legislative review of an executive question is probably one oversimplification too far.

And then especially the kind of the democratic urge that causes some people to think that this jurisdiction strip about legislation wouldn't necessarily fall onto the President or it could be more complicated to mimic. Maybe in some cases it would. But that seems like a point worth picking up. Thanks.

CO-CHAIR RIDRIGUEZ: Thank you very much, Commissioner Baude. I will next hear from Commissioner Ramsey.

COMMISSIONER RAMSEY: Yes, thanks a lot and these are some great comments and I want to continue a little bit in thinking about the points that Professor Grove raised and that Professor Baude just commented on.

One thing in thinking about the role of reducing the role of the Court and the role of the Courts because I think this is more a
question of the judiciary versus what we think of as the elected or the political branches.

But I think there is a question of why you would do that and I think there are at least two answers and the materials try to grapple with this, but perhaps could do a better job.

On the one hand, you might think that Congress, sorry, that the Courts owe a particular deference to Congress, that Congress is a particularly well-placed institution to make constitutional judgments and that the courts should stay out of the way.

Except in unusual circumstances this might be reflected in jurisdiction stripping and might be restructured in supermajority rule targeted at acts of Congress and might be reflected in that and an idea of deference to Congress.

And that is the view that’s associated with Thayer and if the draft implies that Thayer went beyond that, it shouldn’t. But that is what I think what one might call Thayerism although
1 Thayer didn't suggest that Congress should impose
2 this rule.
3
4 He suggested that the Courts
5 themselves should adopt a rule of deference as to
6 Congress. But that raises the question of why
7 Congress.
8
9 It's not clear to me why there should
10 be special deference to Congress as opposed to
11 special deference to the political branches. I
12 understand the argument for juridical, not to say
13 that I endorse it, but I understand it, is the
14 special deference to political branches rising
15 out of the idea of that there should be more
16 democracy, more political decisions as to
17 important matters of social and cultural policy.
18
19 And those social decisions shouldn't
20 go to the Courts, but if that's your view, of why
21 the power of the Court should be reduced, there
22 isn't any reason to limit this to acts of
23 Congress.
24
25 And instead, it seems like it should
26 go more broadly both to the deference to the
executive branch or the supermajority rules, the
executive branch or however you want to put the
limit.

So and indeed it should also go to the
States because in recent times, some of the
greatest intrusions by the Courts into social,
political and cultural policy have been in
respect of state laws.

So if the concern is about protecting
democracy, and protecting the political branches,
it doesn't seem to make a ton of sense to me to
limit the proposals to Congress.

That is limit the proposals to
judicial review of acts of Congress. But now on
the other hand, I understand that the proposals
in this regard have very often been limited to
acts of Congress going back to Thayer and back
into the supermajority proposals from the 19th
Century as well.

So I think that's a dilemma or a
attention I suppose I would say that the draft
needs to make clear that it recognizes and it is
dealing with and that the language needs to be precise.

That on the one hand there is a proposal for reducing the power of the judiciary, vis-à-vis specifically acts of Congress.

And on the other hand, a proposal to reduce the role of the judiciary much more broadly. And I think there is an attempt by the draft to do that, but I think it needs to make sure if it does it successfully.

CO-CHAIR RODRIGUEZ: Thank you, Commissioner Ramsey. I will now recognize Commissioner Andrias.

COMMISSIONER ANDRIAS: Thank you. First I wanted to react just briefly to Commissioner Ramsey's comment and I think the Commissioner Groves' earlier comment to say that I do think that there are reasons why one might think that more deference to Congressional actions is warranted than to state actions.

Reasons relating to the nation's history and the reconstruction amendments and the
floor, among other developments, and I think that it's worth the draft.

Now the only thing more precise in whether it's talking about deference to a supermajority rules with regard to federal legislation, they're also thinking a bit about why one might think the deference in one case and not in the other, not necessarily taking up position on that question.

I do think that those are arguments worth disentangling. Second, I just wanted to step back for a moment to underscore that our, the topics we discussed earlier today in particular proposals to extend the Court didn't impose time limits or topics that have received a great deal of attention, both in the academic literature and also in the media and in the public debate.

And the topics that were discussed now have garnered much less attention. They have garnered some. Certainly there's a lot of law review articles written about jurisdiction
stripping and so on.

But the kind of the concrete thinking about how these kinds of performs would actually operate and put together legislative overrides have very received almost no attention although they've been kind of invoked recently in public debate.

So in my view, I think the draft materials already provide them really with revision can provide a very useful analysis that can help frame not only the President's thinking on these issues, but a longer term by the Republic debate on the role of the Court and its relationship to the political branches.

And I agree with Commissioner Pildes that the just discussion of judicial supremacy and departmentalism should be clarified along the lines he suggests.

I think the current draft in its effort to achieve brevity also ends up being maybe perhaps a bit misleading, but I would note that Commissioner Pildes' clarification goes, in
particular, to help legislative overrides can be accomplished without constitutional amendment. Right?

How they can be achieved through the process of bicameralism and presentment of the ordinary legislative process which I think is extremely important given how hard an amendment is to achieve.

And so kind of offering at least the arguments for how Congress could achieve some of these strategies now the amendment is important. But in order to do that, that nuance that Commissioner Pildes pointed out must be clarified in the draft. And that relates to Commissioner Whittington's point about constitutional amendment.

I certainly have some sympathy with the arguments about making it easier to amend the Constitution. But I worry that topic was beyond our charge.

Although I think it certainly bears mention in the draft and I think more attention
must be given to why legislative overrides may have advantages over a broader change to the constitutional amendment process or may have disadvantages as Commissioner Whittington was suggesting.

But I would hesitate or I would be reluctant to see us kind of start venturing into a discussion of all the various constitutional amendments that are needed beyond those relating to the Supreme Court.

I'm sure we can all think of some. And then, just finally, I wanted to say that I agree with Commissioners who spoke in earlier sessions that we ought not to, just that particular forms are off the table.

That we should try to identify the arguments that would enable reform both with amendments or without amendment and really think the kind of elaborate the arguments for and against both legally and preventably to help inform public debate going forward. Thank you.
other Commissioners who would like to make an
observation or comment about this chapter, I
invite you to raise your hands and do so.
Commissioner Tribe?

COMMISSIONER TRIBE: Yes, I too think
that this is an extraordinarily well done portion
of the materials and I am particularly impressed
by its intricacy.

But there is an important analytical
point that seem to me to be missing. And that is
that in our system, the power of the Supreme
Court to review the validity of legislation
either under a departmental view or under a view
that adopts the position of judicial supremacy
arises from its authority to resolve that cases
or controversies.

Take Marbury itself as a thought
experiment. The Supreme Court did not in a sense
invalidate the judiciary act of 1789. It held
that Act could not constitutionally be applied to
find original jurisdiction in circumstances like
those posed by Mr. Marbury.
Now what would a provision, whether statutory or constitutional purporting to deprive the Supreme Court of the authority to invalidate an act of Congress or purporting to require a supermajority which wouldn't have been an issue in the days of John Marshall, but would be an issue now, or purporting to authorize an override mean on facts like that.

The distinction between facial invalidation then as applied invalidation occupies dozens of volumes of the United States reports and hundreds of articles.

I don't think the chapter as currently conceptualized, deals as fully as it needs to with that distinction. And the related point is the importance of constitutional avoidance.

When the Supreme Court as it often does, as it did in the NFIB vs. Sebelius case, or in a number of others, upholds the law, but only to avoid what it thinks would be a constitutional problem with interpreting it otherwise.

And when constitutional avoidance is
used to reach result X rather than result Y, is
the Court exercising the power to invalidate an
act of Congress or is it not?

I offer no answer to that, but I think
that's a conceptual question that needs to be
answered in this chapter. And relatedly, a point
that Commissioner Pildes made, strikes me as
worth thinking about.

When he said, essentially a court that
is invalidated, let's say a flag burning law, has
for all practical purposes, erased it from the
statute books.

Well, that's not the way most judges
think of it and I gather perhaps not the way
Commissioner Pildes does. The statute is still
there and that leads to a huge literature about
non-acquiescence.

It is not always regarded as
inconsistent with the rule of law for an
executive branch, either of the state or of the
federal government to keep returning to the
judicial system with the constitutional argument
that it has been rejected and saying that you
should reconsider as it's not clear even under a
view that makes the judiciary supreme in the
exposition of the meaning of the law exactly how
one deals with repeated encounters between
litigants and either the legislative or the
executive branch.

And I think that too needs to be
considered in working out the final version of a
draft of this chapter to be considered by the
Commission.

CO-CHAIR RODRIGUEZ: Are there any
other Commissioners who wish to speak? So in
closing, I'll just say one word about legislative
overrides.

As with the term limits materials, I
think the introduction of that idea in this
chapter, if we leave aside whether it's possible
to have something of that sort through statute.

But then think instead in terms of
might we amend the Constitution to enable
legislatures, Congress in particular, to overcome
a constitutional decision of the Court is worth
considering to the extent we think the underlying
questions of democratic theory are ones that
should motivate reform.

And in that sense, it could be
fruitful to look at the way this constitutional
feature functions in the community and system and
that's something the draft gestures at.

It isn't something that's enshrined in
their Constitution and if a Court invalidates a
provincial or a parliamentary law on
constitutional grounds, there are certain types
of decisions that can be overcome for a five-year
period.

And what that means is that regardless
of what the parties said, the law comes back into
effect and there's no difficulty with enforcing
it in any way.

And that's facilitated by the fact
that they have a parliamentary system and there's
an independent judgment necessarily being made
about whether to enforce a law.
In the design of that, there are also certain rights that cannot be overridden. Rights that protect democratic process and in their case, language rights which is central to the constitutional compromise in that jurisdiction.

But this is all just by way of saying that there are design challenges associated with an override, but there are ways of overcoming some of the problems that have been identified.

But it does require taking a particular position on the role that the democratic process should play in shaping the meaning of the Constitution and whether or not it can overcome individual rights in the Constitution itself as recognized by the Court.

And one of the features of this chapter is it prompts us to think about things, not just that are obvious given the debates we've won, but having of other ways of achieving some of these goals.

So with that, I will bring this session to an end and say that we will reconvene
for our final session at 4:10. We'll see you then.

(Whereupon, the above-entitled matter went off the Record at 3:46 p.m. and resumed at 4:10 p.m.)

CO-CHAIR BAUER: So I'm happy to welcome you back from the break. And we're now going to move to the next session where we will discuss materials that bear on the practices and procedures used by the Court to make case selection and to review cases.

These materials were prepared by a working group within the Commission as we've said because we want to make sure anyone who's tuned in understands the materials that we're discussing.

The materials we're discussing prepared on these issues do not reflect the views of the Commission or those of any particular Commissioner.

They were designed, however, to be inclusive in their arguments for and against
reform to assist the Commission in wide-ranging
and robust deliberation.

So after reading the materials in
preparation for this deliberation, Commissioners
have indicated their interest to us in addressing
these topics and I will recognize them shortly.

But first, I would like to turn to
Commissioner Huang who is going to provide us
with a summary of this draft that's also posted
to the website for your review.

And then I will call on the individual
Commissioners for their comments. Commissioner
Huang, the floor is yours.

COMMISSIONER HUANG: Thank you,
Commissioner Bauer. Thanks everyone. As you
know, the range of public debates about the
Supreme Court go beyond the structural reforms
we've been discussing so far today.

Public discussion as well as proposals
for reform have also addressed the Court's
procedures and practices. This includes issues
which have drawn lots of public attention lately
such as the Court's views of emergency orders in cases of great public importance.

It also includes long-standing questions such as how to help the public observe the Supreme Court's proceedings in real time also known as cameras in the Courtroom.

And so ever since the Commission's formation in May, Commissioners have been tasked with considering a wide range of debates and proposals relating to the Court's procedures and practices.

As you'll recall, the Commission heard from expert witnesses on many of these issues over the course of several testimony panels during two sets of hearings this past summer on June 30th and on July 20th.

If you like, you can go back and watch them online. Today's discussion materials also draw on commentary from lawyers, scholars, judges, and some of the Justices and their written opinions or public statements as well as hearing separately held by the House and the
Senate this past year.

   The issues covered and the discussion materials prepared for today fall onto four categories. First, emergency orders, second, case selection, third, judicial ethics, and fourth, courtroom transparency.

   In the first category, the discussion materials surveyed the public debates which have intensified over the past few years and especially this past summer about the Court's use of emergency rulings.

   Most notably, those that allow or don't allow a new law to take effect while legal challenges about that law continue forward in the Courts.

   These discussion materials point out recurring concerns raised by the public debates most of which have to do with how these emergency rulings differ from the way the Court usually decides cases on its very third docket, or merits docket.

   For example, the debates have focused
on how emergency rulings have less briefing. They usually don't involve oral arguments by the lawyers. And often do not provide much public explanation of the Court's reasoning.

While recognizing that emergency procedures are necessary and that they may need to differ from the usual procedures, commentators and commission witnesses have offered a variety of proposals for addressing such concerns.

The ones discussed in these materials include calls for more public explanation of the Court's reasoning as well as clarifying whether emergency rulings have the sort of precedential effect of the Court's regular opinions do.

Proposals from the Commission witnesses that apply specifically to capital cases and more generally, proposals aimed at reducing pressure on the Court to decide cases of great public importance on an emergency basis.

In the second category, case selection, these materials focus on concerns about the informational inputs of the Court at
the point when it's deciding which cases to hear.

Known as the certiorari stage.

The materials addressed proposals to broaden or improve the informational inputs such as by allowing more input from the public, or by allowing more direct input from other Federal judges who are often in a good position to know what legal issues need guidance from the Supreme Court.

The third category is judicial ethics. These discussion materials acknowledge public attention to the fact that the Justices of the Supreme Court are not formally bound by a code of conduct though they may informally consult the code that applies to other federal judges.

Also, unlike other federal judges, they are not subject to the federal statute that governs judicial discipline. Over the years, for various proposals, including Congressional bills have been directed at these topics.

These discussion materials also considered a public debate and proposals about
recusals of the Justices from individual cases to
the potential conflicts of interest.

Fourth and finally, there's a long-standing issue about cameras in the courtroom or
if not cameras, at least the possibility of
continuing the audio live streaming of the Court
started last year. Thank you. Commissioner
Bauer, back to you.

CO-CHAIR BAUER: Thank you very much,
Commissioner Huang. I'd like to begin by
recognizing Commissioner Driver.

COMMISSIONER DRIVER: Thank you, Co-
Chair Bauer and thanks also to Commission Huang
for that characteristically incisive framing of
the issues. I'll be brief. I wanted to speak
about the issue of financial recusals and
Justices owning individual stocks.

I thought that the discussion
materials were somewhat diffident on this
particular issue and I would promote a more
straight-forward maybe a more straight-forward
approach.
We say in the discussion materials on about Page 28 or so, the Commission notes the consensus among observers that no Justice or their spouses and dependent children should own or continue to own individual publicly traded securities.

And I would say that I would not be comfortable merely noting the consensus, but I would like to endorse that consensus as well. Seems to me that the scope of the problem is reasonably significant.

The discussion materials note that at least one recusal has happened in 10 percent of the cert petitions that involve a Forbes 100 company.

And that seems like, as I say, a reasonably large number. I understand that this could be, you know, a delicate matter given that we are dealing with individual Justices, finances, but I do think that there are mechanisms that are in place that when a conflict arises, it offers Justices the opportunity to
divest themselves of the individual stock without
incurring capital gains.

So we identify two potential
solutions, you know, Congress could either
require divestment when conflict arises or the
more far-reaching solution which would prohibit Justices and their families essentially from owning individual stocks.

I would personally be willing to go farther and prohibit the owning of individual stocks. And I should say, I don't believe that this would succeed in transforming the judicial oath into anything like a vow of poverty.

It seems to me that Justices would still be capable of owning index funds and things of that nature. And this would be a viable solution to something that gives, I think, many people concerns.

Having said that, I also note that there are several of my fellow Commissioners who were judges and may be more attune to these issues and I would really invite comment on these
sorts of matters so as to, you know, air them here in our deliberations so. Thanks for hearing me.

CO-CHAIR BAUER: Thank you very much, Commissioner Driver. Commissioner Adams?

COMMISSIONER ADAMS: Thank you, co-Chair Bauer. Thank you, Co-Chair Rodriguez. And thank you, Commissioner Huang for the able summary of this portion of the draft report.

I just have one short intervention here. And I think it makes sense given the amount of time that we, this chapter spends on the Court's use of emergency orders, a/k/a, the shadow docket.

For instance, there is a great deal of depth here. The chapter goes into inadequate procedure for important cases, lack of transparency, the problem of Presidential affect, the fallout from Holloman's health, et cetera.

And I think that's all to the good given how much attention has been paid to the Court's use of emergency orders more recently.
But this is the intervention that I'd like to
suggest.

I do think that this section and I
know, I can imagine the drafters were concerned
about length. I do think this section would
benefit from more context and history,
particularly because as I've said, the Court's
use of emergency orders has been so much in the
news of late.

I think it's an opportunity for this
Commission to provide a real public service
which, of course, we are doing but even
underlining it here so that the public
understands for instance whether this is a
significant deviation from the way the Court used
to behave.

There is some discussion a couple of
sort of right into the chapter about the Court's
practice in the '50s and '60s, but there's not a
really thick substantive account of that and it
would, I think that the chapter would do well to
compare and contrast.
There's a significant different, why is that so, the chapter says the number of emergency orders have multiplied in recent years and has increased dramatically.

I think a few statistics here raised into text would be very useful in connection with these assertions. And I think the report also, the draft report also notes that the number of merits decisions is declining.

I think it would be helpful to know what percentage of the overall docket is comprised of merits versus emergency orders, have those percentages changed over time, and finally, as I indicated before, there's this sort of connection with '50s and '60s and it would be interesting to know if there's been significant changes.

Again, I think that the draft chapter's covering a lot of ground and I think, like the other chapters in the report, it's a significant triumph in terms of the level of analysis and sort of real sort of erudition that
is there, but I think that the chapter would be
improved if we added a little bit more history
and context in the first portion. Thank you.

CO-CHAIR BAUER: Thank you very much,
Commissioner Adams. Commissioner Griffith?

COMMISSIONER GRIFFITH: Yes, thank you,
Commissioner Bauer. I do agree with everything
Commissioner Adams said. I think this is an
important issue that's not well understood.

The only thing I would add is I really
think we should, with all due respect to
Professor Baude, I think we ought to drop the
terminology shattered document.

It just makes it sound so sinister and
yet Commissioner Huang didn't use the term in
describing the then set up. I think they, I
think the report would be improved by getting
away from that.

But having said that, I think we
should add that this is exactly right, that this
an area that public doesn't know a great deal
about.
And because of the increased use of it by the Court, I think it's, I think it would be worthwhile to have more context than this. Thank you.

CO-CHAIR BAUER: Thank you very much, Commissioner Griffith. Commissioner White?

COMMISSIONER WHITE: Thanks again and thanks everyone. On this document I would like to raise two concerns. First, about the emergency docket and second, about case selection.

First off the emergency docket, I think our, the document downplays the connection between the Supreme Court's emergency docket and the lower court injunctions.

Our document alludes to the one specific issue of district court's nationwide injunctions and that's an important aspect of the issue I think, but it's only one aspect.

And what I'm getting at is it seems that the Supreme Court's exercise of equitable powers with abbreviated procedures on issues of
national importance is just an echo of a broader issue of federal courts exercising equitable powers with abbreviated procedures on issues of national importance.

In that sense, the Court's emergency docket or shadow docket, apologies Commissioner Griffith, is just a special example of the bigger question of how Court's ought to carry out the responsibilities as courts in our constitutional system.

At the Supreme Court and in lower courts, judges face constant requests for swift and energetic judicial intervention on a discretionary basis under equitable standards that leave the judges with immense power and with decisions that leave confusing precedential effects.

And so whether the Supreme Court or the lower courts are the ones exercising this discretionary power, it strikes me as somewhat antithetical to the constitutional design of a judiciary created to exercise neither force nor
will but merely a judgment.

And I also think it would be a mistake to attempt as this document attempts, to afford profoundly different treatment to one part of the emergency docket, namely capital cases, than to the rest of the emergency docket.

I understand that death is different. But there are many differences among the various kinds of cases on the emergency docket and so even for someone like me who would like to see the death penalty abolished and the federal government and in all the states, this part of the report strikes me as special pleading.

Now, my second point on the Court's case selection process, I have similar concerns here about the Court's discretion in deciding which cases it's going to hear.

The discussion document highlights many problems inherent in the Court's discretionary power to hear or not hear cases. I worry that this aspect of the Court's work shapes the public's perception of the Justices and also
the Justice's own perception of their constitutional roles.

Reading that part of the document, I thought as I went, well, maybe the best solution here is not to encourage the Justices to wield this power and discretion differently, but to just reduce their power and discretion by reforming statutes and increasing their mandatory docket.

But as I page through the document, through a number of possible solutions, I never reached that one. Instead, we seized our more targeted discussions of how to reallocate discretion.

Again, I think as I said in my first comment today which feels like a very long time ago, admittedly, I think the basic challenge for the Commission in all five of the topics we're discussing, is how we should think about the Court as a Court as a deliberative body entrusted with judicial powers.

Courts should receive cases not claim
them, Courts should decide cases deliberately,
not swiftly and we should always look for
opportunities to reduce the judiciary's
discretion, not enlarge it.

And I hope that this aspect of our
report in particular which I think is especially
relevant to those considerations is re-oriented
accordingly. Thank you.

CO-CHAIR BAUER: Thank you very much,
Commissioner White. Commissioner Baude.

COMMISSIONER BAUDE: Thank you. I'm
sort of reluctant to speak up about this chapter
because I worry that my comments are going to be
destructive rather than helpful, but I do feel
sort of compelled to do so.

So I think there are a lot of things
about the approach these materials take that are
not a good way to approach it at a sort of a high
and systematic level.

So in discussing the emergency docket,
and I'm not at all led into calling it the shadow
docket, I'd be happy not to call it the shadow
docket.

We're discussing the emergency docket,
I worry that we started acknowledging the point
in a few places, that the draft materials still
don't do a very good job of disentangling what
critiques really reduce to just the figuring out
what the merits of particular objections, you
know, that the Court showed a different view
about SBA than it does or a different view about
free exercise than it does and which ones
actually have some sort of, you know, trans
substantive non-partisan, non-political content.

You know, even and then, seems like
it's probably exacerbated to the fact that here's
the one part of our materials where we sort of
trying to talk through a specific about recent
cases.

Something that managed this data to
help us find common ground in other areas, but I
think it makes it harder to do here when we start
actually having to adjudicate a bunch of cases in
a recent memory that we have views about.
Then, another problem is that when it comes to the hammer reform, much of the reforms to Justices here are focused really on telling the Court what to do, telling the Court to behave differently which is again, not an approach we've otherwise taken and I think we've not taken it for good reason.

We were commissioned by the President to provide advice to President and then to the public about some reform possibilities, most of what we're talking about here is not addressed to the President really or the public so much as the Justices.

And I worry that's made worse by the fact that we haven't really heard any form of capacity from the Justices and haven't had them to sit in this process.

And that makes it even harder for us to sort of come in and tell them that they should be doing their jobs differently when we don't really know what they think that they're doing or what they're confronting or why they're doing
what they're doing.

So I think it sort of ends up being both misdirected and potentially uninformed.

Beyond that, I do, I share Commissioner White's concern that singling out how capital cases for sort of separate structural treatment just make us appear guilty of the same kind of picking and choosing particular causes that we worry about when the Court does it.

And that's not great. And then as to other parts, I won't spend some time on them, but I don't think we've done enough to show there's any problem in the Supreme Court bar or case selection process that really merits discussion at all.

The same thing is true for judicial ethics where we haven't really shown there's some sort of judicial ethics problem or even really appearance of judicial ethics problem with the Court that requires us to address it or requires to the Court to do anything differently.

So I'd like to propose a different
approach that, by looking at a different approach
which would be to not issue or to neither pursue
any report on this topic, to just take, you know
I think it was a right thing to do to have a
working group to study it and to try to amass a
bunch of materials I think.

    You know, that will, of course, be
part of the whole record of discussion that's on
the record, but I think in the interest of trying
to find a way to move forward some things that
we've already talked about which there's a lot, I
wonder if it would be best if we just not have
this chapter be a part of our final report and
leave that for some, you know, different body,
different people to consider on their own was my
suggestion.

    CO-CHAIR BAUER: Thank you very much,
Commissioner Baude. Commissioner Boddie?

    COMMISSIONER BODDIE: Yes, hi. So
thank you. I thought this was another terrific
chapter and want to commend everyone who
contributed to it.
I just want to say a quick word about the section on capital cases. I thought that this section could benefit from acknowledging more explicitly the high complexity of capital cases which is important context for understanding the consequences of emergency rulings in this area.

And although I know this is a report to the President, it does have a public audience and it may not be clear to lay audiences that this is a highly specialized and thorny area of law that really does limit the pull of lawyers in the lower courts who can expertly represent people on death row which is another reason why death is different.

And also, why, you know, based on my view, the Court should err on the side of pausing executions. It would be interesting to note if there were empirical studies that talk about the availability of lawyers who have expertise in this area.

I have to imagine that they exist.
I'm not personally aware of them. I knew that in the draft, there is sort of somewhat oblique preference to the special context of capital cases.

But I think that could be drawn out more specifically and I just note that the testimony from the federal habeas, sorry, Federal Capital Habeas Project does provide some language to that effect if you wanted to insert that in the draft.

CO-CHAIR BAUER: Thank you, very much, Commissioner Boddie. And I would like to now recognize Commissioner Ifill. Or do I, have I missed --

COMMISSIONER IFILL: I'm here.

CO-CHAIR BAUER: Oh, did you have your, are you in the queue or --?

COMMISSIONER IFILL: I'm in the queue.

CO-CHAIR BAUER: Okay. The floor is yours.

COMMISSIONER IFILL: Okay. I think first of all, I'm grateful to all of you for
those comments. They actually spark my thinking.

I wanted to respond to two observations made by William Baude. The first one is one, you know, that's not surprising because, you know, we see it all through the literature.

And we see it all in the commentary. You know, is the concern about the Supreme Court shadow docket procedures really just a concern about the merits of the cases that are being taken.

And I guess I would presume to begin kind of from the area that the way in which Adam White talked about what judges do. And I would begin by talking about what we think are the benefits of adjudication and what those elements of adjudication are.

I think we are in agreement as lawyers that we mostly think that adjudication consists of certain elements that we think actually surface the critical issues in cases and allow judges to be in the best position to make good
decisions.

And that could include trial, briefing, argument, appeals and so on and so forth. Most of us would be unemployed if we didn't think that those things were important.

Obviously, when you're dealing with emergency orders, you are truncating a process in which those elements are not happening and I left out one element.

One element, another element is the written decision of a judge which I think in our profession we tend to think actually is a form of discipline because the judge is essentially showing her work, is showing the reasoning, is allowing us to walk through a process and understand the meaning of the decision.

Emergency orders are different and I think it said throughout the text obviously you need the answers quickly and so there's a truncated process.

So when the question is raised about isn't this just about the merits, my reaction to
that is always, yes, partially it is about the merits. It's not just about the merits, but partially it is.

All of the commentators, those who criticize the Court's shadow docket procedures and those who condemn them or those who defend them, excuse me, all recognize that this issue has become uncomfortable as these emergency orders emerge in recent years in matters of national significance, involved in areas that involve the rights of millions of people.

If we think about the COVID prison cases, the election cases, the religious liberty cases, the abortion case, that these are high-profile substantive matters.

And that is drawing our attention to the Court's procedures in the emergency orders realm. So it seems to me it asks that question as to say yes, that is part of it.

It's not just it, but it is part of it and it's what it's revealing is what is bumping together is the reality that emergency orders
don't allow us to get all of the elements that we
tend to feel comfortably belong in the
adjudication of important substantive matters.

And yet we are getting decisions from
the Court that are having the effect of, in many
cases, conclusively deciding the issue because in
the election cases, the election is going to
happen because in the COVID cases, you're either
going to get it or you're not in that short
period and so on and so forth.

So I don't think that's really a
criticism. I think that's a concession. We
recognize that the fact that the merits cases are
so, the substance of the cases are so important
that it actually raises the stakes on these
issues.

And then the question is, well, what
do you expect the Court to do about it and I
think that what this section tries to suggest is
that it is not inappropriate for us to expect the
Court to notice that these are happening in areas
that involve the substantive rights of millions
of people.

And therefore, to take care to be consistent, consistent in whether the Court reveals the standards it's using, consistent in whether the Court actually offers even a brief explanation of the decision, consistent in whether the Court purports to believe that the emergency order has precedential effect or not.

So I think the fact that the merits are involved is of a piece. Not in terms of one side or another, but in terms of the fact that these are important cases.

And then the last part about focusing on telling the Court what to do, I don't really see it that way. You know, I think we're charged in each of these chapters with trying to explore the possibility of reforms on important issues related to the Court that have become the subject of tremendous controversy and that are related to the issues of Court expansion in the minds of people who believe that something must be corrected and those who believe that nothing
must, needs to be corrected.

And it seems important that in the exploration of this set of issues, we identify if there were to be reforms, how would they happen.

It so happens, that because of the subject matter of this section, that most of the power to make reforms actually sits in the power of the Court.

This is not a circumstance in which it is actually something that should fall into the area of Congress or in which the President has the power.

These are actually internal matters that are churning a tremendous amount of discussion that touch on the legitimacy of the Court in the eyes of the public.

And so, I don't think, I don't see it as telling the Court what to do. I see it as identifying for the President and for the public, if reforms were to happen, how they would happen and who would be responsible for making them happen.
So I feel quite comfortable with that.

I understand why it's different than other chapters, but I think it's different than other chapters because of the subject matter.

That doesn't make it, in my view, right for disqualification from the report. But I think it's just right for recognition that it is different and therefore in the reforms proposed and how they're set forth, it's going to necessarily be different.

CO-CHAIR BAUER: Thank you very much, Commissioner Ifill. Commissioner Lemos?

COMMISSIONER LEMOS: Thanks, Co-Chair Bauer. I'm going to end up echoing I think some of what Commissioner Ifill just said. Because I wanted to speak to the same issues that she just addressed.

But I'll try not to just repeat. So as others have mentioned at earlier parts of discussion today, we can't possibly talk about everything that might be relevant to an account of contemporary commentary and debate about the
role and operation of the Supreme Court.

We have to make some line-drawing
decisions and in this chapter in particular,
seems to pose the line-drawing challenge in
particularly stark form.

And I think that's been reflected in
some of the other comments we've just heard.
Commissioner White says, you know, there's more
we should address here and Commissioner Baude
said, no, there's a whole lot less we should be
addressing here.

My own view is that it is useful and
appropriate for this chapter to consider
proposals that the Court could implement itself
voluntarily.

For sure that's a different approach
to reform than proposals for new legislation or
for constitutional amendments. But it strikes me
as a valuable approach for us to consider
especially in a chapter focused on the Court's
own internal process use.

Since the Court sets its own
procedures, it would seem odd to my eye at least to talk about those kinds of issues without considering changes the Court itself might opt to take up.

And then putting that together with constraints of space and time and the need to draw some lines, it then makes some sense to me for the chapter to focus primarily if not exclusively on proposals that are addressed to the Court itself.

And I take it that may be one reason for the draft not to include a lengthy discussion of mandatory jurisdiction, but it seems the more important reason for not focusing on mandatory jurisdiction in any detail in this chapter is that to my knowledge at least it has not been a significant theme in current debates about the Court.

And is also not something that we heard about from the many witnesses who submitted testimony to us. Those witnesses were instead focused on the sort of information environment in
which the Court operates at the certiorari stage and on mechanisms that the Court itself could use to expand that environment or process the relevant information more effectively.

So that's the first thing I wanted to say. The other topic I wanted to touch on was to pick up on Commissioner Baude's and Commissioner Ifill's comments about the relationship between debates about the shadow docket so called and debates about the merits of the Court's decisions.

And I, here I want to associate myself with Commissioner Baude's suggestion that one way our report can and I think should be helpful is by clarifying when and why those debates overlap.

So when and why debates about the Court's emergency orders are in a sense really debates about the merits of the Court's decisions.

And I think to some extent they are and unsurprisingly so because the standards the Court is applying in this context include an
inquiry into the merits by asking whether the
applicant has shown a likelihood of success on
the merits.

And we also heard what to my ear was
really useful testimony about the unavoidably
normative and contestable judgments that go into
other parts of the test including on the
assessment of irreparable harm and the weighing
of the public interest.

And so it follows, I think, that
disagreements with how the Court is applying
those tests are to some extent and again
unavoidably going to be disagreements with the
Court's judgments about contested questions of
law and about how to weigh computing values and
interests.

And I think our report can be helpful
in clarifying that point. And also being clear
about its limits. And so here I really am
echoing some of what Commissioner Ifill said, but
as I understand the pulse for the Court to offer
more explanation for its emergency orders are not
intention on the merits.

In other words, arguments about transparency are not, as I understand them, grounded in or limited to disagreements on the merits, but are driven by a desire for more explanation largely so that the public can understand what the Justices' views of the merits are.

And understand what judgments the Justices are making about how to weigh computing interests and understand how the different prongs of the relevant standards work together including just how much work the merits are doing in the Court's own assessments.

I'd say the same thing about arguments about precedential effect of the Court's emergency decisions. I take the general thrust of those arguments to be independent of the merits or outcome of any given case and to have more to do with kind of generalized considerations about the strength and scope of precedent.
And so, I hope as we move forward with these drafts that as we get toward a more final draft of this chapter, we can better clarify that interaction.

CO-CHAIR BAUER: Thank you very much, Commissioner Lemos. I would like now to recognize Commissioner Crespo.

COMMISSIONER CRESPO: Thank you, Chair Bauer. I thought I'd offer just two comments in response to Commissioner's Baude and also the Commissioner White first on the capital portion of the chapter and then on the issue of addressing the Court.

On the capital portion, I take Commissioners Baude and White to be responding to the fact that the capital cases are broken out to their own section. And the concern being at this endorsed view of it, to use an often-stated phrase, death is different. Don't you just think it's important on this point to distinguish between a descriptive use of that phrase and a normative use of that phrase and to talk about
how I read the report actually using or which I see the report sort of embracing.

On the descriptive point, the idea that death is different, I think, is just important to note and to front and center. Something that the Court itself has said numerous times since the 1970s when its own modern capital jurisprudence sort of started. Is that as recently as 2012 in Miller v. Alabama, that was Justice Kagan that said it; in 1991 in Homeland v. Michigan, that was Justice Scalia.

I think each time the Court says it, it seems to be at least at a minimum addressing the descriptive observation that death is in fact different. This is a point that Professor Bray made to the Commission when he was talking about the basic fact that an execution is irreversible.

Now, of course, in many of the emergency order cases, there are instances where it seems practically irreversible, but in this respect death is actually different and if an execution goes forward it is final.
There is no way to undo an execution. And I think that's the point that again, Professor Bray was making. I think he was echoing the Court again itself when it says that it is different because it's unremittable. It cannot be undone.

Now, that's different than a motive of claim which was also brought forward to the Commission. Again, Professor Bray said not only that death is different, but that the fact that death is different should matter.

His testimony to the Commission was that "the Justices should be much more willing to give shadow docket orders that delay an execution than shadow docket orders that accelerate one."

Now this he was saying because death is different, the Court should treat it differently. I think the report from the Commission could have been written to embrace that normative view.

I expect that perhaps unlike some other issues there are many people in the
Commission who could coalesce around such an idea perhaps in part because the Court itself has treated death differently because it thinks it is different and should be treated differently.

But with, I think with due respect to Commissioner White, I don't think the report actually does embrace this normative point. I think it acknowledges a descriptive point, but I don't think the Commission does actually say that it agrees with Professor Bray.

Rather it quotes him, it quotes those who disagree with him and it lays out the two sides of the argument without stating a position.

The only other thing I'll say on capital point, is that I agree with Commissioner Boddie. There, I think actually that there is quite a bit of empirical evidence on the complexity of capital cases and on why that often times impacts the timing in which these cases are brought.

The current report cites empirical evidence on this from Professor Lee Kovarsky
which I'll just speak for myself. I find
persuasive on this point.

This is in the endnotes of the report.

I think it's something that I would personally
welcome seeing elevated to the text of the
chapter, but I imagine that for all sorts of
space and other reasons, it wouldn't surprise me
if it stays there, but I just wanted to say to
Commissioner Boddie that I think it's an
important point and that it trains some of this
issue surrounding capital litigation.

One other point I wanted to make to
Commissioner Baude on the question of addressing
the Court, you know, it was thinking that this is
as you were speaking and it strikes me that
there's maybe more analytic similarity across the
issues addressing the chapters here than might
meet the eye.

You know, Commissioner Lemos describes
the issues in this chapter as things that the
Court itself could implement and I agree that
these are things the Court itself could
implement. I just think it may be worth observing that a number of the things we spoken about all day are things that the Court itself could implement.

For example, if there were Justices listening to this who actually were persuaded by the normative force of term limits, that's something that the Justices could implement.

They could embrace a norm of all retiring after 18 years. Indeed, you can imagine Justices taking leadership and announcing that they were retiring at 18 years in order to instantiate for precisely such a norm.

Likewise, we've been in jurisdiction stripping or Congress taking certain matters off of the Court's docket, but the Court has an almost entirely discretionary docket.

If it was persuaded by any of those arguments, it could also take steps to do the same thing. So I think really all I'm trying to say is that I think it's perhaps a matter of emphasis that in this chapter, there are matters
as in other chapters, the Court itself could take
up if it wanted to.

Likewise, those things could be
imposed on the Court externally. And this
chapter also talks of ways that many of the
interventions with respect to the emergency
docket could be imposed externally by Congress.

So I just wanted to observe that point
that this may be more a matter of framing our
language than some sort of deep analytical
distinction that separates these chapters from
the others.

CO-CHAIR BAUER: Thank you,
Commissioner Crespo. Commissioner Gertner?

COMMISSIONER GERTNER: Let me start
where Commissioner Crespo ended. I think that
this in one sense, this is another chapter in
which we are talking about issues of legitimacy
of and as well as judicial independence.

And so to some degree, it's broadly
framed in exactly the way that the rest of the
chapters are. A Court that has no rules that are
apparent to anyone else governing what they do, and no mechanisms to enforce ethics is a Court that could well suffer from a legitimacy problem.

So I agree with Commissioner Crespo that there is, that this really is sort of a consistent part of the other themes of the other chapters.

In addition, this, I think that this chapter has a unique role in the overall report. Because this is a chapter with sort of much more concrete, this is what you can do tomorrow kinds of suggestions.

And I think it's really critical that we speak to that. That we do more of the this is what you can do tomorrow kinds of observations and that's where this one is going.

I also, as a District Court Judge, I wasn't sure that I completely understood the point that somehow the shadow docket was related to the effect that district court judges and the courts of appeals are issuing nationwide injunctions.
The fact of the matter is that a district court that issues an injunction has to write an opinion. It has to write an opinion. And that a court of appeals that affirms it has to write an opinion.

Only the Supreme Court doesn't. And it seems to me that that's critical. It's critical to the guidance to the lower courts and I'm not sure that, who said this, maybe it was Commissioner Ifill, but writing opinion changes the decision.

I do some arbitrations now and I think it's hysterical that arbitrations the parties that are involved in an arbitration will say to me, you know, I'm supposed to ask whether they want a reasoned opinion or unreasoned opinion.

And I've always, the, I never knew what to say about that. I feel like saying, okay, you want an unreasoned opinion? You win, you lose, I'm out of here.

Essentially, not writing an opinion enables a different kind of decision making. And
so that is, I think, a key is an issue of transparency, there's an issue of legitimacy, but it changes the nature of the decision making if you have to say it out loud on paper on the front pages of the newspapers.

So I think that is a broad critique of the so-called shadow docket. As to the concern of some that we are intruding into the territory of the Supreme Court Justices: so be it, is my comment. Judges and Justices are responsive to the public, and they can no more be in a tower than any of us can be.

CO-CHAIR BAUER: Thank you, Commissioner Gertner. Commissioner Baude?

COMMISSIONER BAUDE: Thanks. So I just, I have three quick comments. I take off the suggestive points about sort of the descriptive and different. I guess, part of that said, I think there's a land in which everything is different from everything.

You know, the Court also has things it says about, you know, how it's free exercise
right is different from other things, that it's like to enjoy possibly how the abortion right is different, and other parts of the report with regard those are just kind of lumped together.

We move past those. But as, I'm sorry, I'm still not sure that we're sort of being consistent in how we think about what's different from what and what's similar to what.

Of course, you know, some people would say that abortion cases involve death too. It's not my view, but that's part of the debate.

I mean the transparency is actually a good illustration of part of the problem. So I totally agree that asking for just transparency seems like it doesn't allow us to get into the merits.

And yet, I think you would get a very misleading impression from those materials about what kind of transparency the Court provides.

So in the past few years, the Court has taken to writing opinions and in a lot of the shadow docket decisions. And the report does not
try to do this systematic way.

So you know here are all of the, you know, contested emergency orders the Court has issued. Here are the ones they issued an opinion, here are the ones they didn't.

Of course, once they did issue them in Holman Power vs. Jackson, the second eviction moratorium case, a New York eviction moratorium case.

Several of probably the most consequential of the Church COVID cases. I think if we were to line them up, I mean, this is upsetting here, but I think if you were to line them up, it wouldn't be obvious that the Court is making the wrong choices.

We don't really have any basis for saying that something's wrong here. Especially since the report itself sort of professes agnosticism about how the Court should draw the line. So it sort of comes across as a calling upon the Court to do better without even really showing that the Court is not doing well.
And my impression, and again, it is just an impression because we haven't heard from the Court itself, is that this is a self-conscious attempt to put reform on the Court over the past couple of years.

So I think we come across as being sort of out of touch with what the Court is actually doing or, you know, potentially sort of leisurely following the news account that the Court rather than ourselves is something to actually figure out what's going on.

And I, I mean, I have many criticisms of the Court. I am happy to intrude on this, this territory, all the time. I probably do it too much.

But I do think we're not doing it here in an informed and careful way.

CO-CHAIR BAUER: Thank you very much Commissioner Baude. Commissioner White?

COMMISSIONER WHITE: Thanks. Since I already spoke once, I don't want to try people's patience, but quickly just to respond to a few
things that have been said, I do think the issue of mandatory jurisdiction is on the table for the Commission aspects that have been explored and testimony submitted by Michael Kuhn (phonetic).

He alluded to proposals and had very eloquent criticisms of it. The committee of Supreme Court practitioners wrote on it at length and noted that we had specifically invited their testimony on the subject of mandatory jurisdiction and questions of death penalty cases.

So I do think it's a live issue. I don't think we necessarily need to explore exhaustively in our report. With respect to Commissioner Crespo's comments, the points are very, very well taken and the difference that I see and the thrust of the first part of the emergency docket discussion and the capital cases part, I might just be putting my own gloss on it as a reader.

If that's not the case, to the extent that there is a real difference in the thrust of
the first part of this document and the second, I don't think it's really enough to just invoke the, you know, the justifiable line that death is different.

First of all, because as Commissioner Baude said, there's a lots of differences between different kinds of cases on the emergency docket. And we can't just say that the rock is heavier than the stick is long. I think we need to grapple with these as part of our unified whole of the emergency docket. And as Commissioner Baude said, death, matters of life and death arise in any number of issues on the Court's emergency docket.

Questions of national security, questions of abortion which present matters of life and death and all the different dimensions for different people, matters of the criminal process and the COVID cases and so on.

And so again, this might just be my gloss that I'm putting on it as a reader on the Commission, but it did strike me in the reading.
And then finally, Commissioner Gertner's comments on my attempt to draw a connection between the shadow docket and the equitable powers of lower courts is well taken and I don't want to overstate the similarity.

Yes, it is a good thing that the lower courts offer opinions to accompany their preliminary injunctions and TROs and the lower court should do it as well.

But for me, the point I was really getting at, and I want to be clear. It's not so much the fact of a written opinion which is important, but it's just the quality of the process.

The abbreviated process in both cases and also I think the nature of the decision in these equitable matters where it's not just an interpretation and application of law and facts, but it's a mix of discretionary equitable considerations that often confuse as much as they clarify in the written opinion. Thank you.

CO-CHAIR BAUER: Thank you very much,
COMMISSIONER IFILL: Thank you. I just wanted to one more time respond to Commissioner Baude because I don't want to leave the impression that there's kind of shoddy work here that is responsive to kind of the fad of talking about the shadow docket.

The transparency argument is actually connected with the consistency argument. There are a number of cases and I think it's explained in the materials in which the Court has offered a brief and short explanation and including in the most recent abortion case.

I think you will discover that those cases as I think even you indicate, are quite recently and have begun to happen with more consistency because of perhaps not because of, but certainly it correlates with the increasing criticism of the shadow docket.

And I think the argument that is being raised is that should happen more consistently.

That you shouldn't be, jury, you know you
shouldn't be picking between different cases.

Some getting an explanation and some
not. So I think that's the point of it. Not to
suggest that the Court doesn't do it. And as I
have said when we've, you know, talked about this
issue, you know two or three cases doesn't
necessarily mean a trend.

You know, we've been tasked with
studying something. We see it, we have a pretty
heavy body of work to look at and we see it in
consistency and so it's great if the Court has
gotten the messages and is beginning to do it.

But we really have no way of knowing
whether they intend to consistently apply that.
So I don't think we're out of touch. I think
we're quite aware of the cases that went to the
Court is writing those short explanations and
we're approving of them.

We think that should happen and it
should happen more consistently. And then I
would just say, on the death is different piece,
you know, it goes to Commissioner Boddie's
comments and Commissioner Crespo's on the issue of process.

    When I'm hearing death is different for purposes of this particular section, it is not only that it cannot be reversed. It is that the process of capital punishment cases is distinct from almost every other of the procedures by which a capital case gets to the Supreme Court is governed by a very particular body of law.

    One and a particular process, one which the Court itself has critiqued which encouraged Congress to pass a statute to try to change what that process would be like, and frankly, I think the effort was to try to be respectful of that.

    To be respectful of the fact that capital cases sit in a very specific and identifiable procedural lane. But otherwise, I take the comments to be actually quite helpful and the need to add more of the empirical data to explain more in part because of what was said at
the top by Commission Huang which is that this an area that many lay people don't understand. And therefore showing all the work and giving the back story is important. And if Commissioner Bauer will allow greater space for the report, I think that your suggestions are well taken.

CO-CHAIR BAUER: That you, Commissioner Ifill. I just have a couple of quick -- I know I shouldn't prolong what has been a long and extraordinary day. I apologize. I'm also having some audio issues.

So if I'm shouting, I'm overcompensating. I apologize, but what I would say just very quickly is the concluding remark on my part about this conversation and then I will turn it over to Co-Chair Rodriguez for some final remarks.

I just want to say something about our charge which is implicated in some of the comments that have just been made. First of all, as we note in the draft, or has been noted in the
draft, particularly reflected in the comments that we've made about the executive order and how the charge should be understood by the terms of the executive order, we as a Commission, have not been charged with making a recommendations.

We've been charged however, with providing the President with an informed and critical account of the current debate about the Supreme Court.

And that naturally brings us to issues like the ones that we've been discussing just in this last hour. However, it obviously does involve us both in the case of confirmations in the Senate and in cases involving internal operations of the Court.

It involves us in speaking carefully with the President to inform them of the issues that we really do have to address, but attempt to do so in a manner that is institutionally respectful.

We're not speaking to the Court, we're speaking to the President and of course, the
President intends for the report to inform the public.

So I do think these are issues appropriately touched upon, but how we go about it is significant. It was my impression that as Commissioner Driver noted, that the phrase appearing in the draft on judicial stockholding, I hear people are having huge trouble hearing me.

Is that correct? Is there a problem with the audio?

CO-CHAIR RODRIGUEZ: I can hear you well, Bob.

CO-CHAIR BAUER: Okay.

COMMISSIONER MORRISON: Before we couldn't hear you so well, but now it seems fine.

CO-CHAIR BAUER: Okay, very good.

Thank you. That, well and Commissioner Driver was referring to the text. I don't have it in front of me, where there was a note made about consensus that he said he would like to see more affirmatively endorsed.

I read the language of that working
group to be an attempt to come to terms with
precisely this question of how you inform the
President, how you show critically the direction
of the debate has taken on a particular point.

But that you do so in a careful and
respectful way that also doesn't cross into the
line of recommending a particular course of
action directed at the Supreme Court.

And similarly, I think we heard very
powerful testimony about the confirmation
process. I think we ought to bring that to the
public's attention in a variety of ways which are
noted in the draft materials.

Anyway, I will conclude and simply say
that I am very impressed with how this last day
goes. I'm going to turn this over to Co-Chair
Rodriguez, but you have heard today Commissioners
talking about how this process has affected their
view of the issues as they've read the vast
materials, thought about these issues and
listened to one another, views that they thought
that they were bringing into the process have
changed.

And that's in fact what a deliberative process is supposed to be. And I've been really impressed on all sides at all comments today, sober, careful and very much to the benefit of the Commission as a whole.

So with that, I'm going to pause and turn it over for closing remarks to Co-Chair Rodriguez.

CO-CHAIR RODRIGEZ: I will keep this brief and first say that we will reconvene in approximately a month's time to deliberate over what will be a draft report for the Commission that will reflect today's debate and will transform the discussion materials into something that will inform the President as well as the public debate.

The date and time will be announced in the coming weeks and we will publish a draft report in advance of that meeting. I'd also like to issue a final invitation for further public comments.
We welcome public comments and will be receiving them throughout the life of the Commission and looking to accept them until November 14th.

However, I should note that comments most helpful to the Commission if submitted before November 1st and they may be submitted via regulations.gov.

And to find them, again, you may go to the Commission's website where the links are posted. Or you may go directly to regulations.gov.

And then the last thing that I will say is that I very much enjoyed spending the day with all of you. The last time we were together, the last two times we were together, we were listening passively to others and asking questions of some of them, but this was our first real opportunity to talk as a Commission and I think it was enormously productive.

We have points of conflict that are difficult and challenging, but also lots of basis
for providing the appraisals that we were asked to provide.

I wish we could have been in the same room today and perhaps one day we will be. But I thank you for your attention, your time and your incredible work. I hope everyone has a great weekend. And we will be in touch soon.

(Whereupon, the above-entitled matter went off the record at 5:06 p.m.)
disagreements 53:14
89:15 113:12 120:9
288:11,13 289:4
disagrees 229:5
disanalogous 129:9
disappointment 171:1
disapproval 119:4
disarray 181:2
disassociate 198:13
disaster 120:13
discern 81:14
disciplinary 14:7 26:11
15:2 159:5,9,19
160:5 193:14 227:16
254:9
disciplinary 268:14
discussed 15:1 30:19
50:22 88:10 62:10
190:2 244:13,19
258:10
discussed 18:22
191:17 197:22 222:6
discussing 9:13 14:4
33:16 34:11 136:18
216:4 254:16,17
255:18 270:19 271:20
272:2 310:11
discussions 48:7 49:8
51:22 53:6 72:11
80:20 92:8 113:4
115:4 194:10 223:18
225:17 231:22 270:13
dismember 173:20
disempower 221:21
disempowered 237:18
disempowering 221:18
dissenting 244:11
272:5
disfavor 129:3
disfavored 128:13
disloyal 170:21
dismantle 116:3
Dismissing 266:12
disfavor 129:3
disfavor 128:13
disloyal 170:21
CERTIFICATE

This is to certify that the foregoing transcript

In the matter of: Commission Meeting

Before: Presidential Commission on SCOTUS

Date: 10-15-21

Place: teleconference

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

[Signature]

Court Reporter

NEAL R. GROSS
COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701
(202) 234-4433 www.nealrgross.com